REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: TUNOI, O'KUBASU & WAKI, JJ.A)
Criminal Appeal 175 of 2001
BETWEEN

JOHN WAMBUA MUTUNGA …… APPELLANT

AND

REPUBLIC …….RESPONDENT

An appeal from the judgment of the High Court of Kenya at

Nyeri (Juma, J) dated 28th July, 2001
in
H. C. Criminal Case No. 31 of 1998)
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JUDGMENT OF THE COURT

The appellant, John Wambua Mutunga, was convicted of murder by the Superior Court (Juma, J.) on ***24th July, 2001*** and sentenced to death. The particulars of the offence were that on the ***25th day of June 1998*** at Mukuyu market in Muranga District of the Central Province the appellant murdered Peter Machaaga Gatimu.

The case against the appellant was mainly based on the evidence of three witnesses – Stephen Mwangi ***(PW3),*** John Irungu (PW7) and Patrick Njuguna ***(PW10).*** These were young boys who were with the deceased Peter Machaaga Gatimu when the incident took place. The three boys stated before the trial court that they were staying at Mukuyu market where they used to do casual work of cleaning shops and butcheries. They used to sleep outside the shops at that market. According to the evidence of these young boys it was on the evening of 24th June 1998 when the group went to the video shop to watch a football match. The match ended at about midnight and they went to where they used to sleep outside the shops. While outside the two shops (Father Gitonga's shop and Dicks Enterprises), two police officers appeared. Stephen Mwangi (PW3) Patrick Njuguna (PW10) and Dennis Karanja (not a witness) ran away leaving behind John Irungu (PW7) and the deceased. One of the police officers had a gun and he is the one who shot the deceased in the head. As a result of this incident P.C. Jane Ndungu (PW11) accompanied P.C. Kanja to the scene where they found the body of the deceased. Postmortem examination on the body of the deceased was conducted by Dr. Paul Mbalu (PW9) who formed the opinion that the deceased died of head injury consistent with gunshot. The appellant was arrested and charged with murder.

When put to his defence the appellant admitted killing the deceased . It was the appellant's defence that the killing was accidental as he was not familiar with the gun that he had that night.

From the evidence on record there can be no dispute that the deceased died as a result of a gunshot during the early hours of 25th June, 1998 when he was outside some shops at Mukuyu market. It is also not in

dispute that it was the appellant who shot the deceased. The appellant was a police officer on duty when this incident took place. The issue before the trial court was under what circumstances the appellant shot the deceased. As already indicated the case against the appellant was based mainly on the evidence of the three boys (PW3, PW7 and PW10) who were with the deceased. The three boys gave their own version as to what happened while the appellant gave his own version. The learned Judge of the Superior Court appreciated this fact when in the course of his judgment stated as follows:-

> ***"The accused in his evidence admitted killing the deceased. The issue for determination is whether the killing was intentional or accidental. The Accused has contended that it was accidental because he was not familiar with the gun he had that night. It was only the second time he was ever handling that type of gun. The prosecution contends that the killing was intentional and relies on the evidence of the eye witnesses."***

The learned Judge dealt with other aspects of the case like attempted cover up of the offence by some of the police officers, what the assessors stated to him and finally came to the conclusion that the appellant was guilty as charged and hence convicted him of murder. In convicting the appellant the learned Judge stated:-

> ***"The Accused was telling a lie when he said that he had only handled the type of gun once before the eventful night. The Arms Movement Register that was produced in evidence shows that the Accused had been issued with SHE Machine gun on various occasions before the day of the shooting. He even used one after the shooting.***
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> ***I agree with the Assessors that the Accused is guilty of murder. He deliberately shot Peter Muchaaga Gatimu without good cause. I find him guilty as charged and I convict him accordingly."***

When this appeal came up for hearing before us on 16th May 2005, Mr. Wanjohi Mburu, the learned counsel for the appellant confined himself to two grounds of appeal in his supplementary memorandum of appeal. The two grounds were essentially to the effect that the learned Judge erred in law in convicting the appellant of murder while there was no proof of malice aforethought and secondly, the learned Judge erred in law in failing to accord the appellant the benefit of doubt in view of inconsistent evidence tendered by the prosecution.

This being a first appeal to this court, we are duty bound to review the evidence and re-evaluate the same so that we may come to our own conclusion and decide whether the evidence on record supports the conviction of the appellant, but as we do so we must give allowance to the fact that we have neither seen nor heard the witnesses – see **OKENO V. R** [1972] E.A. 32

From the recorded evidence the incident of shooting took place during the early hours of 25th June 1998 at Mukuyu market in Muranga District. There was evidence from two night watchmen John Gichuiri Warui (***PW1***) and Andrew Kabena Waiganjo (***PW2***) who were guarding vehicles at that market to the effect that shortly after 12.30 a.m., some two people had appeared flashing torches and when PW1 asked them what they wanted they beckoned him to draw nearer. PW1 decided to blow his whistle and the two men ran into a maize plantation. As a result of this whistle blowing by PW1 the appellant and his colleague who were at a nearby road block came to answer the distress call. The two police officers then informed ***PW1*** that should the thieves come again he should not blow the whistle but call them. It was immediately after this incident that the appellant and his colleague confronted the young boys ending up in the shooting of the deceased.

As already stated earlier the evidence against the appellant was based on the testimony of three young boys – **PW3, PW7** and **PW10.** According to Waiganjo ***(PW2)*** he heard gunshots and then saw street-boys running towards him. Antony Joseph Mwangi (PW4) the owner of Dicks Eric Enterprises testified to the effect that street boys used to sleep on the verandah of his shop. It is to be remembered that the young boys had told the trial court that they were sleeping on the verandah of Dicks Enterprises shop. Dr. Paul Mbalu (PW9) who conducted postmortem examination on the body of the deceased testified that the

deceased was about 14 years old. Taking the evidence of these witnesses (***PW2, PW3, PW4, PW7*** *and* ***PW10***) together what emerges is that there was a confrontation between the two police officers (the appellant and his colleague) and the street boys. The record shows that Patrick Njuguna (PW10) was aged 15 years. Indeed the learned Judge made the following observation when taking his evidence:-

> ***"Court: Patrick understands nature of oath and is intelligent enough to be sworn. Both counsel agree."***

That was recorded in respect of Patrick Njuguna (***PW10)***. But nothing special is recorded in respect of Stephen Mwangi (***PW3)*** and John Irungu ***(PW7)*** who were with (***PW10)*** and the deceased. From the record of the trial court the three eye witnesses (PW3, PW7, and PW10) were street boys and although nothing specific was said about their respective ages what emerges is that these were young children. Section 124 of Evidence Act (Cap 80 Laws of Kenya) 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. Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person, if, for reasons to be recorded in the proceedings the court is satisfied that the child is telling the truth."***

The proviso to section 124 of the Evidence Act is a recent amendment inserted by section 103 of the Criminal Law (Amendment) Act, 2003 which relates to sexual offences. Needless to say, this appeal does not relate to a sexual offence.

The basic statutory provision relating to the evidence of children of tender years is to be found in section 19(1) of the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya, which says:-

> ***"19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court, or such person as aforesaid, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, or such person as aforesaid, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth, and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with the provisions of section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."***

The former Court of Appeal for Eastern Africa, had occasion to deal with the section in a number of cases the most outstanding ones being:-

(a)**Nyasani s/o Gichana vs. R** [1958] EA 190

(b)**Kibangeny Arap Kolil vs.** R [1959] EA 92

(c***)Oloo s/o Gai vs. R*** **[**1960]

In Nyasani s/o Gichana v. R (supra) this is what the Court said after quoting verbatim section 19(1) of the Oaths and Statutory Declarations Act:-

> ***"It is clearly the duty of the court under that section to ascertain, first whether a child tendered as a witness understands the nature of an oath, and if the finding of this question***

is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth"

In the case of ***Kibangeny Arap Kolil v. R*** (supra) this is what the court said after quoting earlier English decisions:-

"In the present case, the learned trial judge, so far as appears from the record, made no such investigation before affirming either of the two boys witnesses. Such an investigation need not be a lengthy one, but it must be made and, when made, the trial judge ought to record it.

The investigation should precede the swearing and the evidence and should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his general intelligence"

The passages we have quoted from ***Nyasani s/o Gichana*** (supra) and ***Kibangeny arap Kolil*** (supra) deal with procedures which a trial court should follow when receiving evidence of a child of tender years. This procedure was emphasized in the recent decision of this Court in ***Kinyua v. R [2004]*** I KLR 256 at p. 265 where this Court said:-

"There are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child – witness appears in court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child – witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigation in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise.Where the court is so satisfied, then, the court will proceed to record unsworn evidence from the child – witness"

We now turn to the record before us. While a feeble attempt was made to ascertain the capability of ***Patrick Njuguna*** **(PW10)** the record is silent in respect of the other two boys – ***Stephen Mwangi (PW3)*** and ***John Irungu (PW7).*** That was an error on the part of the trial court. The submissions of Mr. Mburu for the appellant must have been based on the fact that the trial Judge failed to follow the proper procedure in recording the evidence of the young boys. He relied on the decision of the predecessor of this Court in ***Muhidini s/o Asumani v. R*** [1962] E.A. 383 in which it was held, inter alia:-

"(i) the trial Judge ought to have recorded his investigation into the question whether the evidence of Robert should have been received on oath or affirmation, or unsworn, in pursuance of section 152 (3) of the Criminal Procedure Code.

(iii) the trial Judge had failed to direct either the assessors or himself on the risk of acting on the uncorroborated evidence of a child even though such evidence was on oath."

In view of the foregoing it is our considered opinion that the appellant's version of what took place ought to have been given due consideration since the only other material version was that of the young boys whose evidence was not received in strict compliance with statutory provision.

Before we conclude this judgment we wish to comment on what appears to have been prejudicial remarks by the prosecutor in his opening remarks. According to the record the trial of the appellant

commenced on 28th June, 2000, when one Mr. Oluoch who appeared for the State addressed the trial court as follows:-

> ***"Accused Police Officer at time. Deceased a street boy going home when Accused shot the deceased. No reason to shoot deceased who was 14 years. It was one a.m. sticks(2) of cigarettes and miraa. Accused had homicidal tendencies. Attempts to cover up the offence incriminating exhibits planted at scene to raise defence of self defence"***

The above was stated in the presence of the assessors. This was clearly prejudicial to the appellant as it would appear that the assessors were being told that the appellant was a man of homicidal tendencies. We considered the entire record but nowhere did we find any evidence to show that the appellant was a man of homicidal tendencies. We think, those opening remarks must have influenced the assessors in their verdict. No wonder each returned a verdict of guilty.

Having so said, we must bring this judgment to its conclusion. We have now considered the evidence before the trial court and having evaluated the same find that as the version by the appellant was not given due consideration the same ought to have been considered as against the only eyewitness account of the young boys. Having regard to what we have said about the reception of the evidence of the young boys and as the appellant admitted shooting the deceased accidentally the trial court should have given the appellant the benefit of doubt by finding him guilty of manslaughter as clearly there was no credible evidence on which to convict the appellant on a charge of murder.

In view of the foregoing, we allow this appeal, quash the conviction and set aside the sentence of death passed on the appellant. We find the appellant guilty of manslaughter contrary to **section 202** as read with *section 205* of the Penal Code and convict him accordingly. Taking into account all the circumstances of the case we sentence the appellant to ten (10) years imprisonment and order that the sentence should run from the date he was convicted of murder by the High Court i.e. from 24th July, 2001. It is so ordered.

Dated and delivered at Nyeri this 20th day of May, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.