REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT MOMBASA

Criminal Appeal 224 of 2007

NORMAN WACHIRA NGOBIA.....APPELLANT

AND

invited to safeguard the requirement of the law section 124 of the evidence act (sic) which provides how such evidence should be **approached and beated (sic) before the predent (sic) is reached."**

The other grounds in the appellant's own memorandum were not argued.

The other ground argued by Mr Nyabena, apparently as a supplementary ground, was to the effect that the appellant's constitutional right under **section 72(3)** of the Constitution having been violated by the appellant not being brought to court within fourteen days of his arrest, the trial was itself a nullity and by that fact alone, the appellant was entitled to an acquittal. For that proposition, Mr Nyabena relied on this Court's decisions in **Paul Mwangi Murunga Vs Republic, Criminal Appeal No. 35 of 2006 (unreported), Mark Wanjala Wanyama Vs Republic, Criminal Appeal No 69 of 2006** (unreported) and **Elisha Otieno Odero Vs Republic, Criminal Appeal No 161 & 162 of 2006** (unreported). Those decisions followed the case of **Albanus Mwasi Mutua Vs Republic** Criminal Appeal No 120 of 2004 (unreported). The general effect of those decisions is that where there is an unexplained violation of an accused person's constitutional right, such violation results in an unfair trial and accordingly the accused person is, without more entitled to an acquittal.

We must deal with this issue first. The appellant, from the recorded evidence, was arrested on 26th October, 2004, one day after the alleged commission of the offence. The record before us shows that the first entry was made by a Deputy Registrar of the High Court at Malindi. The date on which this entry was made is not shown either in the hand-written or the typed record of the Deputy Registrar. The appellant was not present before the Deputy Registrar when the entry was made. We also note from the hand-written record of the High Court that the Deputy Registrar's entry is at page two; page one of the hand-written record appears to be missing. Be that as it may, the Deputy Registrar ordered as follows:-

"**Court: Issue production order for accused before Hon. Judge on 10.3.05. An advocate to be appointed and served to undertake the defence of the accused person.**

D.O Ogembo.

Deputy Registrar"

Pursuant to this order the appellant appeared before Ouko, J on 10th March, 2005; the Republic was represented by Mr Ogoti, a senior state counsel, while the appellant was represented by Miss Matara Advocate. The charge of murder was then read out and explained to the appellant in Kiswahili. He pleaded not guilty to the charge and after various mentions and adjournments, his trial eventually started on 9th June 2005 by which time Mr. Gekanana Advocate had taken over the defence of the appellant from Miss Matara. Mr Gekanana was present throughout the trial of the appellant.

What is important on the issue of the alleged violation of the appellant's rights guaranteed under **section 72 (3)** of the Constitution is that right from the very first day when he appeared in the High Court and throughout the trial, he was represented by counsel and at no stage was the issue of his rights having been violated ever raised. We have set out the cases relied on by Mr. Nyabena in support of the appellant's position that he ought to be acquitted because of the alleged violation of his constitutional rights. The cases Mr. Nyabena relied on including the case of ALBANUS MUTUA, supra, were all cases of robbery with violence under **section 296(2)** of the Penal Code and, which are triable by magistrates and where accused persons are generally not represented by counsel. Apparently Mr Nyabena was not aware of the decisions of this Court in cases such as those of **James Githui Waithaka & Another Vs Republic, Criminal Appeal No 115 of 2007 (unreported), Protas Madakwa Alias Collins & Two Others Vs Republic, Criminal Appeal No 118 of 2007 (Unreported)** and **Thomas Sangare Kelolon Vs Republic, Criminal Appeal No 169 of 2006** (unreported). The principles

established by these latter authorities is to be found in **JAMES WAITHAKA GITHUI's** case, supra and it is as follows:

