IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 289 of 2006

JOHN MACHARIA GACHANJA ……. APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

at Nakuru (Kimaru, J)

dated 17th December, 2004

in

H.C.C.CR. C. NO. 101 OF 2003)

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JUDGMENT OF THE COURT

The appellant in this appeal *John Macharia Gachanja* married *Phyllis Wanjogu Kanyi* (PW3) on 3rd November 2002. Before her marriage, Phyllis had given birth to the deceased, Elizabeth Wanja on 16th August 2002. Phyllis stated in her evidence in the superior court that at the time the two got married the appellant accepted the deceased although she was not sired by him. Later however, Phyllis said the appellant was not happy with the deceased and that occasioned misunderstanding between her and the appellant to the extent that Phyllis went back to her father's home. She took the deceased with her. On 13th July 2003, at about mid-day, Phyllis took the deceased to her aunt, Eunice Njeri Memia (PW2) who lived about one kilometer away from her father's home. She left the deceased there and she went to Kapten market. That was the last time she saw her daughter alive.

Eunice accepted to stay with the child. She gave the deceased food and the deceased went outside to play with other children amongst them James Kinyanjui (PW1). Sometimes later that afternoon, the door to the house of Eunice was knocked and when Eunice responded positively, the appellant entered the house and greeted Eunice who was together with one Mumira. Before the appellant sat down he asked Eunice the whereabouts of Phyllis. Eunice told the appellant Phyllis had gone away. The appellant sat down for a short time but thereafter left and went outside. Eunice remained inside the house. Kinyanjui, who was playing with the deceased and others outside the house, said that as they were playing, the appellant told them to go with him as he was going to buy them sweets. They went with him and he took

the deceased along with him. After he had taken the deceased, he told Kinyanjui and others to go back. He did not buy them sweets. Kinyanjui refused to return and remained where he (Kinyanjui) was so as to see where the appellant was going with the deceased. The appellant threw stones at him but he refused to go away. After the appellant went away with the deceased, Kinyanjui went home and told Eunice, who was his mother that the appellant had taken the deceased. Kinyanjui also never saw the deceased alive again. On the same day Zipporah Gakuhi (PW5), a student at Kieni Secondary School was going to her grandmother's place at about 4.00 p.m. On the road near the homestead of Mama Waishigo, she met the appellant, whom she knew, carrying the deceased. She passed him and knew that he was carrying his own child. She accomplished her mission as her grandmother had also sent her to some other place. As she was going back she saw many people at Mama Kimani's compound. She went there and saw the deceased lying down on the ground with bloody clothes. She knew that was the same child she had seen earlier on that afternoon. When she saw the deceased with the appellant, the deceased was ***"OKAY"*** health wise. On the same afternoon, John Ndungu Wakalia (PW4) was on his way from his home to Ndemi, a local shopping centre. On the road, he saw the deceased lying down on the grass. Her clothes were bloody. He reported the incident to the owner of the adjacent farm to go and see if she could identify the deceased. The owner of the farm went and saw the deceased but could not identify the deceased. In the meanwhile David Kanyi (PW6), the maternal grandfather of the deceased was at Ndemi centre when he got information that the appellant had taken away the deceased. He rushed home and found Eunice together with Kinyanjui. He was given full information. He called Kinyanjui's father who joined him and together they started tracing the deceased following the direction towards the appellant's home. As a result of further information, they went to the place where the deceased was abandoned. They found many people surrounding the deceased. The deceased was then on a gunny bag. He recognized the deceased as his granddaughter. She had been stabbed and all the intestines were outside her body, but she was still alive though unconscious. He was helped by among others Ndungu and Jasmile Gichini Maina (PW7) and they took deceased to Ol'Kalou Police station and then to Ol'Kalou District Hospital. On the same day about 4.00 p.m. Duncan Ndegwa (PW8), a brother of the appellant, was at home with his mother and sister. The appellant approached him and told him he (the appellant) had strangled the deceased but that he should not tell anybody. According to Ndegwa, the appellant warned him that if he told anyone what the appellant had told him, the appellant would kill him. The appellant then gave him a radio and an iron box to keep for him as he was going away. The appellant then went to his house and drank water and went away. The deceased passed on at Ol'Kalou hospital that night of 13th/14th July 2003. The incident was reported to Ol'Kalou Police station by Kanyi. Corporal Agnes Gitonga (PW10) was assigned to investigate it. She opened investigation file and recorded statements of the witnesses. By that time, the appellant was still at large. Later, on 19th July 2003, P.C. Naftali Chege (PW9) based at Ol'Kalou Police station received certain information on where the appellant was hiding at Ng'arua area. Chege was led by one of the appellant's brothers to where the appellant was at his aunt's place, a distance away from Ol'Kalou. P.C. Chege got reinforcement from Ng'arua Police station and the appellant was arrested. On 1st August 2003, Dr. Vitalis Koguto (PW11) at Nakuru Provincial General Hospital carried out postmortem on the body of the deceased. The body had a cut wound on the epigastoram (on the chest) running to the left which was curved downward 5 cm long. There was also a stab wound on the left chest wall between T11 and T12 approximately 1.5 cm long. Internally, the stomach was cut, and the small intestines were cut. There was punctured spleen with internal bleeding. In his view cause of death was internal haemorrhage secondary to stab wounds.

The appellant was then arraigned before the superior court, apparently after undergoing Committal Proceedings Procedure before a subordinate court as that procedure had not been abolished by the time the offence took place. In his defence, he denied the offence and in an unsworn statement, he gave a lengthy narrative of his domestic problems with his wife, the mother of the deceased, which problems he blamed on third parties who, he claimed incited his wife against him. According to the appellant, he loved his wife and did not kill the deceased. He was at his aunt's home when he was arrested for an offence he never committed. However, he said that on 13th July 2003, the date of the incident, he was sad because he was not allowed to live with his wife and he told his brother that he would go and visit his aunt at Ng'arua.

The above, in brief, are the facts that were before the superior court. The superior court (Kimaru J.) summed up those facts to the three assessors who were helping him and after the summary, each assessor

had the opinion that the appellant was guilty of the offence of murder as charged. The learned Judge then considered all the facts before him and the law and having done so, he too found the appellant guilty of the offence of murder under ***section 203*** as read with ***section 204*** of the Penal Code, convicted him, and sentenced him to death as by law prescribed.

The appellant felt dissatisfied with that verdict and hence this appeal premised on original memorandum of appeal and a "supplementary grounds of appeal" both prepared and presented by the appellant in person but which were adopted in part by Ms Ateya, the appellant's learned counsel at the time the appeal was heard.

In her submissions before us, Ms Ateya raised two main grounds based on the original memorandum of appeal. These were first, that the learned Judge of the superior court erred in law in convicting the appellant on circumstantial evidence which was insufficient to establish guilt as there were several co-existing circumstances that weakened the inference that the appellant was in the circumstances the perpetrator of the offence and none other. Secondly, that the trial court erred in law in convicting the appellant on the evidence of a child of tender years without corroboration of that evidence. In respect of the supplementary grounds of appeal, Ms Ateya addressed us on the sixth ground which alleged that the trial was vitiated by the failure of the learned Judge to comply with the provisions of ***section 306*** of the Criminal Procedure Code and that the trial Judge further erred in law in convicting the appellant notwithstanding that his (appellant's) constitutional rights were breached in that the provisions of ***section 72 (3) (b)*** of the constitution was not complied with by the prosecution; and that the trial was a nullity as the provisions of ***section 77 (2) (b)*** and ***(f)*** of the constitution as read with ***section 198*** of the Criminal Procedure Code were not complied with by the trial court. After addressing us on the aspects relating to circumstantial evidence and complaint about convicting the appellant on what she felt was uncorroborated evidence of a child of tender years Ms Ateya abandoned the complaints relating to failure to comply with ***section 77 (3) (b)*** and ***section 77 (2) (b)*** and ***(f)*** of the Constitution and ***section 198*** of the Penal Code. Mr. Gumo, the learned Assistant Deputy Director of Public Prosecutions, on the other hand supported the conviction maintaining that whereas it was true that the conviction proceeded on circumstantial evidence, that evidence however was watertight and the conviction upon it was proper. On the alleged omission of the superior court to comply with the requirements of ***section 306,*** Mr. Gumo submitted that the appellant suffered no prejudice as he had an advocate and the law requires the court to inform either the appellant or his advocate of his rights spelt out in ***section 306*** of the Criminal Procedure Code. The appellant's then advocate was aware of the requirements and informed the Court that the appellant was going to give an unsworn statement. He submitted that there was corroboration of the evidence of PW1 and that in any event ***section 111*** of the Evidence Act enjoined the appellant to explain what actually happened in the circumstances of this case.

This is a first appeal. This Court is therefore enjoined to revisit the evidence afresh, analyse it, evaluate it and come to its own independent conclusion putting in mind however, that the trial court saw the witnesses, their demeanour and also heard them and giving allowance for the same - see ***Okeno vs. R*** **(1972) EA 32.** The learned Judge of the superior court, having analysed the evidence that was adduced before him stated as follows in convicting the appellant:-

"***I do find that the prosecution as established by circumstantial evidence that it is only the accused who could have fatally injured the deceased. I have considered the submissions made on behalf of the accused by his counsel. No other person had the intention to do harm to the deceased. The accused was the last person seen with the deceased while she was alive and in good spirit. The accused's conduct was incompatible with his innocence. There can be no other inference other than the fact that the accused killed the deceased by fatally stabbing her……I have considered the evidence adduced by the accused in his defence. The said evidence does not in any way dent the strong case established by the prosecution against him."***

Before we consider whether the conviction which clearly proceeded on circumstantial evidence was proper and whether there was need to corroborate evidence of Kinyanjui and whether that evidence was indeed corroborated and whether even without that evidence the conviction would still stand, we need to consider and dispose of three other matters that were raised by the appellant. These are whether the

provisions of ***sections 77 (2) (b)*** and ***(f),*** and ***72 (3)*** of the constitution and ***section 198*** of the Criminal Procedure Code were violated on facts of this case and the law. We also need to consider whether the provisions of ***section 306*** of the Criminal Procedure Code were violated and if so the effect of such violation. As we have stated Ms Ateya readily conceded that the provisions of ***section 198*** of the Criminal Procedure Code and ***section 77 (2) (b)*** and ***(f)*** were complied with as the record clearly states that the charge and every element of the particulars were read over and explained to the appellant in Kikuyu language which he understood. We also note that most of the witnesses who gave evidence were, going by names, people of that community. As to those who were not of that community, and those who chose different languages, the language in which they gave evidence was indicated and an interpreter provided. Nothing turns on that ground of appeal. As to the complaint on the alleged breach of ***section 72 (3)*** of the Constitution, we observe that the offence took place on 13th July 2003. This was at a time when Part VIII of the Criminal Procedure Code, which provided for committal proceedings, was still in existence. It was repealed vide Act No. 5 of 2003 which came into effect on 25th July 2003. In effect the case was subject of committal proceedings. The appellant was produced before the Deputy Registrar of the superior court on 15th September 2003 and was before a Judge of the superior court on 27th October 2003, but the charge was read to him on 28th October 2003. It is apparent to us that the appellant had appeared before the subordinate court much earlier as the case was subject of committal proceedings. We cannot tell from the record when he was produced before that court for the first time. In short, the allegation that the appellant's rights under ***section 72 (3)*** of the Constitution were breached cannot stand as there is no evidence that he was produced in the subordinate court after fourteen (14) days from the date P.C. Chege arrested him. He cannot benefit under that provision of the Constitution. As to the non compliance with ***section 306*** of the Criminal Procedure Code, it is true the record does not indicate that the learned Judge explained to the appellant or to his advocate, the appellant's rights after the close of the prosecution case. However, the then advocate for the appellant is on record as having told the court, after the appellant was put to his defence, the following:-

"***Mr. Mugambi:- The accused person will give unsworn evidence."***

Thus the appellant made a choice of the type of evidence he wanted to give in his defence. That in effect means that his advocate, who knew all the options that were in law open to the appellant and he could therefore explain those same options and the appellant made a choice. In the circumstances, we do not read any prejudice to the appellant by the apparent omission of the trial court to record that it complied with the provisions of ***section 306***. Again nothing turns on that ground.

We will now consider the two remaining grounds. First, the law is clear that in order to rely on circumstantial evidence to convict an accused person the links in the chain of that evidence must be complete and thus the evidence must point at the accused as the only person committed the offence and none other. In the case of ***James Mwangi v. Republic*** **(1983) KLR 327,** this Court held:-

"***1. In a case depending on circumstantial evidence, inorder to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.***

2. In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference."

The prosecution had the duty of bringing its case within those parameters before the superior court could convict the appellant on circumstantial evidence in this case. We say so because we also agree, like the superior court that this was a case based on circumstantial evidence as no one actually saw the appellant stab the deceased.

Ms Ateya says that the standard of proof was not achieved by the prosecution because the prosecution relied heavily on the evidence of Kinyanjui, a child aged 11 years whose evidence required corroboration but whose evidence was not corroborated in material respects. We have carefully considered that submission and the record. Kinyanjui was eleven years old when he gave evidence. After the *voire dire*, he gave sworn evidence. In our view, whereas it was prudent to direct the assessors that it would be

unsafe to convict unless there was corroboration of such evidence, the court, having warned itself and the assessors, could still convict even without corroboration. It is only in a case where a child of tender years gives unsworn evidence that corroboration is an essential prerequisite. In the case of ***Johnson Muiruri vs. Republic*** (1983) KLR 446, one of the holdings of this Court was:-

"***Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration."***

In the case before us, Kinyanjui's evidence was that the appellant is the person who took away the deceased on 13th July 2003 from the compound of Eunice where the children were playing. He did not state at what time. Eunice said the child was left with her and at 4.00 p.m. the appellant visited her home. At that time the deceased and other children were playing outside. Zipporah met the appellant carrying the deceased at about 4.00 p.m. that day. In our view, Zipporah's evidence and evidence of Eunice corroborated the evidence of Kinyanjui on the material aspects as to who took away the deceased that afternoon. Even if that were not so, Kinyanjui's evidence could still be acted upon after warning as it was sworn evidence. Further, and even if the evidence of Kinyanjui was discarded, still the evidence of Zipporah, that the appellant had the deceased that afternoon would have sufficed for a conviction in this case.

Thus in the case resulting in this appeal, there was proof that the appellant had a problem with his wife over the deceased whom his wife says he did not like. They apparently parted ways at the relevant time and he admitted that in his evidence. He was seen by Eunice at her house where the deceased was. Kinyanjui said the appellant took the deceased with him. Zipporah met him carrying the deceased and immediately thereafter the deceased was found stabbed and in poor state of health near a bush, abandoned. In such a scenario where the appellant was the last person seen with the deceased before the deceased was found lying down unconscious with serious stab wounds and her intestines hanging outside the body, the rebuttable presumption is that the appellant is the only one who could have known what happened to the deceased. ***Section III (1)*** of the Evidence Act comes into operation. It says:-

"***When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."***

In this case, the appellant was the last person seen with the deceased prior to the deceased being found seriously injured and thereafter her death. He was the only person who had special knowledge of what could have happened to the deceased. He had to explain that aspect of the matter. We have carefully perused the evidence that was before the trial court and the defence of the appellant. The appellant never made any effort to discharge that burden.

The totality of the above is that the appellant who was seen by Zipporah carrying the deceased immediately before the deceased was found with stab wounds unconscious has not explained what happened to the deceased and even if the evidence of Kinyanjui is ignored, the prosecution had proved beyond reasonable doubt that the deceased was the only person involved in the injury and eventual death of the deceased.

In conclusion, having dealt with all the points that were raised before us and having on our own considered anxiously the law and facts of this case, we do not entertain any doubt that would make us disturb the judgment and conclusion of the learned Judge of the superior court. It will stand. The appeal is dismissed.

Dated and delivered at Nakuru this 2nd day of October, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR