**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL 74 OF 1991**

**D M G ……. APPELLANT**

**AND**

**REPUBLIC ……..…… RESPONDENT**

***(An Appeal from the Judgment and the conviction of the High Court of Kenya at Nairobi (Mango, J) dated 29th July, 1991***

**in**

**H.C.CR.C. No. 46 of 1989)**

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**JUDGMENT OF THE COURT**

This is a first appeal brought by **D M G** (the appellant) against his conviction and sentence for the offence of murder contrary to ***section 203*** as read with ***204*** of the Penal Code. The particulars of the charge allege that on 23rd January, 1988, at ***[particulars withheld***] village, Gatundu in Kiambu District of the Central Province, he murdered N G M (the deceased).

The alleged murder was unusual, most foul and shocking. The deceased, a boy aged 5 years, was the first born child of the appellant. He was described as having been about a metre tall at the time of his death. He resided with his mother, P W G (Pauline) at Buruburu Estate. Also living with Pauline were her two other children and her sister N G T (Nancy).

The appellant and Pauline entered into a statutory marriage in 1982, cohabited thereafter, but in or about 1987 the cohabitation ceased because of differences between them, which, according to Pauline arose because of the appellant's refusal to support his family.

Events leading to the death of the deceased started on 22nd January, 1988. The deceased was a pupil in a certain school at Buruburu, Nairobi. He would be escorted to that school daily by Nancy who would later collect him after school hours. On 22nd January, 1988, Nancy escorted the deceased to his school as usual, and later went for him. She found the appellant at the school, also wishing to collect the deceased. When the deceased and other pupils were allowed to go home he came out and on seeing the appellant he rushed to him. He was apparently happy to see his father. There was no dispute at the appellant's trial that he informed Nancy to go ahead and prepare lunch for herself, the deceased and himself.

Nancy, without any hesitation agreed and went ahead as requested. But the appellant did not follow her as he had promised. Instead, he left with the deceased allegedly to his office where he stayed until about 5.00 p.m. after which he left with him to his home at Gatundu.

On 23rd January, 1988 at about 2.00 p.m., the deceased was found by S G G (Susan) in a drum of water headlong, dead. Susan was the appellant's mother. Both the appellant and Susan testified that the deceased must have tried to get a cup which was in the drum, but fell inside and drowned.

The prosecution case was that the appellant killed the deceased with a view to making a claim under an accident policy he had obtained for the deceased.

No one saw the deceased falling into the drum. Nor did any person witness his killing. The evidence which was adduced at the appellant's trial was wholly circumstantial. The late Mango, J heard the appellant's case with the aid of assessors. In his judgment, after setting out the background facts and the law on circumstantial evidence, he analyzed the evidence before him and held that the inculpatory facts were inconsistent with the appellant's innocence and irresistibly pointed to the appellant as the person who killed the deceased. In coming to that conclusion, he did not only consider the appellant's behaviour between 22nd and 24th January, 1988, but also his relationship with his family and the fact that a few months earlier he had taken an accident policy for the deceased. In his view the taking away of the deceased by the appellant on 22nd January, 1988, was clandestine, and the fact that he did not inform either Nancy or Pauline that he wanted to go away with the deceased suggested his actions were all calculated. He also evaluated medical evidence which he accepted, and held that as that evidence had excluded drowning in water as the cause of the deceased's death, the appellant's story that the deceased had accidentally fallen into the water drum and drowned was displaced. He then proceeded to find the appellant guilty of murder, convicted him and sentenced him to the mandatory death sentence provided under the relevant law. The appellant was aggrieved, and hence the present appeal.

It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions on it in deciding whether the judgment of the trial court should be upheld or overturned – See **OKENO V. R. [1972] EA. 32**. In doing so, the Court must bear in mind that it did not see witnesses testify as to be able to comment on demeanor of the various witnesses at the trial.

The appellant has proffered five grounds to challenge the decision of the superior court, viz

(1) The learned trial Judge erred in coming to the conclusion that the deceased was murdered when medical evidence before him showed to the contrary.

(2) The learned trial Judge erred in law and fact in failing to hold that Prof. Kungu's evidence as to the cause of death lacked any probative value.

(3) That the learned trial Judge erred in law in concluding that the case against him was proved beyond any reasonable doubt when evidence pertaining to the cause of death was jumbled up and inconclusive.

(4) The learned trial Judge erred in law and fact by relying on the accident insurance policy as proof of malice aforethought without more.

(5) The learned trial judge erred in law and fact by failing to hold that the prosecution had failed to call essential witnesses and that such failure was prejudicial to the appellant.

Mr. Patrick Kiage appeared for the appellant in this appeal. His submissions before us were three pronged. Firstly, he submitted about the relationship between the appellant and the deceased, starting with a statement that if the appellant killed his five year old son it is a grave matter deserving the sentence meted out to him. He however, submitted that the death of the deceased was explainable. He based his submissions on the findings of the trial Judge, that when the deceased saw his father he was very happy and ran to him, the appellant thereafter bought for him a soda and later went with him to Gatundu where he spent the night with him without any problem, that on the next day the deceased was

happily playing at the appellant's rural home as the appellant himself sat under a tree reading a newspaper. Learned counsel, then surmised and submitted, that those circumstances did not portray the appellant as one who killed or could have killed his own son. It was his view that the appellant's statement to Nancy that she should go home a head of them to prepare lunch were merely dismissal and could not be said to have been predeterminative in nature. It was merely a white lie. Otherwise he said if the appellant had intended to kill his son he would have stolen him. Instead, he picked the boy openly after school.

The second prong of Mr. Kiage's submission related to the accident insurance cover. The appellant had in mid-July 1987, about six months before the deceased died, taken out an accident insurance policy for the deceased naming himself as sole beneficiary. Upon the death of the deceased, the appellant made a claim for payment within one month of that death. It was Mr. Kiage's submission that the taking out of the policy *per se* has no probative value as in his view it was an innocent act. It does not raise a motive for killing notwithstanding the fact that it could raise a financial motive.

The third prong of Mr. Kiage's submission is on medical evidence. A post mortem examination on the body of the deceased was performed by Dr. Jason Kaviti in the presence of Professor A. Kungu. Both professionals prepared medical reports on the cause of death which the trial Judge considered in his judgment.

Dr. Kaviti found a few *ante mortem* bruises on the left mid-maxillary line or armpit area and right side of the chest. The lungs were "*cyanotic and mildly congested*." There were food remains in the *trachea* and main *bronchi*; bruises on scalp at the parietal and frontal regions; minimal *sub-dural haemorrhage* on both parietal regions and around the *medulla oblongata*. He formed the opinion that the cause of death was "… *asphyxia* and *subdural haemorrhage* following blunt head injuries and drowning."

Professor Kungu on the other hand found bruises in both the left and right side of the chest quite consistent with Dr. Kaviti's findings. On the head, however, he noted "extensive and widespread bruising of the scalp with numerous *haematomata*, bruises …. in the *periosteum* covering the skull" but no fractures of the skull. Like Dr. Kaviti he found "*subdural haemorrhage*" ….. particularly over both the *parietal lobes* and in the *posterior cranial fossa*" but no *lacerations or haemorrhage* on the brain substance.

In the respiratory system he found the *pharynx mucous* membrane congested but without any excessive fluid in the area, the trachea or mouth. Like Dr. Kaviti he found food in the trachea and both main bronchi. The lungs were congested. He noted that "there is no *oedema* nor fluid in the small *bronchi* at all as would be expected in drowning."

In the *gastro-intestinal* tract, he found food material of a recent meal – about two to three hours previously. The liver, kidney and spleen were all congested. His conclusion was that the cause of death was "*Asphyxia* – But **NOT** typical of drowning" combined with head injury.

Mr. Kiage submitted that in absence of evidence to show any obvious injuries on the body when it was taken out of the drum the injuries found on the body during post-mortem examination could have been caused during movement of the body to the mortuary. In his view the cause of death is unclear.

Mr. J. Kaigai, Senior State Counsel, represented the State. He took us through the evidence on record and concluded that the circumstances taken cumulatively pointed irresistibly to the appellant as the person who killed his son, more so because the asphyxiation of the deceased was inconsistent with drowning.

We have set out the background facts and the rival submissions of counsel who appeared in this matter. One point is clear. The evidence on record is purely circumstantial. The trial Judge appreciated this and relying on the case of **R V. KIPKERING ARAP KOSKEI & ANOTHER, [1949] 16 EACA 135** he concluded that the inculpatory facts were incompatible with the appellant's innocence, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The learned Judge also warned himself, correctly in our view, relying on the privy council decision in **TEPER V. REGINAM [1952]**

**AC. 480**, that it was important for him to consider whether there were co-existing circumstances which would weaken or destroy the inference of guilt, before convicting the appellant. The Privy Council, in **TEPER'S** case, rendered itself on the issue thus:

*"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there were no other co-existing circumstances which would weaken or destroy the inference."*

This test was applied by the Court of Appeal for East Africa in the Ugandan case of **SIMONI MUSOKE V. R. [1958] EA 715**, and recently by this Court in the case of **PARVIN SINGH DHALAY V. REPUBLIC** Criminal Appeal No. 10 of 1997, in which the Court said:

*"For our part, we think that if there be other co-existing circumstances which could weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."*

So much for the law on circumstantial evidence. We are satisfied the trial Judge correctly set out the law on circumstantial evidence. However, how did he apply the law to the matter before him? Before we deal with that issue, we need to deal with the ground of appeal relating to the alleged failure by the prosecution to call essential witnesses. The appellant has not indicated in his memorandum of appeal the witnesses the prosecution was obliged to but did not call. The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden?

In **BUKENYA AND OTHERS V. UGANDA [1972] EA 349** the Court of Appeal for East Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:

*"…. There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent …. While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."*

We have not been asked to draw any adverse inference, and even if that were so, we would not have been inclined to do so in absence of any evidence to show that some essential witnesses were not called by the prosecution to testify.

We must now revert to the issue as to how the learned trial Judge handled the evidence before him. There was no dispute the appellant took the deceased away from his school by trick. He made Nancy believe he would come home with the deceased which he never did. The next day the deceased was found dead in a drum of water. While the law is clear that the burden is throughout on the prosecution to prove a criminal case beyond any reasonable doubt, and the accused has no duty or burden of establishing his own innocence, there are times when the law places a duty on an accused to explain certain facts particularly those peculiarly within his own knowledge. ***Section 111*** of the Evidence Act, ***Cap 80*** laws of Kenya which casts that burden on the accused provides, in pertinent part as follows:

"***111 (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."***

There are proviso which exclude the application of that provision, which are not present in this case. The learned trial Judge did not allude to this provision. However, the way he handled the evidence shows he had it in mind. Failure to offer a reasonable explanation raises a rebuttable presumption of fact that the

accused committed the act or made the omission complained of.

The evidence before the trial court is clear that after Nancy left the appellant with the deceased only the appellant and his mother said they saw the appellant alive just before he was found dead on 23rd January, 1988. This was in the appellant's home in Gatundu. Only them, but more especially the appellant had a duty to explain how the deceased died. He is the one who took him away from the school where Nancy had taken him to. As we stated earlier he used a trick to take the boy away from the custody of the boy's mother. As the learned trial Judge pointed out he did not ask permission from the boy's mother to take the boy away. Nor did he attempt to do so but was denied such permission.

Mr. Kiage's submission on behalf of the appellant had a two pronged purpose. Firstly, to show that the appellant had offered an explanation for taking the boy away. Secondly, that the explanation was reasonable, plausible and provided co-existing circumstances which weakens any inference of guilt.

The explanation offered by the appellant and his mother is very simple. The deceased was playing within their home in Gatundu. Only himself and his mother were at home. The appellant was reading a newspaper and his mother was peeling potatoes, but both of them had full view of the deceased as he played. They do not explain this, but apparently the boy unnoticed went to the backside of his grandmother's house where there was a drum and tried to climb onto it. The drum had no cover, and was placed on some stones. The boy was then aged five (5) years, was about one metre tall, and the drum itself was more than one metre in height. So, since it was placed on stones it must have been even higher than the deceased. The appellant explained that the deceased must have tried to get a cup which was inside the drum when he fell inside and drowned. But, if the drum was higher than the deceased how was he able to see that there was a container inside which he could attempt to remove? The point was not canvassed by both the appellant and the prosecution. The learned trial judge did not also allude to it. Nor did the appellant explain how a boy of that age would climb on to the top of the drum. The facts and immediate circumstances preceding the deceased's death were matters particularly within the appellant's own knowledge. As we stated earlier the appellant had a duty of offering a reasonable explanation or explanations as to how the deceased met his death. The assessors and the learned trial Judge were not satisfied the appellant offered any such explanation.

Besides there are certain contradictory statements the appellant made to the police, and produced in evidence without objection, regarding why he had taken the boy. The very first time he was asked about it his explanation was that he had taken the boy to see his grandmother who had not seen him for quite a while. But he later changed the story to say that as the boy was the first born, under Kikuyu custom he was required at Nyahururu for some traditional ceremony. The boy was not taken to Nyahururu. This may appear a simple and inconsequential factor, but it goes to test the appellant's credibility and the truth of this story. Had the appellant indeed wanted the boy to attend such a ceremony, one would have expected that he would have made sure the boy attended and participated. Nothing prevented the appellant from taking the boy to Nyahururu. According to what he told the trial Judge, he was relaxing at home with his mother and the boy on the day he died suggesting that the story about the boy being required at some ceremony was merely an afterthought.

We also consider the circumstances, as explained by the appellant and his mother, as to how the deceased might have died. The drum in which the deceased allegedly drowned was barely twenty-six feet from where the appellant was seated under a tree. That distance was short and would have enabled the appellant to hear the deceased's fall into the drum or at least the splashing of water in the course of the fall. That neither the appellant nor his mother heard any peculiar sound from the direction of the drum is telling. The deceased's death must have occurred otherwise than as explained by the appellant.

Medical evidence disproved death by drowning in water. We do not lose sight of the fact that medical evidence is merely opinion evidence, and a Judge must test it against other evidence before acting on it. Two doctors excluded death from drowning in water as the cause of the deceased's death. The surrounding circumstances lend support to that view. The learned trial Judge considered those circumstances and quite properly came to the conclusion that the circumstances pointed irresistibly to the appellant as the person who killed the deceased. On our part we have no hesitation in coming to the

conclusion that the explanations the appellant gave as to how the deceased died are clearly unreasonable and unbelievable. He has not discharged the burden the law places on him to offer a reasonable explanation as to how the deceased met his death. Consequently, a reasonable presumption is raised that he is the person who intentionally killed the deceased.

Accordingly we have no hesitation in coming to the inevitable conclusion that the appellant's appeal against conviction lacks merit. It is accordingly dismissed. As for sentence, the only sentence prescribed by law is death. We lack the power to interfere with it. Consequently, the appellant's appeal against sentence is also dismissed.

Dated and delivered at Nairobi this 5th day of May, 2006.

**S.E.O BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**W.S. DEVERELL**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR.**