"**.....The two appellants, right from the time their trial opened in the High Court, were each represented by an advocate. Their trial was before the High Court which by law is the "constitutional court" in Kenya. The appellants and their advocates must have known that their constitutional right had been violated. Yet the advocates raised no kind of complaint at all and as we have said the High Court is the constitutional court in Kenya and if the appellants' advocates had raised the issue there, the judge would have had to deal with the issue just as Mutungi, J. did in the NJOGU case, supra. When we asked Mr Muthoni and Mr Nganga why the advocates representing the appellants did not raise the matter with the Judge, their answer was that they did not know. An information before a judge is different from a charge-sheet before a magistrate. The charge-sheet would normally show on its face the date on which an accused person was arrested and the date on which he is brought to court. An information does not have on it details such as the date of arrest. So that a magistrate is able to see at a glance the relevant particulars from which it can easily be deduced if section 72(3) of the Constitution has been complied with. A judge by merely looking at the information will not be able to tell when the accused person was arrested. The date on which the offence was allegedly committed is not necessarily the date of the arrest. We think we cannot equate advocates to poor and illiterate accused persons and where an advocate is present in court and does not raise such relevant issues, the appellant whom the advocate represents must be taken to have waived his or her right to complain about alleged violations of his or her constitutional rights before being brought to court. Different considerations must continue to apply where an accused person is unrepresented. The advocates for these appellants could have easily raised their complaints with Okwengu, J and we have no doubt she would have dealt with them and resolved them one way or the other. The appellants must now be treated as having waived the alleged violation of the constitutional rights and we reject the grounds of appeal dealing with these points."**

These remarks aptly apply to the circumstances of the appeal now under consideration and there is no reason shown why a conclusion different from those reached in the cases following **JAMES GITHUI WAITHAKA'S** case ought to be reached in the present appeal. We must accordingly reject, as we hereby do, the appellant's contention that his appeal be allowed because his constitutional rights under **section 72(3)** of the Constitution were violated. If those rights were violated, he waived the right to complain by keeping silent about the violation in the High Court.

We can now deal with the ground raised in the appellant's home-made memorandum of appeal and which we set out earlier in the judgment.

The first witness who testified on behalf of the prosecution was a child of tender years, namely Douglas Muduri (PW1); he was aged ten years at the time he testified. The deceased was the first wife of the appellant and it appears Douglas was their son. Before allowing Douglas to testify, the trial judge carried out a *voire dire* and concluded that Douglas possessed sufficient intelligence to enable him appreciate what it meant to testify and that he also understood the nature of an oath. The Judge allowed Douglas to give sworn evidence and the effect of that evidence was that on 25th October, 2004 at about 12 noon he was at home with his younger siblings, the deceased and the appellant. Some altercation started between the appellant and the deceased, apparently over some grass which had been cut in the compound, and which the deceased was collecting. According to Douglas the appellant told the deceased to stop collecting the grass or he would burn the house. The appellant went into the house and returned with a knife; he also picked a piece of wood. The deceased started to run away and the appellant followed. The deceased ran towards the shamba but in the process fell down, and the appellant caught up with her. The judge recorded Douglas as saying:-

"**She fell down and the accused caught up with her and stabbed her with a knife. She died. I screamed and people responded among them Mundia. As the accused was chasing the deceased the latter screaming (sic) for help. The knife used to be for the accused. I can identify it. The accused came out of the house with the knife and stick. This is the stick (a piece of timber). Piece of timber MF 1. a kitchen knife shown. This is not the knife."**

In cross-examination Douglas said the deceased had been using a hoe to collect the grass; that she ran away leaving the hoe behind; that the appellant chased her for a short distance; that the appellant used the stick or piece of timber to beat the deceased on the stomach area; that the appellant hit the deceased with the stick about ten times, and that there was no older person available. The second witness for the prosecution was Mercy Wanjiku (PW2) and she said she was fourteen years old. She was the daughter of the appellant with his second wife. After a *voire dire*, the Judge allowed her to testify on oath but as soon as she started to do so, Mr. Ogoti who was the prosecuting counsel noticed that she was not quite willing to testify. Without seeking to declare her hostile, Mr Ogoti applied that he be allowed to cross-examine the witness. The Judge granted the request and in cross-examination by Mr. Ogoti, Mercy said she was present when the incident took place; that she heard Douglas scream; that she saw the appellant sitting on the deceased but that the appellant did not stab the deceased. She at first denied signing her police statement but on being shown her signature she agreed she had signed the statement though the same had not been read to her. When further cross-examined by Mr. Gekanana for the appellant Mercy said she heard Douglas scream at 4 p.m. but that she did not go to where Douglas was and did not talk to him. We must say straightaway that Mercy's evidence added no real value to anyone's case. Though the Judge did not formally declare her a hostile witness, the effect of the Judge's order allowing the prosecutor to cross-examine her was really to declare her a hostile witness. In ordinary circumstances, parties are not allowed to cross-examine their own witnesses and by allowing Mr. Ogoti to cross-examine her the Judge in effect declared her hostile. We shall, accordingly, not place any weight on her evidence.

Samuel Mundia Ng'ang'a (P.W.3) was a neighbour of the appellant. He knew both the appellant and the deceased. He heard screams from the home of the appellant and ran there. He saw the appellant running and Douglas was following. He followed them to the boundary of the home and he saw the appellant bending. Douglas went to Samuel and Douglas was still screaming. Douglas told him (Samuel) that the deceased had been "murdered". He also joined Douglas in screaming and they were soon joined by Joseph Kimani Tatua (PW11). Joseph was the local village elder and according to him at about 3.45p.m. he was on his farm when the appellant approached him. The appellant complained to him about the deceased who had been away from home and on returning started to insult him (appellant). The deceased had taken a panga belonging to the appellant and the appellant wanted Joseph to go and sort out the dispute. Joseph said he would go and followed the appellant. When Joseph was about 15 to 20 steps way, he saw a boy called Mundia (PW 3) who went to him and asked him to go and see the deceased being killed by the appellant. Joseph told that boy to go and get other people so that the appellant could be arrested. He kept watch to ensure that the appellant did not escape and after about thirty minutes, he saw the appellant approach him. According to Joseph, the appellant asked him why he (Joseph) had come late; the appellant said he had finalized the matter he had called Joseph to sort out. The appellant left and went towards Hongwe. Joseph sent someone to go and call the police. The police officers who visited the scene that day were Corporal Victor Mlawasi (PW8) and Constable Patick Maina (PW9). They collected the body from the scene on the same day but this must have been after 6 p.m. The appellant was apparently not present at the scene. Chief Isaac Mwangi (PW 7) arrested the appellant in the morning of 26th October, 2004. The Chief said he recovered a knife from the appellant. That knife was produced as exhibit 3 but as we have seen, Douglas said that was not the knife the appellant had used to stab the deceased. The other evidence we need to refer to is that of Dr Gedion Mutiso Mutua (PW 10). Dr Mutua conducted the post-mortem on the body of the deceased on 3rd November 2004. He found two stab wounds on the left side of the

eye and the neck. There was a rupture of the vessels and on the head there was a penetrating stab-wound piercing

through to the brain. There were signs of bleeding under the skull and Dr. Mutua formed the opinion that the cause of death was cardiopulmonary arrest secondary to hemorrhage. Some blood stain was found on the shirt which the appellant had been wearing. The Government analyst **(PW12)** found that stain to be of group "O"; the deceased was of blood group "O" but the appellant's blood group was never determined. The learned Judge correctly held that this evidence was inconclusive.

What did the appellant say when put on his defence? In his unsworn statement, he said he left Kirinyaga in 2001; he had two wives, the deceased and another one. He had eight children with one and six with the other. He went and settled in Lamu. He had two houses with three rooms each and the plot at Lamu was divided into three portions, one for each wife and one for himself. He fell ill and was sleeping under a mango tree. But then he decided to clear the bush behind the house as rats were breeding there. He used a panga to do so. The deceased then came and started complaining about who had cut the bush. The appellant is a born-again Christian. The deceased told him to clear all the rubbish he had dumped on the land, and take the cleared rubbish to the other wife's land. The deceased had a panga, and said she would cut the appellant like vegetables. The appellant decided to go into his house. The deceased followed him there. He went into a second room but the deceased still followed him there. He pushed her and walked back into the first room. He picked a piece of timber from a bed and as she lifted the panga to cut him, the appellant shielded himself with a piece of timber and pushed the deceased away. She fell down and when she got up, the deceased left the house. The appellant went to the house of his other wife, locked himself in and slept. It was then about 12 noon. While in the house, he heard Muchiri or Munduri (PW1) quarrelling with the other children. Appellant asked Muchiri what was happening and Muchiri said the deceased had gone to the shamba. He told Muchiri to follow the deceased and shortly thereafter, Muchiri returned and reported that deceased had blood all over her body and was dead. He went with Muchiri who was crying to the shamba and found the deceased had passed away. Mundia **(PW3)** came and he asked him to help. Mundia refused and returned to his home. He left the body where it was and decided to go to the police station. But he instead went to his son's house reaching there at night. In the morning he saw the chief **(PW7)** with two others. He told them what had happened. The chief called the police and he was arrested. He did not have a knife. The police threatened him and one of them called Mwangi, beat him so much that he (appellant) lost his hearing. The police brought a knife and a piece of timber which he was seeing for the first time. He only shielded himself with the timber. He could not have harmed his wife with whom he had children. He came to Lamu with both his wives. He loved both of them.

We have found it necessary to set out in full the relevant portions of the evidence recorded by the learned trial Judge. That was the evidence on which the Judge and the assessors convicted the appellant. This is a first appeal to this Court and that being so, we must ourselves re-evaluate that evidence afresh and draw our own conclusions from it. The only person who says he actually saw the appellant stab the deceased was Douglas, the ten year old boy. Mr. Nyabena, apart from pointing out to us what he said were inconsistencies and contradictions, rightly submitted that the evidence of Douglas required corroboration under **section 124** of the Evidence Act. On the question of contradictions and inconsistencies pointed out by Mr. Nyabena, they were to the effect that Douglas said the offence was at 12 noon while it was stated in the Information itself that the offence took place at 4 p.m. He submitted that a difference of four hours had to be explained. We do not think there is much substance in this complaint. It is clear from the recorded evidence that the witnesses were merely estimating time. Douglas put it at 12 noon; Mercy put it at 4 p.m. Samuel also put it at 4 p.m. and Joseph the village elder (PW11) said he first heard about the matter at 3:45 p.m. In his unsworn statement, the appellant himself talks of 12 noon stretching to 2 p.m. when he was woken up by the noise from Douglas. The truth is that the deceased met her death due to stab wounds on

24th October, 2004; whether the wounds were inflicted at 12 noon, at 2 p.m. or at 4 p.m. cannot be such a grave issue. The witnesses were talking about time as was appreciated by each one of them.

The other inconsistency pointed at by Mr. Nyabena was whether two pieces or one piece of wood was recovered at the scene. Once again nothing much turns on this. The prosecution produced only one piece of timber and Douglas identified it as the one he had seen the appellant use to hit the deceased. The appellant himself said he had used a piece of timber to shield himself from being cut with a panga by the deceased. The appellant did not say what happened to the piece of timber he had used.

We, however, agree that even if the evidence of Douglas was to be accepted as true it still required corroboration. **Section 124** of the Evidence Act before its amendment by Act No. 3 of 2006 provided that:-

"**Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."**

The amendment by Act No. 3 of 2006 replaced the expressions "***child of tender years"*** with the expression "***alleged victim".*** The amendment, however, is not relevant to the charge under consideration because the offence was committed long before the amendment and even the trial and conviction of the appellant took place before the amendment.

We agree with Mr. Nyabena that the evidence of Douglas, even if accepted, required to be corroborated in material particulars. The learned Judge and the assessors who saw Douglas accepted his evidence as true. He was the son of the appellant and was only ten years old. It is difficult to imagine why such a young boy would dream up falsehoods against his own father. He talked of cut grass as being the cause of the dispute between the appellant and the deceased. The appellant in his unsworn statement also talks about cut bush as being the cause of the dispute. Like the learned Judge and the three assessors we are satisfied that Douglas was a witness of truth and that his evidence was correctly accepted.

Was that evidence corroborated? Douglas said the appellant was armed with a knife and a piece of timber as he chased the deceased. A piece of timber was in fact found next to the body of the deceased. Douglas also said he was screaming as the appellant was attacking the deceased. Samuel Mundia (PW3), who was their neighbour said he ran to the scene after he had heard screams and that on arrival, he saw the appellant bending down and Douglas ran to him (Samuel) and told him deceased had been "murdered". Again Douglas said the appellant used a knife to stab the deceased. Dr Mutua found various stab wounds on the body of the deceased. Then Joseph, the clan elder, who was not even at the scene swore the appellant told him that he had finalized the dispute the appellant had summoned him (Joseph) earlier to sort out. The appellant himself left the scene and according to him, he intended to go to the police station. Instead he went to his son's house and chief Mwangi (PW7) arrested him the following morning and called the police. All these pieces of evidence are corroborative of Dougla's evidence that the appellant attacked the deceased using a piece of wood, which piece was found next to the body, and a knife. Dr Mutua confirmed that a knife was used to inflict injuries on the deceased. The appellant's unsworn statement appeared to have suggested that the deceased was attacked by someone else after their fight in the house. There was absolutely no evidence of any other person being within the vicinity of the attack. The evidence of Douglas was not only true but was also fully corroborated by other independent evidence implicating the appellant in the crime. The very nature of the injuries he inflicted on the deceased showed that he either intended to kill her or to cause her grave injuries.

On our own consideration and evaluation of the recorded evidence, we are satisfied that the learned trial Judge and the assessors came to the correct conclusion on the matter, namely that the appellant, with malice aforethought caused the death of the deceased and he was rightly convicted on the charge of murder. The sentence imposed on him was and still is the only lawful one. We order that this appeal be and is hereby dismissed.

This judgment is delivered pursuant to **Rule 32(2)** of the Court of Appeal Rules and is not signed by Nyamu, JA.

Dated and delivered at Mombasa this 16th day of October, 2009

R.S.C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR