IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 63 OF 2005

JOSEPH WAMBIRWA MWATHI …….……. APPELLANT

AND

REPUBLIC …….……..RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J.) dated 1st March, 2005

in

H.C.CR. CASE NO. 14 OF 2004)

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JUDGMENT OF THE COURT

On the morning of the 2nd February, 2004 the body of seven-year old ***Samuel Mukuria Wanjiru*** ("the deceased") lay on a polythene paper in a pool of blood in the sitting room of his grandparents' house in Gatitu village, Nyeri. The anterior aspect of the neck had a deep cut wound which had severed the trachea, carotid arteries, thyroid and jugular vein. Only the back of the neck held it to the rest of the body. According to ***Dr. Ibrahim*** (PW2) who examined the body on 10th February, 2004, only a sharp object could have caused such injury. No one witnessed the killing of the deceased.

The deceased was an abnormal child of a single mother. He was unable to walk and did not learn to talk normally. His grandfather was ***Joseph Wambirwa Mwathi*** ("the appellant") who together with his wife stayed with the deceased in their two-roomed house – the sitting room where the body of the deceased lay, and a bedroom.

In the same homestead also lived their two sons ***Patrick Thanju Wambirwa*** (PW1), ***Samwel Mukuna Wambirwa*** (PW3) and their daughter, ***Beatrice Wanjiru***, the deceased's mother. Separate from the main house was a kitchen adjacent to which was a goat-shed. All the members of the household had access to those buildings.

That morning, ***Patrick*** (PW1) had gone out to fetch grass in order to feed the goats. His elder brother ***Samwel*** (PW3) had gone tilling the shamba some 300 metres away from home. Their mother had woken up even earlier to go to another shamba with their sister. As PW1 was feeding the goats, he saw his father alone inside the kitchen bending but he did not bother him as it was not unusual for his father to be there. As he was leaving the goatshed for the garden, he saw his father leave the kitchen and he called ***Patrick***.

He told ***Patrick*** that he had killed the child. ***Patrick*** thought it was an accident like pushing the door thus hitting the child but he followed his father towards the main house. His father opened the door and entered the house. ***Patrick*** followed and there, lying on his back on a polythene bag, wearing only a vest, lay the deceased. He rushed out in shock to call his elder brother (PW3) from the shamba. By that time their father had gone into his bedroom and lay on his bed. ***Samwel*** arrived and called out to his father asking what had happened. His father told him, what happened was what ***Samwel*** had seen. ***Samwel*** understood it to mean that his father was the one who killed the child.

The two brothers then decided to report the matter to Mukuruweini Police Station where they arrived at about 10.00 a.m. and found ***Pc James Njeru*** (PW5) at the report desk. They were told to look for a motor vehicle. They went different directions looking for it but only ***Patrick*** managed to get one through their uncle, ***Muriuki Muchunu*** (PW4) a retired chief of the area. ***Patrick*** met PW4 on the way to Kiahungu town and ***Patrick*** informed him that his father had killed the deceased and a vehicle was needed to take the body to the mortuary. PW4 had however, earlier heard that rumour from members of the public before he left home. He offered ***Patrick*** his own vehicle which was at his home and proceeded on his way. Along the way PW4 saw the appellant walking and behind at a distance of about 30 metres, his son ***Samwel*** (PW3) following him. ***Samwel*** had failed to get a vehicle and was returning home when he saw his father going towards the direction of the police station and he followed him from behind without talking to him. That is when PW4 saw them and walked faster to catch up with the appellant. On asking him where he was going, the appellant said he was going to Nyeri but had 100/= only for transport. PW4 told him to accompany him to PW4's daugher's place to collect another 100/= and the appellant accepted. As the two walked together the appellant volunteered to tell PW4 that he had killed the disabled child. He also told him that he had used a knife which he kept where the firewood was. As they approached Mukuruweini Police Station, PW4 held the appellant, and a struggle ensued and then a policeman came to his assistance. The appellant was locked up in police cells.

The police led by ***Pc James Njeru*** (PW5) went to the home, collected the deceased and made a search for the killer knife. They found one on the rafters holding the kitchen roof on top of some firewood but the knife had no blood stains or any signs of washing. It was not taken for any forensic analysis but was still produced in evidence. The mother of the deceased and the appellant's wife went to the police but were not questioned about the incident.

The appellant was charged with, and was tried before the superior court, for the offence of murder which he denied. His unsworn defence was brief: - he had gone somewhere on that day but when he returned home he found the child having died. He loved the boy and so he went to the police without talking to anybody.

The superior court was satisfied with the evidence tendered before it as probative of the offence charged, convicted the appellant and sentenced him to the mandatory death sentence. The appellant was aggrieved and now comes before us on appeal.

As this is the first and also the last appeal, we are duty-bound to subject the evidence on record to a thorough evaluation and to make our own conclusions in the matter always allowing for the fact that the trial court saw and heard the witnesses appearing before it. This Court stated in **Pandya v. R [1957] EA 338 at pg. 337**: -

"On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the judge or magistrate with such other materials as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses but there may be other circumstances, quite apart from manner and demeanour which shew whether a statement is credible or not which may warrant a court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has

not seen. On second appeal it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principes."

See also **Okeno v. R [1972] EA 32**.

It is also evident that there was no eye-witness to the offence and we must therefore consider whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt. That was the standard set out in **Rex v. Kipkering arap Koske 16 EACA 135**. But, in **Musoke v. R [1958] EA 715** citing with approval **Teper v. R [1952] A.C. 480**, the predecessor of this Court added a further principle that:

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

In coming to the conclusion that the appellant ought to be convicted for the offence, the superior court **(Khamoni, J)** expressed itself as follows:

"***I have no reason to doubt the evidence of P.W.1, P.W.3 and P.W.4 concerning the Accused person. I have no reason to doubt the evidence of P.W.2, the postmortem doctor or the evidence of P.W.5 Police Constable James Njeru. From the evidence before me, I cannot accept any suggestion that anyone else, apart from the Accused person, committed this offence. The Accused person talked to P.W.1, P.W.3 and P.W.4 and what he told them is clear and consistent. The intention to kill can be seen from the nature of the injury. It was not stabbing. It was slaughter done at the throat where the person doing the slaughter must have had the intention to kill although the motive for that killing has not been brought out. According to the doctor, the cutting was so deep that the head remained connected with the rest of the body only by means of muscles at the back of the neck. In the circumstances, I am satisfied that the prosecution has proved the offence of murder against the Accused person beyond reasonable doubt."***

The appellant challenges those findings on three grounds argued by learned counsel Mr. Wanjohi Mburu. He submitted firstly, that the evidence of PW1 and PW3 was hearsay. They only testified on what they were allegedly told by the appellant. So was PW4's evidence. They all purported to testify that the appellant confessed to them that he had committed the offence of murder, but this they cannot do in law by dint of ***section 25 (a***) of the ***Evidence Act***. The section which was introduced by **Act No. 5** of **2003** states: -

"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court."

That evidence therefore, in Mr. Mburu's submission, was for exclusion in which case only circumstantial evidence remains for consideration. The only circumstantial evidence is that the appellant was alone with the deceased in the home. But in the same home were also the two sons, PW1 and PW3, the wife of the appellant, and the mother of the deceased. All of them, including outsiders, had access to all the houses in the compound and were equally capable of committing the offence. The guilt of the appellant was therefore not the only reasonable hypothesis.

For his part, learned Senior State Counsel, Mr. Orinda submitted that the evidence of PW1, PW3 and PW4 was not focused on confession for the offence committed but on the conduct of the appellant that day, which included what he said, how he said it and what he did. In his submission, the chain of events as narrated by those witnesses led only to one conclusion that it was the appellant who was responsible for the deceased's death. The appellant was squarely put on the scene by his sons and they spoke to him. He was all alone with the deceased at the home that morning. They heard what he said and saw what he showed PW1. Mr. Orinda further submitted that the allegation that any one else was capable of committing the offence in the circumstances of this case was an afterthought because it was not put to any prosecution witness in cross-examination during the hearing. That ground of appeal should therefore be

rejected.

We have carefully considered that ground of appeal and we cannot accept the submission of Mr. Mburu that the entire evidence of PW1, PW3 and PW4 amounted to hearsay evidence. Apart from the rumours heard from members of the public by PW4, the record relates to what those witnesses saw, what they heard and what they did in relation to the appellant. We find for ourselves, that the oral statements accord with ***section 63*** of the ***Evidence Act, (Cap 80)*** which, as far as is relevant, states: -

"**63(1) Oral evidence must in all cases be direct evidence.**

(2) For the purposes of subsection (1), "direct evidence" means –

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:"

As correctly submitted by Mr. Mburu however, it would be erroneous to construe the accused's statements as heard by those witnesses to the effect that he killed the deceased to be a confession for the offence charged. Confession is defined in ***section 25*** of the ***Evidence Act*** as: -

"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."

With effect from 25th July, 2003 when ***Act No. 5*** of ***2003*** came into effect, such confession may only be made in court if it will be admissible and provable against an accused person and ***section 25 (a)*** (supra) is clear on that. The offence here is alleged to have been committed on 2nd February, 2004. To the extent therefore that the superior court appeared to accept the evidence of those witnesses as affording a confession, we would hold that it was a misdirection. Nevertheless, it is our view that the circumstantial evidence on record irresistibly implicates the appellant with the commission of the offence and we have been unable to find any other reasonable hypothesis or extenuating circumstances. The dead body of the deceased was found in the appellant's house. The appellant was the only person present at the homestead that morning and he was seen by PW1 and PW3, his sons, who were believed on their testimony by the trial Judge and we find no reason to impeach their credibility. He opened the house where the deceased lay and went into his bed to lie down before leaving the house later to go towards Nyeri. It was with the help of PW4 that the appellant was apprehended. It is true that there was no credible murder weapon produced in evidence as the one produced was not subjected to forensic examination. This, we think,was incompetence on the part of the prosecution and cannot be held against the appellant. The lack of a murder weapon is however not the end of the matter. It is also the law that there is no burden of proof placed on the appellant to explain his actions or presence at the scene of the murder. Nevertheless, we think the fact that there was a dead body inside the house of the appellant and the appellant was the only person present there, called for an explanation from the appellant if no adverse conclusion would be drawn. That is the import of **section 111(1)** of the **Evidence Act** which states in relevant part:

"**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:**

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence

given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

The presence of the dead body was especially within the knowledge of the appellant. The appellant's evidence in defence, as we have shown above, was simply that he had gone to an unspecified place at undisclosed time and when he returned he found the deceased's body in his house. In view of the inculpatory evidence placing him on the scene of the crime however, that evidence is effectively displaced. The first ground of appeal has no substance and we dismiss it.

Mr. Mburu further submitted that there was no motive for the murder of the deceased and that on the contrary, the evidence on record was that the appellant and the deceased had a good relationship. He lived with the deceased in the same house. So was the relationship between all other family members. It was a good one. Motive, in his view, was a relevant consideration as it would establish malice aforethought. The superior court however drew an inference on malice aforethought from the nature of the injuries inflicted on the deceased but these, in his submission, were not inflicted by the appellant.

Generally speaking, motive is not essential to prove a crime. Considering the issue in **Libambula V R [2003] KLR 683**, this Court stated:

"**We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime."**

Furthermore, ***section 9(3)*** of the ***Penal Code*** provides: -

"**Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility."**

There was no proof of motive in this matter but the appellant took the risk of cross-examining PW4 on his character and the witness revealed this: -

"**I know him as a bhang taking man as I arrested him when I was a chief and he was imprisoned at Kingongo".**

The appellant neither challenged that evidence nor pleaded any circumstance that would negate the general presumption as to criminal responsibility and in particular the presumption of sanity under ***section 11*** of the ***Penal Code***: -

"**Every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question, until the contrary is proved."**

We are satisfied in this case that it is the appellant who caused the death of the deceased and that he intended the consequences of his acts, whatever the motive. Malice aforethought is established *inter alia* by an intention to cause death of or to do grievous harm to any person. We agree with the learned trial Judge that the injuries inflicted on the deceased established malice aforethought. That ground of appeal also fails.

Finally Mr. Mburu submitted that the defence of the appellant was not considered. The record indeed indicates that the brief statement of the appellant in his defence was reproduced by the learned Judge but

there is no further comment on it. We think that was an unfortunate omission by the learned Judge, but we may ask as Senior State Counsel Mr. Orinda did, what difference it would have made considering the view taken by the superior court on the prosecution evidence. We have ourselves looked at the evidence and it is clearly short on any substance that would displace the prosecution evidence or raise reasonable doubts thereon. At no time did the appellant put it to any of the prosecution witnesses that he had left his house and if so at what period in time. In all the circumstances we do not find that the appellant was prejudiced by the failure to analyse his defence for whatever it was worth, and we reject that ground of appeal also.

All in all we find no merit in this appeal and we order that it be and is hereby dismissed in its entirety.

Dated and delivered at Nyeri this 4th day of August, 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