IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 132 of 2004

PETER IRUNGU MUKURATHI …….. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Okwengu J) dated 26th May, 2004

in

H.C.CR.C. NO. 114 OF 2003)

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JUDGMENT OF THE COURT

The appellant *PETER IRUNGU MUKURATHI* was convicted by the High Court sitting at Nyeri of the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code and sentenced to death. This is an appeal against the conviction and sentence.

The particulars of the charge stated that on 31st day of July, 1999 at Kabuta village, the appellant murdered *GITHAE KAMAU*.

The appellant was tried with the aid of assessors.

The appellant is the brother of *SAMUEL KAIBA MWANGI* (PW1) (Samuel). On the 31st July, 1999 at about 2 p.m. the deceased, Samuel Kamau and four other boys namely, *STEPHEN NJOROGE KAMAU* (Stephen) (PW4), *TIMOTHY KARIUKI*, *MAXWELL MWANGI* and *ELIUD MAINA* were resting outside the house of Samuel's parents. Stephen is the brother to Samuel.

The appellant went there and entered into the house. He came out with a glowing firewood and commanded Stephen to go to a stream to fetch water saying that he was thirsty. Stephen took a jerrican and went to the river to fetch water. After Stephen left, the appellant dropped the firewood, picked a panga and started cutting Githae Kamau on the head and arms in the presence of Samuel. Samuel ran away towards the stream. He met his brother Stephen on the way and reported to him what he had seen. Stephen ran to the home of ***Clement Mwangi Kamundei*** (PW6), (Clement) and reported to him. Thereafter, ***Stephen***, ***Clement***, ***Francis Warurie Mwangi*** (Francis) (PW6) and other villagers went to the scene. They saw blood outside the house and a trail of blood leading to the boundary of the neighbouring farm where the body of the deceased was lying. The body had multiple cuts on the head and on the arm. They started looking for the appellant. Clement saw the appellant running from a ban used for

drying tobacco. He was chased and hid near a latrine where he was arrested.

Upon being found, he stood up and called Clement pleading with him not to beat him. The appellant was asked to produce the panga that he had used to cut the child. The appellant then removed a panga from his jacket and gave it to Clement. The panga had dry blood. The appellant was tied up and taken to the police station.

The body of the deceased was taken to Muranga District Hospital mortuary. ***Dr. Paul Wambua Mbalu*** (PW2) who performed the postmortem examination found that the deceased, who was 4 years old, had three deep cut wounds on the skull which had fractured the skull and a deep cut wound on the left wrist. He formed the opinion that the cause of death was due to severe head injury plus acute haemorrhage following multiple deep cuts on the head. The appellant was examined by ***Dr. Antony Muthee*** (PW3). He was 28 years old and his mental status was normal.

The appellant in an unsworn statement at the trial denied committing the offence and stated that he was working in the farm on the material day when villagers went to the farm at about 2 p.m. and told him that they had been informed by KAIBA (***Samwel***, PW1) that he, appellant, had killed a child.

The trial Judge was of the view that the evidence of Samuel required corroboration and found corroboration in the conduct of the appellant and the possession of the panga which inflicted the fatal injuries.

The learned Judge in her judgment said in part:

"***Although the accused denied involvement in the commission of the offence, I find that the accused did not speak the truth. His conduct as testified to by his two brothers PW1 and PW4 and PW5 and PW6 clearly shows that he was trying to hide, a fact which was not consistent with his innocence".***

On the question of the possession of the murder weapon, the learned Judge said:

"***Although the accused denied that nothing was recovered from him, PW4, PW5 and PW6 all testified that the Accused was asked to surrender the panga he had used in attacking the child and he produced a panga from his pocket and gave it to PW6. Although the panga was said to be blood stained, PW6 explained that the blood was dry and this would probably explain why there was no obvious blood on the Accused clothing. Moreover, it is apparent, that the officer who investigated this case blundered as they did not submit the panga or Accused's jacket to the government analyst for examination.***

Not withstanding this, I do believe and accept the evidence of PW4, PW5 and PW6 that the Accused had a panga in his possession.

The accused's conduct and the fact that he was apprehended whilst in possession of a panga within the vicinity of where the deceased had just been cut to death all provide material corroboration to the evidence of PW1".

The main ground of appeal is that the trial Judge erred in law in relying on the sole evidence of Samuel – a child of tender years which was not sufficiently corroborated.

Mr. Mahan, the learned counsel for the appellant submitted that Samuel was a child of tender years at the time the offence was committed and that repetition of what Samuel told other witnesses does not amount to corroboration. In his view, the evidence of Samuel was not sufficiently corroborated and the conviction based on such evidence was unsafe.

Mr. Orinda, the learned State Counsel, on his part, submitted, that since Samuel was 16 years old at the time of the trial, he was not a child of tender years. He contended that ***section 124*** of the Evidence Act refers to the age of a witness at the time of giving evidence and not at the time of the commission of the offence. He, however contended that the evidence of Samuel was sufficiently corroborated by independent evidence of the circumstances of arrest of the appellant.

The record shows that the learned Judge examined Samuel before receiving his evidence. Samuel stated, among other things, that he was 16 years of age, that he had finished primary education ***(Class VIII)***; that he goes to church but that he did not know what an oath is. After the inquiry the trial Judge made a finding that Samuel was sufficiently intelligent to understand the importance of speaking the truth but that he did not appear to understand the nature of the oath. It is apparent that the trial Judge made the inquiry pursuant to ***section 19*** of the ***Oaths and Statutory Declarations Act (CAP 15)*** which authorizes the reception of the unsworn evidence of a child of tender years who does not understand the nature of the oath, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and also understands the duty of speaking the truth.

Section 124 of the Evidence Act provides:-

"***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."***

There is a proviso to that section introduced by ***The Criminal Law (Amendment) Act No. 5 of 2006*** as further amended by the ***Sexual Offences Act – Act No. 3 of 2006*** authorising the court to convict on uncorroborated evidence of a child of tender years (now referred to as "*alleged victim"*) in criminal cases involving sexual offences if, for reasons to be recorded, the court is satisfied that the child (alleged victim) is telling the truth.

In the absence of statutory definition, any child of the age or apparent age of under 14 years is generally considered as a child of tender years. By the definition in ***section 2*** of ***The Children Act – 2001 No. 8 of 2001***, a child of tender years is defined as a child under the age of ten years.

We respectfully agree with the interpretation of ***section 124*** of the Evidence Act by Mr. Orinda, that, the relevant time to determine whether a witness is a child of tender years is on the date of the trial. If the witness is not a child of tender years at the date of reception of his evidence, then ***section 124*** does not apply and the evidence does not statutorily require corroboration.

It is clear therefore that the superior court misdirected itself in law by applying both ***section 19*** of the Oaths and Statutory Declarations Act and ***section 124*** of the Evidence Act to the evidence of Samuel who was of the age or apparent age of 16 years on the date of the trial. He should have been required to give evidence on affirmation if he did not understand the nature of the Oath. The evidence of Samuel did not in the circumstances of his case required corroboration as a matter of law.

Similarly, the trial Judge misdirected herself by applying ***section 19*** of the Oaths and Statutory Declarations Act to the evidence of ***Stephen*** (PW4), who was 16 years old at the date of the trial. He should have given evidence on affirmation if he did not understand the nature of the oaths.

We have particularly reconsidered and revaluated the evidence of ***Samuel, Stephen,***

Clement, Francis and of the appellant as the first appellate court is required to do.

The evidence of Samuel and Stephen, the two brothers of the appellant, is consistent that the appellant was at home with the deceased before he sent Stephen to fetch water. There was consistent evidence from Samuel that he saw the appellant cutting the deceased with a panga several times. The deceased was killed early in the afternoon. There was blood at the scene and blood trail leading to where the body of the deceased was found lying. The appellant ran away when he saw the villagers and hid. He was arrested in possession of a blood stained panga which Samuel identified as the murder weapon. Both Francis and Clement are closely related to the appellant.

We are satisfied in the circumstances, that there was cogent and credible direct and circumstantial evidence against the appellant from witnesses who are closely related to him. In our view, the irregularity in the manner the evidence of Samuel and Stephen was received did not occasion a failure of justice.

Although the appellant did not plead insanity at the trial Mr. Mahan submitted that the court was aware that the mental capacity of the appellant was in question and should have been considered.

There is a presumption of sanity enacted in ***section 11*** of the Penal Code. The appellant was represented by a counsel at the trial. He did not raise the defence of insanity at the trial nor in the memorandum of appeal. The defence which is raised belatedly is not supported by the evidence and has no merit.

The superior court made a finding that the prosecution had failed to call three other boys as witnesses but, nevertheless, held that an adverse inference could not be drawn from that fact.

We do not, with respect, agree with the submission that the court misdirected itself in so finding. An adverse inference would arise only where the evidence to support the charge is barely adequate (see ***Bukenya and Others vs. Uganda*** [1972] E.A. 549). That is not the case here.

Lastly, we are satisfied that the trial was regularly conducted under ***section 298(1)*** of the Criminal Procedure Code with the aid of two assessors after the third one was discharged.

In the result, we do not find any merit in the appeal. It is accordingly dismissed.

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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR