REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT NAKURU

Criminal Appeal 203 of 2006

SGT …….....……...... APPELLANT

AND

REPUBLIC …….....…….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Kimaru, J)

dated 2nd June, 2006

In

H.C. Cr. C. No. 107 of 2004)

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JUDGMENT OF THE COURT

The appellant, SGT, was convicted by the superior court (Kimaru, J) for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code and sentenced to death. He appeals against both conviction and sentence.

The particulars of the offence alleged that on the night of the 27th October, 2004 at Nairegia Enkare Trading Centre, the appellant murdered Keronya Tanyasis, hereinafter, "the deceased". According to the prosecution case, the deceased went to have a drink at the Tosheka Bar at the aforesaid trading centre. He had been drinking beer with his friends in the said bar from about 3.00 p.m. on that day. His friends left at about 7.30 p.m., leaving him to drink alone. Just then the appellant arrived. He danced a little, and then went upto the deceased and demanded that the deceased buy him a beer. A quarrel ensued, and soon thereafter the deceased picked his glass of beer and dropped its contents onto the appellant. There was some contradiction about whether the beer was spilt onto the appellant's face or shirt. However, nothing much turns on that issue. At that point, the owner of the bar intervened, and asked the appellant to leave the bar. He did so. After some time the deceased walked out of the bar and was heard by the owner of the bar, Benjamin Ole Marigeti (Benjamin) to say "*Kumbe hii mtu bado iko nje*" meaning that "*this man is still here*". Benjamin did not see what happened outside the bar, he simply heard those words spoken by the deceased. Soon thereafter, the deceased returned to the bar bleeding from a cut wound on his left hand by the wrist. Both Benjamin and an employee at the bar, Juliana Muthoni Mungai (Juliana) saw the deceased walk back to the bar. When Juliana asked him who had cut his hand the deceased said it was the appellant. Both Benjamin and Juliana administered first aid, then arranged to take him to

the Nairagie Enkare dispensary where the clinical officer could not assist much, and recommended that he be taken to Narok District Hospital. However, he died on the road to the hospital. In a post-mortem conducted by Dr. Abakalwa Gerishom, the cause of death was said to be shock due to severe haemorrhage due to cut wound of the hand. Dr. Gerishom observed that the deceased had a 12 cm cut wound on his left hand from the root of the thumb to the end of the ulna bone. The wrist bones were cut and displaced, and the hand severed.

Meanwhile, the appellant had disappeared from the area. Police Constable John Kipyego (Kipyego) was the investigating officer. He testified that the appellant was arrested by members of the public, some 10 km. away, on the 2nd November, 2004 – four days after the incident. He re-arrested the appellant who was then arraigned in court on 16th November, 2004.

The appellant made a sworn statement in his defence. He denied killing the appellant. He testified that upon arrival at the Tosheka bar at 6 p.m. on the material day, he ordered an alcoholic drink called Amario's spirit. According to his testimony, it was the deceased who approached him, asking for a drink. When he told the deceased he had no money to buy him (the deceased) beer, the latter got annoyed, picked the appellant's glass, and poured the drink onto the appellant. He said he did not react, and simply left after the owner of the bar told him to do so. The following day he went to Naribo to look for maize for sale. He was in Naribo when he was arrested by members of the public.

The assessors were divided on the verdict . Two of them returned a verdict of not guilty, while the third found him guilty. However, the trial Judge found the appellant guilty of the offence of murder. In the course of his judgment, the trial Judge said in part:-

"*When the deceased walked out of the bar, a few minutes thereafter, he stood at the door and made comments referring to someone. When he came back shortly thereafter to the bar, after being cut, he told PW4 that it was the accused who had cut him. The evidence adduced by the prosecution establishes that it was no one else other than the accused who could have cut the deceased. It was obvious that the deceased was referring to the accused when he mentioned that there was someone, who he was familiar with, who was standing outside the bar.*

The accused in this case, being annoyed, and having been told to leave the bar by the owner , went outside the bar, armed himself with a sword, and waited for the deceased to come out of the bar. The accused intended to seriously injure the deceased. The accused had an opportunity to cool off his anger and therefore the subsequent assault of the deceased was calculated and premeditated. The resultant death of the deceased could not be said therefore to be unforeseen. The deceased clearly told PW4 that it was the accused who had cut him. I have no doubt that the deceased had identified the accused as his assailant. The circumstantial evidence points to no other, other than the accused; he had the motive and the will to harm the deceased. The evidence of PW3 and PW4 coupled with the dying declaration of the deceased which he told to PW4 points to the fact that it was the accused who cut him on the hand and thus fatally injuring him."

The learned trial Judge considered the defence of the appellant and said in the last part of the judgment:-

"*The evidence adduced by the accused in his defence did not in any way dent the strong prosecution case against him. Although he testified that after the altercation with the deceased he left the bar and went home, his subsequent behaviour of disappearing from his residence is a pointer to the fact that he knew what he had done. I therefore find him guilty as charged on the charge of murder."*

The appellant filed a home-made memorandum of appeal on 15th June, 2006. His counsel later filed the supplementary grounds of appeal. Essentially, there are six grounds of appeal as follows:-

"*1A. THAT the Honourable Trial Judge erred in finding that there was any or any sufficient evidence to establish that the Appellant had malice aforethought or attacked the deceased with a sword or at all.*

2A. THAT the Honourable Trial Judge erred by drawing his own inferences not supported by any evidence.

3A. THAT the Honourable Trial Judge misdirected himself with regard to the evidence of PW4 by failing to show a proper appreciation that any statement relating to the identity of the deceased's assailant was a dying declaration which was of negligible value because in the circumstances of the case, it was not made in contemplation of death and required satisfactory corroboration.

4A. THAT the Honourable Trial Judge erred by disregarding the Appellant's reasonable defence of alibi.

5A. THAT the Honourable Trial Judge erred and misdirected himself as to the onus of proof.

6A. THAT the Honourable Trial Judge erred in Law and misdirected himself by sentencing the Appellant to death when the Appellant had been a child being 18 (say Eighteen) years at the time of the commission of the alleged offence."

Mr. Ochieng' Orege, learned counsel for the appellant, submitted among other things, that there was no evidence that it was the appellant who actually attacked and injured the deceased; that there were many people outside the bar and any one could have attacked the deceased; that no other person who was outside the bar was called to testify; that the murder weapon was not produced in court; that the deceased's statement that "this man is still here" was wrongly interpreted to imply the appellant's guilt; that the deceased's dying declaration that it was the appellant who cut him was not corroborated by any other evidence; that if indeed the deceased had received timely medical assistance, he would not have died; that the appellant's alibi was not properly considered; and, finally, that the appellant being a person under the age of 18 should not have been sentenced to death, even if found guilty.

While conceding the submission on sentence, Mr. G. E. Mugambi, learned State Counsel, opposed the appeal on all other grounds. He submitted that there was strong circumstantial evidence to connect the appellant with the murder of the deceased.

As the first appellate Court it is our duty to reconsider the evidence; re-evaluate it and reach our own independent conclusion. We have to bear in mind that unlike the trial court we did not have the benefit of seeing and hearing the witnesses testify as to assess their credibility. This we have done. We would agree with the learned State Counsel, that there is strong circumstantial evidence linking the appellant to the murder of the deceased. The facts outlined by us previously in this judgment are not in dispute in any material sense. It is not disputed that there was some altercation between the appellant and the deceased; that the deceased poured alcohol on the appellant; that the appellant was thrown out of the bar; that later the deceased was heard to say "*this man is still here*" in reference to the appellant; that the deceased returned to the bar injured, and told Juliana that it was the appellant who had attacked him. Those facts irresistibly point to the guilt of the appellant.

The learned Judge recognised that the case against the appellant was dependent on circumstantial evidence. Relying on the case of Mwangi v. Republic (1983) KLR 522, the learned Judge correctly appreciated the conditions which circumstantial evidence must satisfy before an inference of guilt can be drawn from such evidence and concluded that the circumstantial evidence on record satisfied the conditions. On our part, we are satisfied that there was strong circumstantial evidence against the appellant and that there were no co-existing circumstances which would weaken such evidence and that the appellant was properly convicted. The appeal on conviction therefore fails.

We now turn to ground 6A of the appeal, regarding sentence. After finding the appellant guilty as charged, the learned Judge proceeded to sentence him to death on the basis that "*there is only one sentence provided by the law*", and that is death. That sentence was imposed despite the uncontroverted evidence before the trial court that at the time the offence was said to have been committed the appellant was only 17 years of age. Dr. Gerishom (PW1) testified in part before the trial court as follows:-

"*On 12th November, 2004 [ST] was presented to me for examination to determine his mental status and age. I confirmed that he was mentally fit to follow court proceeds (sic). He was found to be below 18 years age."*

The "*Medical Examination Report*" (P3) signed by Dr. Gerishom also indicates clearly that the appellant was 17 years old.

The learned Judge clearly erred when he concluded that there was only one sentence that was provided by the law - death. With great respect to the learned Judge, that is not so.

First, *section 25 (2)* of the Penal Code provides and has always provided:-

"*25 (2). Sentence of death SHALL NOT be pronounced on or recorded against any person if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct , and whilst so detained shall be deemed to be in legal custody."*

(Emphasis added)

Secondly, the Children Act, i.e. *Act No. 8* of *2001*, became operational on 1st March, 2002, long before the appellant was sentenced, indeed long before the date of commission of the offence. *Section 190 (2)* of that Act is categorical on the issue:-

"No child shall be sentenced to death,"

and *section 2* of the Act defines child as

"*any human being under the age of eighteen years."*

Once again that section deprived the learned Judge of the jurisdiction to impose the death sentence on the appellant, even if the appellant was guilty of murder.

The Children Act is an extremely important piece of legislation in our statute books. It represents a fundamental commitment to honour and enforce the rights of the child, as enshrined in that statute, and it is also consistent with various international instruments that seek to protect children. Accordingly, it is extremely important that all the courts continue to remain vigilant about the important provisions of that legislation. There is no doubt in this case that the learned Judge erred in law in pronouncing a sentence of death on the appellant, who was a child within the meaning of the law.

For the foregoing reasons, we dismiss the appeal against conviction but allow the appeal against sentence. We set aside the sentence of death and substitute therefor an order under *section 25 (2)* of the Penal Code to the effect that the appellant shall be detained during the President's pleasure. We direct that the file be placed before the trial Judge to comply with *section 25 (3)* of the Penal Code.

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

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.