REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 250 OF 2005

JOSEPH KIPTUM KETER …… APPELLANT

AND

REPUBLIC …….....…… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kitale (Wanjiru Karanja, J) dated 25th October, 2005 in H.C. Cr. Case No. 30 of 2001)

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JUDGMENT OF THE COURT

Joseph Kiptum Keter, the appellant, was arraigned and tried before the High Court at Kitale (Wanjiru Karanja, J) with the aid of assessors for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence alleged that on 5th August 2001 at Lamaiywet Village, Moi's Bridge Location in Uasin Gishu District within Rift Valley Province, he murdered Milka Cherono Keter (the deceased).

At the conclusion of the trial, the assessors returned a finding of guilty of murder, a finding the trial Judge agreed with in a reasoned judgment; convicted the appellant and sentenced him to the mandatory death sentence as provided under the penal provision. The appellant was aggrieved, and in this appeal he challenges his conviction and sentence on three broad grounds, namely:

(1) his conviction was against the weight of the evidence

(2) the evidence relied upon was not credible

(3) the trial Judge failed to consider the appellant's defence.

The case for the prosecution as presented before the trial court was short and straightforward. The deceased was the last child of the appellant and Everlyne Chepkurgat Keter (Everlyne). In total the couple had seven children. The couple got married in or about 1988, but their marriage was not peaceful, more so after the deceased was born. Everlyne testified that the appellant, a known stock thief, was alleging that he had not fathered the child, and that he was unhappy whenever Everlyne complained against his habit of stealing livestock. At one time, in or about December, 2000, he assaulted her, tied her

with ropes and threatened to kill either her or the deceased. However, a short while later he relented and untied her. The repeated assaults caused Everlyne to return to her parents' home on or about 7th January, 2001 where she remained until 5th August 2001, the day the deceased was killed. Before then, the appellant never went to look for her, nor did he take any steps to cause her to return to their matrimonial home.

On 5th August 2001, Everlyne was at her parents' home with the deceased who was then about one year and eight months old. The other children were then living with the appellant. On that day, however, one of the children, Sarah Chepkoskei Keter, (Sarah) had come to visit her mother. Sarah and the deceased were happy to see each other, and consequently went to play together behind their grandparents' house leaving their mother indoors. While playing, their father, the appellant, came, found them playing and after greeting them he sent Sarah to call her mother. While Sarah was away, the appellant allegedly knocked the deceased down, stepped on her chest, after which he lifted her by her legs and forcibly smashed her head against logs of wood which were lying nearby. The deceased's head was shattered and the brain oozed out. She died instantly.

Everlyne testified that she witnessed the incident, and so did Noah Kiprono Maiyo (Noah), Joseph Kiprop Tum (Joseph), Sarah, and John Keter Bett (John). Joseph and John were Everlyne's elder brothers while Noah was her nephew. These four and Everlyne were the prosecution's eye-witnesses. The trial Judge heard and saw them testify and believed their respective testimony. She also believed the testimony of Paul Kipkorir Karoney (Paul), who was then a KANU nominated councilor. Paul testified that the appellant visited him at his house at 3 a.m. on 6th August 2001, and after introducing himself he confessed to him that he had killed the deceased and sought his guidance on what he needed to do in the circumstances. Paul further testified that he asked the appellant to surrender himself to the police, which he did.

In this appeal, Mr. Cheptarus, for the appellant, submitted before us, *inter alia*, that all the alleged eye-witnesses and Paul could not properly be believed; firstly, because they were all related to Everlyne and on that account, they were unlikely to be impartial witnesses. Secondly, the learned counsel submitted that considering the story the appellant gave, he escaped from the scene when Everlyne's brothers attacked him and he was, therefore, not at the scene when the incident took place. Thirdly, that although Paul was presented by the prosecution as an independent witness, he was not strictly one as he had some connection with Everlyne's family.

This being a first appeal, the principles to guide us are set out in the old case of Okeno v. R. [1972] EA 32 in which the former Court of Appeal for East Africa authoritatively stated thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R* [1957] EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala v. R. [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958[EA 424."

We have gone through the record of appeal in detail. It is quit clear to us, and we so find that the relationship between the appellant and his wife Everlyne was far from cordial. We eschew any attempt to state what the cause of the sour relationship was. Whatever the cause, what is clear is that because of misunderstandings, Everlyne returned to her parents' home. It was also not in dispute that on 5th August 2001 the appellant went to Everlyne's home and it was on that same day that the deceased died. Her death was not accidental. The post mortem report clearly shows that her skull was shattered with resultant extensive damage to the brain. The head was completely deformed.

The eye-witness account of several witnesses as to how the deceased met her death is supported by the post mortem report. However, as we stated earlier, Mr. Cheptarus, for the appellant, thinks that because the prosecution eye-witnesses were related to the deceased, they should not have been believed.

Whether or not a witness is to be believed is a matter for the discretion of the trial court. And judicial discretion is based on evidence and sound legal principles. The practice of criminal law courts is that the trial Magistrate or Judge has to observe the demeanour of witnesses, and on the basis of that demeanour and other factors decide whether any particular witness is a witness of truth or not. There is no principle of law, to our knowledge, which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused. Section 125(1) of the Evidence Act, Cap 80 Laws of Kenya sets out the general principle on competency of witnesses. That section provides:

"125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause."

Part IV of the Evidence Act has provisions with regard to the questioning of witnesses. Among the questions which may be asked of a witness are those in relation to credibility. It is on the basis of such questioning that a court is enabled to determine whether or not a witness is a witness of truth.

All the witnesses who said that they saw the appellant hold the deceased by her legs, lifted her up, and forcibly smashed her head against logs of wood were examined, and cross-examined in the presence of the trial Judge. She heard and saw them testify. She assessed their respective credibility and on that basis accepted their respective testimony. In those circumstances, the trial Judge was perfectly entitled to act on their respective pieces of evidence, as she did. We cannot in the circumstances fault her on that.

Having come to that conclusion, we cannot, but agree with Miss Oundo, Senior State Counsel, that the offence the appellant allegedly committed was committed in broad daylight. The eye-witnesses knew the appellant well before, and cannot be said to have mistaken another person for him. There was a motive for the killing. Everlyne testified that he had on an earlier date threatened to kill either herself or the deceased. This clearly showed he had not only the motive but the necessary mens rea. He had earlier expressed the view that the deceased was not his child. The trial Judge believed this and the story that Everlyne had incessantly disapproved the appellant's alleged stock thieving, a sentiment the appellant resented.

Mr. Cheptarus also raised the issue of failure to call certain witnesses. **Bukenya v. Uganda [1972] EA 549** clearly states that the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. Those who testified in this case clearly established that the appellant killed the deceased; that he had no legal basis for doing so; that the appellant when he killed her was of sound mind and discretion, and possessed the necessary guilty intention. In those circumstances, the appellant should not be heard to complain that certain witnesses were not called.

The appellant also complains that the trial Judge did not fully consider his defence. The appellant's defence was that his wife was a drunkard, a behaviour he strongly disapproved. But because she was unwilling to stop, she decided to return to her parents' home. She went with the deceased. He also testified that on 5th August 2001, at the request of his in-laws, he went to his wife's home, allegedly to discuss her case. However, in the course of their discussions, his brothers-in-law attacked him, beat him up and would have continued doing so had he not escaped. He denied killing the deceased or witnessing who did it. In short, the appellant's defence was an *alibi*. However, in view of the overwhelming eye-witness account as to how the deceased met her death, the *alibi* was clearly displaced. That was the conclusion of the trial Judge and we, too, have come to the same conclusion. This ground of appeal is clearly without any merit.

We find no basis for interfering with the appellant's conviction. The sentence which was imposed on the appellant was the only one provided by law. In the result, we dismiss the appellant's appeal in its

entirety.

Order accordingly.

Dated and delivered at Eldoret this 23rd day of February, 2007.

S.E.O BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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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