IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 4 of 2005

D.M.W....................................…………………….………..APPELLANT

AND

REPUBLIC…………………………......……...……….RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Okwengu, J) dated 24/11/2004

In

H.C.CR.C. NO. 32 OF 2001)

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JUDGMENT OF THE COURT

D M W, the appellant, was tried with the aid of assessors on an information charging him with offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars contained in the charge were that on the 7th October, 2000 in Nyeri District within the Central Province murdered *R.W.M* hereinafter referred to as "the deceased". At the conclusion of the trial the assessors were of the unanimous opinion that the appellant was guilty of murder. The learned Judge Okwengu J agreed with them and sentenced him to death. The appellant now appeals to this Court against both the conviction and sentence.

On 7th October, 2000 at about 4.00 p.m., the deceased who was then aged about 7 years was playing with her sister *W*, who was 3 years old, outside their parent's gate. Their mother *R. W (PW2)* was at home busy with her usual domestic chores having arrived from her shamba. Her neighbour, *D. M.W*, the appellant herein, who lived about two farms away, approached the fence of PW2 and asked her whether her husband was in. When informed that he was not around the appellant went away. Shortly thereafter PW2 went into her house and *W* followed her in. They stayed for about 30 minutes when she inquired as to where the deceased was. *W* did not know. However, after another brief moment the deceased came. PW2 testified that the deceased was crying and writhing in great pain with blood trickling down from her private parts. When asked what had happened to her she told PW2 that the appellant had called her and taken her to his house where he placed her on the bed and slept on her and put something in her private parts. The deceased narrated her ordeal also in the presence of her grandmother *R.K (PW3)* who corroborated the testimony of PW2.

A significant piece of evidence came from *V.G (PW4)*. She is a neighbour to PW2. PW4 met PW2, PW3 and the deceased hurriedly walking towards the local hospital. PW4 on asking what had injured the

deceased, PW2 and PW3 informed her that she had been assaulted by the appellant. PW4 knew the appellant and that he worked at the mission where she decided to go and look for him. She testified:-

"*When I reached the mission D was just coming out of the house. I asked D: "is that you?" but he quickly ran away."*

The deceased was taken to Othaya Police Station and thereafter to Nyeri Provincial General Hospital by PW3 and PW4 where she was immediately admitted at about 11.00 p.m. *Dr. Kazungu Koba (PW8)* who was the Doctor on duty was called to attend to her. Upon examination he found that the deceased had vaginal bleeding and pain around the birth canal. She was also mildly pale due to blood loss. He decided to carry out an emergency operation to stop the bleeding and to repair the areas which were torn. The operation was carried out with the assistance of one Dr. Odongo and an anaesthetist *Antony Nyagah (PW12).* The doctors repaired the tears which were a 3 cm long on the vaginal wall and a 2nd degree pereneal tear (i.e. a cut extending from the birth canal towards the anal opening). They successfully stopped the bleeding but unfortunately on reversal of the anaesthesia the deceased became fully awake but regurgitated stomach contents on removal of the throat pack. This arose because the operation being an emergency one, the deceased was not starved of food for about six hours the recommended period prior to the operation.

The doctors frantically tried to suck out the food material in an effort to improve the ventilation but as fate would have it the deceased developed cardiac arrest due to clogging of lungs by carbon dioxide and she was certified dead at 3.50 a.m. The doctors upon, further examination, were of the opinion that the cause of death was aspiration leading to lung collapse.

The death of the deceased was reported at Othaya Police Station to *P.C. Samuel Bargoria (PW11*) on 8th October 2000 at about 7.30 a.m. and he immediately proceeded to the house of the appellant while accompanied *by P.C. Kiragu* and *P.C. Mukami*. They did not find the appellant in the house. They broke into the house and carried out a search therein. They observed that the beddings were disturbed and bloodstained. PW11 took possession of a blanket and a shirt both of which were bloodstained.

On the same date i.e. 8th October, 2000 at around 7.00 p.m. *S.M (PW5)* who was then a leader of the local Youth Vigilantes group and five of his members found the appellant at a hotel within K. They apprehended him and took him to Othaya Police Station where he was re-arrested by *PC. Eliud Kimathi (PW7)*

On 12th October, 2000, *S.M (PW6),* the father of the deceased, identified her body to *Dr. Moses Njue Gachoki (PW9),* the then Provincial Pathologist, who carried out a thorough post mortem examination on the body. PW9 noted that there was food material within the respiratory system. He was of the opinion that the food material which had been sucked into the trachea was the cause of death and that this was contributed to by the emergency operation as the deceased was not starved for the required safe hours. He thought that the emergency nature of the injuries which had been suffered by the deceased demanded urgent operation and there was no time for vacuum cleaning the stomach.

PW11 later forwarded the bloodstained blanket and shirt of the appellant together with a bloodstained dress and vest belonging to the deceased to the Government Analyst for examination. However, no analysis could be carried out since blood samples of the deceased and the appellant were not forwarded for examination and comparison purposes.

In his defence the appellant gave an unsworn statement. He testified that on 10th October, 2000 he went to Nyeri from Othaya. In the evening he went to a Disco at R and spent the night there. The next day he was within Nyeri town until at 3.00 p.m. when he boarded a vehicle to go back home. However, on arrival at K the vehicle failed to go beyond that point. His fare was returned to him and he went to a nearby café and ordered tea and mandazi. Immediately he finished eating, two people approached him and apprehended him alleging that he had defiled the deceased and had escaped. He maintained that the decesed's mother had a grudge against him because she was sacked from the Monastery where the

appellant was engaged. He denied having been with the deceased.

The learned trial Judge considered the evidence and concluded:

"*It is evident that the deceased's misfortune emanated from her defilement which necessitated the emergency operation--------- PW8 and PW12 confirmed that the deceased had a second degree pereneal tear and tear of post lateral vaginal wall and was bleeding profusely. This is what necessitated the emergency operation. I find that the injuries were clear evidence that the deceased had been defiled. It is also apparent from the evidence of PW8, PW9 and PW12 that the deceased's immediate cause of death was aspiration due to the presence of food material in the trachea and that this was due to the emergency nature of the operation as the deceased had to be rushed to theatre without being starved".*

The learned trial Judge found that the doctors appeared to have had limited experience as they had worked only for a total of a year and two months including their internship period. The anaesthetist did not fair any better, he had a slightly longer experience of about three years. However, the learned Judge was satisfied that the treatment employed by them on the deceased was proper, in good faith and with common knowledge and skill.

On the issue of the cause of her death, the learned trial Judge concluded that although it resulted from the emergency operation, but, in terms of *section 213(a)* of the Penal Code it was actually caused by the defiler who inflicted serious bodily injury on the deceased in consequence of which she had to undergo the emergency surgical operation.

As to who defiled the deceased the learned Judge held that the deceased was consistent in her statement, which the trial court took it to amount to a dying declaration, that it was the appellant; that there was cogent evidence that the appellant had been around PW2's house shortly before the deceased disappeared only to return about 30 minutes later having been defiled; that the beddings of the appellant were bloodstained and of which he gave no explanation about; and that, this was consistent with the statement by the deceased that she had been sexually assaulted in the bed in the appellant's house. The learned trial judge concluded:-

"*I am satisfied that the accused is the person who defiled the deceased and inflicted bodily injuries on her which necessitated the surgical operation. In terms of section 213 (a) of the Penal Code the Accused caused the death of the deceased. It is clear that the Accused had the intention to commit a felony of defiling the deceased and this is sufficient to establish malice aforethought under section 206(c) of the Penal Code."*

There are six grounds of appeal in the memorandum of appeal of which Mr. Mandi, learned counsel for the appellant, argued two grounds only. These are:-

"*1. That the learned trial Judge (sic) erred in law and fact by basing a conviction on the evidence of PW2 and PW3 in respect to the alleged dying declaration of the deceased without considering that the named "DOMINIC" is a common name (sic) among men in the community.*

2. That the learned trial judge further erred in both law and fact by misdirecting herself by holding that malice aforethought had been established under section 206 (c) of the Penal Code, yet the two Doctors i.e. Dr. Odongo and Dr. Kazungu Koba had limited experience, hence the requirements of section 213 of the Penal Code were not fully complied with".

The learned State Counsel, Mr. Orinda, did not support the conviction and urged for a re-trial on the ground that no plea was ever taken before the trial commenced and also when a new trial judge took over after the previous one retired.

This is a first appeal and as this Court has said on numerous occasions the first appellate court has a duty to reconsider the evidence, evaluate it and draw its own conclusions in deciding whether the judgment of the trial court can be upheld. See ***OKENO VS. REPUBLIC*** *[1972] EA 32*. As the case of

OKENO (supra) clearly shows mere failure to evaluate the evidence by the trial court does not in all cases lead to an acquittal. The Court has to be satisfied that the irregularities complained of occasioned a failure of justice. In that case the court said in part at page 36 para 1:-

"*Notwithstanding the form taken by the High Court's judgment, we are nevertheless satisfied that the Judges did make their own evaluation of the facts although this is not made to appear clearly …….. we are satisfied that the irregularities undoubtedly contained in the first appellate judgment did not infact occasion a failure of justice and that had the Judges discharged their duties in accordance with the law as laid down in the long line of authority they must have inevitably come to the same conclusion…………………"*

We will first dispose of the failure to plead before the trial began and failure to take a new plea by the appellant after the first trial judge retired. The appellant first appeared before Juma J on 27th July, 2001 for plea which was not taken but postponed to 25th September, 2001. The case was stood over from time to time until 25th April, 2002 when it is recorded:-

"*25/4/2002*

Mitey – Judge

Ondari for State

Gikaria – Court Clerk

Mr. Gitahi: My client will not plead guilty to manslaughter.

Mr. Ondari: In that case we proceed with the charge of murder as laid.

J.K. MITEY

JUDGE"

The trial properly started on 16th July, 2002. No plea was taken but the assessors were chosen and evidence was taken from four witnesses and the case was then adjourned severally until Mitey J retired and Okwengu J resumed trial on 18th December, 2003, also without taking plea. It is indisputable therefore that no plea was taken before any of the two trial judges. That such elementary axiom or omission escaped the notice of two judges and two experienced advocates somewhat surprises us. However, we have no hesitation whatsoever in holding that the omission not having occasioned the appellant a miscarriage of justice the error is curable by the application of *Section 382* of the Criminal Procedure Code and we so affirm that the trial did not amount to a mistrial so as to justify a retrial. We reject the submissions of Mr. Orinda.

The appellant has averred in his grounds of appeal that the cause of death was not defilement but asphyxia due to aspirating food and that this was an anaesthetic death. We think that the issue that arises for consideration is: what is the nexus between the defilement and/or sexual assault on the deceased and the cause of her death? Or, simply put, what is the immediate and primary cause of the death of the deceased?

In the old English case of *R V. Mc INTYRE (1872) 2 Cox 379,* where a blow was given which in the opinion of a surgeon rendered a restorative necessary, and the injured being unable to swallow was choked in administering the restorative, it was held that the death was caused by the blow. Again, if a man is wounded and the wound turns to a gangrene or fever for want of proper application or neglect, or leads to septic pneumonia or meningitis and the man dies from gangrene, fever etc. or if it becomes fatal from the refusal of the party to undergo a surgical operation, or if death results from an operation rendered advisable by the act of the accused, this is homicide – murder or manslaughter – depending upon

the circumstances under which the wound was inflicted. *R V DAVIES (1883) 15 Cox 174*, *BRINTONS LTD V TURVEY [1905] AC 230.*

In the recent English case of *R V CHESHIRE* [*1991] 3 ALL ER 670*, during an argument in a fish and chip shop about midnight on 9/10 December 1987 accused produced a handgun and shot deceased in the thigh and stomach. During his treatment in hospital deceased developed respiratory problems and a tracheotomy tube was placed in his windpipe. He died in hospital on 15 February 1988. At the post-mortem it was found that deceased's windpipe had become obstructed due to narrowing near the site of the tracheotomy scar.

The accused was charged with murder. The pathologist who conducted the post-mortem gave evidence that the immediate cause of death was cardio-respiratory arrest 'due to a condition which was produced as a result of treatment to provide an artificial airway in the treatment of gunshot wounds of the abdomen and leg'.

And he said:-

"*In other words, I give as the cause of death cardio-respiratory arrest due to gunshot wounds of the abdomen and leg."*

Judge Lowry QC directed the jury that "the bullets caused the death, even if the treatment was incompetent, negligent. For you to find that the chain was broken, the medical treatment or lack of medical treatment must be reckless….. Reckless conduct is where somebody could not care less. He acts or fails to act careless of the consequences, careless of the comfort or safety of another person……" Accused was convicted of murder.

The Court of Appeal *(Beldans LJ, Boreham and Auld JJ)* held that the test to be applied in determining whether a felonious act has caused a death which follows, in spite of an intervening act is whether the felonious act is still an operating and substantial cause of the death.

Section 213 of the Penal Code defines causing death as follows:-

"*A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases:*

(a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill."

(b) ………………..

The doctors in this case had limited experience and their failure to take precautionary anaesthetic measures might have been inept or unskillful and probably more experienced doctors than those at Nyeri Provincial Hospital might have recognized and prevented the possible consequences of operating on a full stomach and thus preventing the deceased's death. Nevertheless, the complication which resulted in the death was a direct consequence of the defilement or sexual assault and which remained a significant cause of the deceased's death. We so hold.

We will now consider the most difficult issue as far as this appeal is concerned. Who caused the death of the deceased? It is manifestly clear from the evidence on record that the deceased was defiled and that there was no eye witness to the defilement. However, the deceased was consistent in her statement to PW2, PW3 and PW4 that she was defiled by the appellant. The statement related to the cause of her death and the circumstances which resulted in her being taken to hospital and operated upon. The cause of

her death being in issue, her statement therefore to the three witnesses was admissible under the Evidence Act *Section 33(a)* as a dying declaration. However, in practice an accused person should not be convicted on a dying declaration in the absence of corroboration. *PIUS JASUNGA S/O AKUMU V R (1954) 21 EACA 331.* Again, the statement herein is by a child aged 7 years whose unsworn evidence in the absence of corroboration cannot on its own found a conviction and further such evidence cannot corroborate other evidence which requires corroboration – *Solu wa Tutu v R 1 EACA 183*.

Even if the so-called dying declaration is excluded altogether, there are facts in the case which could be inferred from circumstantial evidence that the appellant did indeed defile the deceased and caused her the injuries which necessitated the operation which resulted in her death. Firstly, the appellant and the deceased were neighbours and the deceased knew the appellant well. The appellant was at their (deceased) home at the material time. Secondly, the appellant left the neighbourhood for Nyeri immediately after the sexual assault on the deceased and the reason he gave for leaving home and loitering the whole of the next day in Nyeri town is not reasonable nor convincing. His conduct before and after the incident is not consonant with his innocence. Thirdly, there is the unexplained blood stains on the appellant's bedding. Fourthly and most importantly, is the consistent statement by the deceased to the three witnesses, PW2, PW3 and PW4 that she had been defiled by the appellant. The combination of all these circumstances taken together create a strong conclusion of guilt on the part of the appellant.

There is no suggestion from the evidence tendered in the trial court that there were other D's within the home of the deceased. Moreover, it is clear from the evidence as to which D the deceased was referring and that was the appellant and no one else.

Having considered all the grounds of appeal canvassed before us we think that they have no merit and we reject them.

For these reasons, we uphold the conviction. We are satisfied that the appellant's guilt had been proved beyond doubt. We dismiss the appeal. It is so ordered.

DATED and DELIVERED at NYERI this 13th day of February, 2007.

P.K TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

………………………………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR