



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA**

**Criminal Appeal 442 of 2007**

**RASHID THOMAS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from a conviction and sentence of the High Court of Kenya at Malindi (Mr. Justice Ouko)  
dated 7<sup>th</sup> November, 2006***

**in**

**H.C.CR.C. NO. 5 OF 2006)**

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**JUDGMENT OF THE COURT**

*RASHID THOMAS*, the appellant, was tried on an Information which charged him with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars contained in the Information were that on 12<sup>th</sup> December, 2005 at Mtepeni village, Mtwapa Location in Kilifi District of the Coast Province murdered Mariam Kahindi, the deceased.

It was the prosecution case that the appellant and Kadzo Nyangi (PW1), the mother of the deceased, were lovers. On the material day PW1 and the deceased who was aged 3½ years were picked up by the appellant and they went to spend the night in his one roomed house. During the night the appellant picked a quarrel with PW1 accusing her of aborting his child. The appellant picked the deceased and with a great force sat on her four times as PW1 protested and screamed. It would appear that the deceased died on the spot. The appellant threatened PW1 with harm should she disclose how the deceased met her death.

It was further the prosecution's case that as a result of her daughter's death PW1 gave different versions of the deceased's cause of death. To some people she told them that the deceased had a cerebral malarial attack to which she succumbed while to others she stated that the deceased had an epileptic fit. But, after her burial, PW1 confided in her sister, Kanze Thoya (PW2) that, in fact, it was the appellant who had killed the deceased. On this disclosure the matter was reported to the area Assistant Chief, who in turn reported to the police. The body was subsequently exhumed and post mortem conducted by Dr.

Mandalya (PW7). It revealed that the deceased had suffered a suggestive cut on the left side of the head, a fracture on the upper part of the spine and a fracture of the pelvic bone. PW7 further noted that the deceased's bowels had come out through the rectum. In the doctor's opinion the deceased's death was caused by haemorrhagic shock due to multiple injuries.

In his unsworn statement the appellant, though agreeing that PW1 was in his house during the material night denied that the deceased had accompanied her therein. He explained that he only learnt of the deceased's death a day after PW1's visit. He even attended the funeral. However, a few days later he was arrested. He maintained his innocence.

However, the learned trial Judge (Ouko, J.) in a reserved judgment held:-

*"I am satisfied that Kadzo's (PW1) evidence was credible and was supported by medical evidence. The injuries noted on the deceased were consistent with an adult exerting force on a baby. According to Dr. Mandalya the deceased must have suffocated due to the pressure on her body.*

*Further the fractures noted in the post mortem report were compatible with the manner Kadzo described the events of the fateful night. I come to the conclusion that the accused caused the death of the deceased, an innocent soul whose only crime was to accompany the mother to her lover. It is similarly clear from the injuries sustained that the accused had malice aforethought. He intended to cause the deceased's death. The accused is a stout, medium-built man while the deceased was only 3½ years. By repeatedly sitting on her, the accused intended to cause her death."*

He then found the appellant guilty as charged and sentenced him to death as provided by law.

When the appeal was called to hearing Mr. Ondari, learned Assistant Director of Public Prosecution informed the Court that the State conceded the appeal on the ground that the conviction of the appellant was founded on the word of the PW1, the mother of the deceased, against that of the appellant. He stated that PW1 might have been accessory before the act or an accomplice and that her evidence lacked corroboration. Further, Mr. Ondari argued that there was no evidence that PW1 went into the house of the appellant with the deceased. As she had lied on the cause of the death of her child, PW1 could not be a credible witness. He submitted, therefore, that the conviction of the appellant was unsafe.

With respect, we would agree. It is trite law that if a witness is so discredited as not to be worthy of any belief, which is the end of his evidence, and unless there is some other independent corroborative evidence, the prosecution must fail. See *Ndungu Kimanyi v R* [1979] KLR 282. It is also a firm rule of practice that the evidence of an accomplice witness requires corroboration and that the Court may only and in appropriate circumstances convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the Court duly warning itself and the assessors, where the trial is held with the aid of assessors as was done in this case, on the dangers of doing so. See *Kinyua v Republic* [2002] 1 KLR p 256.

It is apparent from her testimony before the trial court that PW1 had lied to her mother and her sisters on the cause of the death of the deceased and as to where she had slept during the material night. Further it can reasonably be concluded from her evidence that PW1 had taken the deceased to be an obstacle to her relationship with the appellant who might have been willing to take her as his wife but without the deceased. PW1 may therefore have been an accomplice. As she had lied, her evidence was totally worthless and in the particular circumstances of this case there was no need to look for corroboration.

In the result, this appeal is allowed. The conviction is quashed and the sentence of death is hereby set aside. The appellant shall be entitled to his liberty forthwith unless he is otherwise lawfully held.

*Dated and delivered at Mombasa this 25<sup>th</sup> day of July, 2008.*

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR