



IN THE COURT OF APPEAL

AT NYERI

(CORAM: CHUNGA CJ, TUNOI & LAKHA JJ A)

CRIMINAL APPEAL NO 38 OF 2002

BETWEEN

MICHAEL MURIITHI KINYUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court at Nyeri, Juma J, dated 23rd November 1999 in HCC Cr No 15 of 1997)

JUDGMENT OF THE COURT

This is a first appeal by the appellant who was tried and convicted by Juma J in the High Court of Kenya at Nyeri on 23rd November 1999 on a charge of Murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the charge were:-

“On the 15th day of October, 1996 at Gathiuru Forest in Nyeri District within the Central Province unlawfully murdered Joseph Njeru.”

We note, at the very outset, the use of the word “unlawfully” in the particulars of the charge. It is not a necessary ingredient of murder and its inclusion in the particulars was surplusage. It, however, occasioned no injustice to the appellant and we find nothing that turns on it.

The basic facts on which the appellant was convicted may be stated shortly thus. Both him and the deceased were residents of the same area and, apparently, knew each other perfectly well before.

On 14th October, 1996, the appellant’s radio was reportedly stolen from his house. He immediately suspected the deceased to be the thief.

Accordingly, the appellant made a report to his three immediate neighbours., PW1, PW2 and PW3 and named the deceased to them. They then went to the deceased’s home, found him, and arrested him. Asked about the radio, the deceased admitted to have stolen the same but said that he had taken it to the home of one Kiogora.

The deceased was escorted by the appellant and the three witnesses to the appellant’s house. There, a decision was made that he should spend the night at the appellant’s home because he might otherwise disappear. Kiogora’s home where the deceased had taken the radio, was far away and could not be reached that evening.

At the same time, there were two young boys (PW4 and PW5) in the appellant's home that evening. They were school going children and their homes were close to the appellant's home. It would appear that the appellant had, that evening, invited them for unknown reasons to stay with him at his home.

Thus, when PW1, PW2 and PW3 left the appellant's home, those who remained behind were the appellant himself, the deceased, PW4 and PW5 respectively. The two boys' (PW4 and PW5) evidence formed the main basis of the conviction against the appellant in the High Court. According to them, immediately the three witnesses left, the appellant called one Mueregi to bring a rope, which was brought and the appellant used it to tie up the deceased. Thereafter, the two boys said, he started beating the deceased and he did so for the better part of the night on various parts of his body. In particular, the two boys testified that the appellant used a hot metal object to burn the deceased on various parts of the body. He burnt the metal object on fire and when it became red-hot, he applied it on various parts of the deceased's body.

The beating continued up to the morning of the following day when the two boys were leaving for school. They said that, by that time, the appellant removed the deceased from the house and placed him outside near the door. The deceased had not died and the appellant continued beating him until the deceased started to kick his legs and eventually, passed away.

Following the death of the deceased, information reached the neighbours who came to the appellant's home. One of them, (PW6), was the chairman of the local youth group. He testified that he went to the appellant's house and found a dead body outside the house. The appellant himself, together with one Muriuki, were comfortably seated near the body and taking drinks. PW6 and others arrested the appellant, took him to the Forest Officer and eventually, he was taken to the local police station. Before being arrested however, according to PW6, the appellant carried the body back into the house. PW6 observed that the body had several burns.

At the police station, Inspector James Mugo (PW8) re-arrested the appellant from PW6 and others. The Inspector then visited the appellant's home and found the deceased's body inside the house. He observed that the body had burn marks on various parts. He removed the body from the house to the local district hospital. He was given a metal object by the appellant and he took possession of the same and produced it in evidence as Exhibit 2.

In their evidence, the two boys identified the metal object (Exh 2) as the one the appellant used to burn the deceased's body at night.

On 13th November, 1996 postmortem examination was eventually performed on the body of the deceased. The pathologist found bruises all over the body. The bruises appeared to be of heat burns. Cause of death was established as multiple body injuries with dislocation of the neck. We observe that there was no extra-judicial statement by the appellant put in evidence by the prosecution.

After the close of the prosecution case, the appellant was placed on his defence. We pause to observe that, in placing the appellant on his defence, the learned judge recorded that section 211 of the Criminal Procedure Code had been complied with. This, obviously, is an error. Section 211 CPC has no application to trials in the High Court. It is for application in trials in the subordinate courts. The correct section which the learned trial judge should have complied with, at the close of the prosecution case, is section 306 CPC. We are, nevertheless, satisfied, that this error occasioned no injustice to the appellant as he proceeded to put his defence without any difficulty.

In his unsworn statement, the appellant denied the offence. He said, that on 14th October, 1996, he was on his farm and when he returned home in the afternoon, he found that his house had been broken into and his radio and Kshs 3000/= stolen. As he examined the house, two boys, presumably PW4 and PW5, came to the house. Together with the boys, he went to the local youth leader and made a report. He returned home and started preparing food and as he did so, he saw a group of people in the nearby plantation. They were running away and he identified four of them whose names he gave as Gitonga, Jacob, Kimathi and Muriuki. He saw a person lying in a ditch in the potato plantation and when he called

out there was no answer. He moved nearer and found that the person had blood oozing from his mouth. He went to the local youth leader to make a report but he did not find him. He tried to report to the local Forest Officer but, he too was not there. The following day, he went to the scene and found the dead person still lying there in the plantation. Eventually, he found the Forest Officer and explained to him what had happened. They went to the police station where he and four others were arrested and placed in cells. After some days in the cells he was charged in court with murder while the others arrested with him were released. Before he was charged in court, he was given a prepared statement which, he initially refused to sign but, after some beating by the police, he yielded and signed.

The appellant called no witness and closed his case after the unsworn statement.

The learned trial judge summed up the case to the assessors, setting out all the relevant facts. Eventually, each of the three assessors returned opinion of “not guilty”.

On 23rd November, 1999, the learned trial judge delivered his judgment. He summarised the evidence for both sides as already indicated in this judgment. He dismissed the appellant’s version of the events and accepted the prosecution case. He found the appellant guilty as charged and convicted him accordingly. In doing so, the learned trial judge expressed himself thus:-

“I do not believe the statement by the accused that the deceased was found in the ditch in the potato plantation. PW6 Mwiti was not involved in the arrest of the deceased. He was an independent witness. He testified how he found the body of the deceased with the accused. The accused took the body into the house before being arrested. There is the evidence of PW8 Inspector Mugo. He testified that he recovered the body of the deceased from the house of the accused.

I am satisfied that the prosecution has proved its case against the accused beyond reasonable doubt. I find the accused Michael Muriithi Kinyua guilty as charged and I convict him accordingly.”

Following conviction, the appellant has brought this appeal before us. In his home-made petition of appeal, he raised several grounds and at the hearing of the appeal on 14th May, 2002, he was represented by Mr Maina Karingithi while the Republic was represented by the Provincial State Counsel Mr A.O. Oluoch.

Mr Karingithi based his submissions largely on the second ground in the appellant’s petition which was:-

“That the learned High Court judge erred in law by failing to find that the evidence of the children, though direct, were of tender age which was not corroborated by any independent evidence.”

In his submissions before us, Mr Karingithi enlarged the appellant’s complaint and pointed out that, indeed, the two witnesses (PW4 and PW5), were treated as children of tender years and their evidence cannot form the basis of conviction, without corroboration. There was no corroboration and there was no direction by the learned trial judge on this, Mr Karingithi further submitted. He referred us to various passages in the judgment of the learned trial judge and attacked, particularly, the passage where the judge held that the evidence of the two boys (PW4 and PW5), provided corroboration to the evidence of PW1, PW2, and PW3.

In law, Mr Karingithi submitted, PW1, PW2 and PW3 were accomplices because, they arrested the deceased jointly with the appellant, escorted him to the appellant’s house, left him there with the appellant, and were seen to slap him before leaving him with the appellant. In the circumstances, said Mr Karingithi, the three witnesses were certainly accomplices and their evidence required corroboration.

The basic rule of law, Mr Karingithi submitted, is that evidence, which, itself, requires corroboration, cannot be used to corroborate another evidence which also requires corroboration. In this respect therefore, the evidence of PW4 and PW5, could not be used, to provide corroboration to the evidence of

PW1, PW2 and PW3. For these reasons, Mr Karingithi asked us to allow the appeal.

On the other hand, Mr Oluoch did not agree with the submissions of Mr Karingithi. He supported the conviction. He also supported the judgment of the learned trial judge and submitted that the evidence of PW4 and PW5 on the one hand, could properly provide corroboration to the evidence of PW1, PW2 and PW3. According to him, there were authorities to support this proposition, although he did not produce any authorities before us in that regard.

Those were, basically, the submissions by both sides and we shall now deal with them one by one.

The main plank of prosecution case rested on the evidence of the two boys (PW4 and PW5). They were in the appellant's house throughout the night as the appellant, according to them, mercilessly beat the deceased and continued to do so in the early morning of the following day. If properly received, accepted, and weighed according to law, theirs, was, clearly, eye-witness account of the events in the appellant's house that fateful night.

However, as the record shows, the two boys (PW4 and PW5) were treated by the learned trial judge as children of tender years. PW4 gave his age as fifteen years while PW5 gave his age as fourteen years. There is no statutory or judicial definition of the phrase "a child of tender years" for purposes of the Law of Evidence. It is, however, accepted that it is left in the good discretion of the trial judge to assess whether a young witness tendered in court by the prosecution, or by another party, is a child of tender years or otherwise. Here therefore, we find no fault with the judge in, basically, treating the two boys as children of tender years, he, having had the advantage of seeing and assessing them when they appeared before him to give evidence.

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 Declarations 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] EA 86.

In *Nyasani s/o Gichana v. R* 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* 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 the *Nyasani s/o Gichana* case and in the *Kibangeny arap Kolil* case deal with the procedures which a trial court should follow when receiving evidence of a child of tender years. We would summarise the position thus. 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 investigations 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. In respect of PW4, this is how the learned trial judge’s notes read:-

“PW4 JAMES NGARI s/o JACINTA MUNGE – a child.

I am 15 years old. In Std 6. I am a Catholic. I understand the effect of telling the truth. Witness is possessed of sufficient intelligence to be sworn.

Clearly, the learned trial judge followed the wrong procedure. Although he carried out and recorded investigations, he did so in respect of the second step we mentioned in the preceding paragraph. He seems to have directed his investigation to the question of whether the child was possessed of sufficient intelligence to justify receiving his evidence and understood the duty of telling the truth. This should only have come after the investigations on the first step to ascertain whether the witness understood the nature of an oath. Investigation as to the intelligence of the witness and the duty to tell the truth would only arise if the witness did not understand the nature of an oath. Although the child (PW4) was allowed to give sworn evidence, there was no investigation and no finding that he understood the nature of an oath. The investigation done was in regard to his intelligence which would only justify unsworn evidence.

In regard to PW5 this is what the record of the learned trial judge reads:-

“PW5 SAMUEL MAINA

Court: He is a minor. Says in std 4. Goes to Seventh Day Adventist Church. He is fourteen years. Knows about telling the truth.

Witness fit to be sworn.”

Again, like in the case of PW4, the judge followed the wrong procedure. His investigation, though carried out and recorded, was in regard to the child’s intelligence and duty of telling the truth. There is no reference whatsoever to the first step to ascertain whether the child understood the nature of an oath. There was therefore, no investigation done and no finding made on the particular question whether the child witness understood the nature of an oath or otherwise.

We observe that the confusion we have seen in the procedure followed by the learned trial judge in this appeal, trial itself in so many appeals that come before us where trial courts are dealing with the evidence from children of tender years. The procedures are required by statute and need strict compliance. Several judicial authorities, some of which we have set out in this judgment, clearly explain that procedure. We would like to call the attention of trial judges and magistrates to this procedure and to emphasise that there is need for strict compliance failure of which, may very well, in appropriate circumstances, vitiate conviction, and result in allowing the appeal.

We now turn to the question of corroboration. This arises in two main ways in this case, First, there is the issue of accomplice evidence. In his judgment, the learned trial judge appears, as we said earlier, to have treated PW1, PW2 and PW3 as accomplice witnesses. He looked for corroboration and found the same in the evidence of PW4 and PW5 both of whom, were children of tender years.

The three witnesses PW1, PW2 and PW3 assisted the appellant in arresting and/or escorting the deceased to the appellant's house. They left the deceased under the custody of the appellant with the understanding that the deceased was to spend the night there. Up to this stage, there would, probably, have been no basis for treating the three witnesses as accomplices. However, the two boys (PW4 and PW5) testified that they saw PW1, PW2 and PW3 also participating in the beating of the deceased by slapping him. It would seem to us that it was, probably, on this basis that the learned trial judge treated the three witnesses as accomplices.

We find no fault, basically, in the finding of the learned trial judge that the three witnesses may well have been accomplice witnesses. After all, they were initially arrested and kept in custody during investigations although this alone would not make them accomplice witnesses. But it goes to show that there was reasonable suspicion against their role in this matter, and to fortify the testimony of the two boys (PW4 and PW5) that they may have participated in beating the deceased.

Under section 141 of the Evidence Act, Cap 80 Laws of Kenya an accomplice is a competent witness and a conviction based on his evidence is not necessarily illegal or irregular. However, there is a firm rule of practice that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if satisfied that the accomplice witness is telling nothing but the whole truth, and upon the court duly warning itself and the assessors, where the trial is with the aid of assessors, on the dangers of doing so.

Before corroboration can be considered however, a court of law dealing with accomplice witnesses must first make a finding as to the credibility of the witnesses. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence, and unless there is some other evidence, the prosecution must fail. If the court decides that the witness, though an accomplice witness, is credible, then the court goes further to decide whether the court is prepared to base a conviction on the evidence of the accomplice witness without corroboration. If this is so, the court must direct and warn itself accordingly. On the other hand, if the court decides that the accomplice witness, though credible, requires corroboration, the court must look for, find, and identify the corroborative evidence. – see:-

(1) *Rex v Kariuki & Others* (1945) 12 EACA 84

(2) *Morjaria v Republic* [1972] EA 10

In the present case, all that the learned trial judge said was:-

Even if this part of the evidence by PW1, 2 and 3 were to be disregarded as being “that of accomplices we are left with the evidence of the two minors, PW4 and PW5.”

He then proceeded to say that the evidence of the two boys PW4 and PW5 corroborated that of the accomplices PW1, PW2 and PW3. We are of the opinion that the learned trial judge did handle the issue of accomplice evidence in the manner required by law. He made no specific finding that the three witnesses were, indeed, accomplices. And if they were, the judge did not explicitly direct himself and the

assessors on the nature of accomplice evidence and the weight to be given to it required by law. This omission, however, must be considered in the light of all the evidence and, on its own, we are satisfied that it would not invalidate the trial and the conviction in the circumstances of this case.

The second way in which corroboration arises in this appeal is in regard to the evidence of the two boys (PW4 and PW5) who were children of tender years.

Upto 1963, the relevant statutory provision was the proviso to section 19 (1) of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya which was in the following terms:-

“ Provided that, where evidence by virtue of this section is given on behalf of the prosecution in any proceedings against any person, for any offence, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other evidence in support thereof implicating him.”

Dealing with the proviso, the Court of Appeal for Eastern Africa said as follows in the *Nyasani s/o Gichana* case:-

“The second matter upon which we desire to comment is the fact that in his judgment the learned trial judge has failed to warn himself of the need under the proviso to the section quoted above, that corroboration of the unsworn evidence of a child of tender years or to look for the necessary corroboration. Such omission is a serious defect in a judgment and may well result in a quashing of a conviction.”

And in the *Kabangeny arap Kolil* case, the court said:-

There was moreover another irregularity regarding the evidence of these boys which has fortified us in allowing the appeal, and that is the failure of learned trial judge, so far as can be gathered from the record, to warn either himself or the assessors of the danger of convicting on their uncorroborated evidence. Had their evidence been neither sworn nor affirmed, then there would have been a legal necessity for its corroboration by other material evidence implicating the appellant, by virtue of the proviso to section 19(1), and a conviction upon it, if uncorroborated, would have been bad notwithstanding such warning. But even where the evidence of a child of tender years is sworn or affirmed, then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it, if uncorroborated without warning itself and the assessors (if any) of the danger of so doing.”

Finally in the case of *Oloo s/o Gai* the court quoted with approval and followed the passage we have quoted earlier from the *Kibangeny arap Kolil* case. The court then concluded thus:-

“The learned trial judge therefore, has not merely omitted to give himself a proper direction as to the desirability of corroboration in the case of evidence given by a child of tender years, even though such evidence is given on oath and the need for caution in convicting without such corroboration...”

The three cases we have quoted deal with two aspects of the proviso to section 19 (1). The first aspect is in regard to the requirement for corroboration where a child of tender years gave sworn evidence. In this situation the requirement was under a rule of practice only. The court could still base conviction on such evidence even without corroboration if the child spoke nothing but the truth and upon the court warning itself and the assessors of the danger of doing so.

The second aspect of the proviso dealt with in the decisions we have quoted is where a child gave unsworn evidence. In such a situation, the proviso made requirement for corroboration a rule of law. If there was no corroboration, a conviction could not be based on such evidence alone even with a full and proper warning by the court to itself and to the assessors.

That was the state of the law until 1963. The Evidence Act No 46 of 1963, in the second schedule, thereto, carried out amendments to some other statutes with bearing on the Law of Evidence. One of the statutes amended was the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya by removal of the proviso to section 19(1) thereof. It follows, therefore, that the proviso has not been part of the Act since 1963.

The net result, in our opinion, is that, the removal of the proviso also removed the requirement that the unsworn evidence of a child of tender years required corroboration as a matter of law. Despite this, we think that the practice is a sound one and should still be followed by courts as a rule of practice.

On the other hand, the requirement for corroboration to the evidence of a child of tender years, given upon oath or affirmation, was never under a rule of Law. It was under a rule of practice, enunciated by the courts in their judicial decisions. This requirement was, accordingly, not affected by the removal of the proviso to section 19(1) of the Oaths and Statutory Declarations Act in 1963 as we have stated since it was never part of the proviso. The practice, accordingly, still remains valid to the present time.

We hold, for the reasons we have advanced that, where a child of tender years is allowed by the court, upon proper investigations under section 19(1) of the Oaths and Statutory Declarations Act, to give sworn evidence, there is a requirement, as a rule of practice, that such evidence should be corroborated. It is a sound rule of practice which has stood the test of time and it ought not be disregarded for the sake of fair trial and justice to the offender. That corroboration should be in material evidence implicating the accused and the court ought to direct itself and the assessors as we have earlier shown in this judgment. It however, remains a rule of practice only and, subject to proper warning as we have shown, the court may convict upon such evidence without corroboration.

In the present appeal, PW4 and PW5, despite irregularities we highlighted earlier, were allowed to give sworn evidence. They were aged 15 years and 14 years respectively, were going to school, and held religious beliefs. They, therefore, would have known and understood the nature of an oath and on this, they were, in our opinion, properly sworn, notwithstanding the irregularities we have highlighted.

Having been sworn, the evidence of PW4 and PW5, required corroboration as a rule of practice only. Although the learned trial judge did not direct himself and the assessors on this, we have, on our own evaluation of the evidence, as we are entitled to do on first appeal, satisfied ourselves that there was, indeed, sufficient circumstantial corroboration as we shall demonstrate below. – see *Nyasani s/o Gichana*, where the court said:-

“In the circumstances of the instant case, however, we did not think that the defect warranted our intervention as there was, in fact, ample corroborative evidence”

The pathologist (PW7) who performed postmortem examination, found, as said earlier, multiple injuries on the body which were the cause of death. He also found several bruises all over the body which were consistent with heat burns.

It will be recalled that the two boys (PW4 and PW5) gave evidence that the appellant beat the deceased on various parts of the body throughout the night. It will be recalled that they said in the evidence that the appellant used a hot metal object to burn the deceased on various parts of the body. They described in detail how this was done and all this is on record. We are satisfied that, to a large measure, the evidence of the two boys (PW4 and PW5) is fully corroborated by the medical evidence given by the pathologist. What the two boys described in their evidence is fully consistent with postmortem examination report.

It was also the evidence of the two boys that the deceased was brought to the appellant's house by the appellant and others (PW1, PW2 and PW3). It was further, their evidence, that the beating took place in the house till morning when the appellant carried the deceased outside the house and placed him near the door where the beating continued till the deceased started to kick his legs. PW6 came to the appellant's house upon information and found the appellant and one Muriuki drinking outside the house near the door. Close to them was a dead body which the appellant himself later carried back into the house before

he was placed under arrest. The dead body was later identified as the deceased in this case.

The finding of the body just near the appellant's door and the appellant sitting there, once again, fully corroborates the evidence of the two boys.

In any event, we may ask, if it is true the deceased was killed elsewhere in the potato plantation as the appellant alleged, how did the body find its way at the place where PW6 found it near the appellant's door? Furthermore, if he had nothing to do with the killing of the deceased, we may further ask, for what good reason did he carry the body back into his house as PW6 said? Then there is PW6's observations on the body. Like the pathologists, he too, saw burns all over the body. We are satisfied that PW6 did also, in his evidence, provide important material, which circumstantially, corroborated the two boys (PW4 and PW5) in full.

And finally, we have the evidence of PW8, Inspector James Mugo. He, with other officers, visited the appellant's house on 16th October, 1996 led by the appellant himself. He found deceased's body in the appellant's house. He, too, observed burns on the deceased's legs, hands, shoulders and stomach. In fact the appellant showed him a piece of iron bar and a *panga*. The iron bar had, earlier, in their evidence, been identified by the two boys (PW4 and PW5) as the one with which the appellant burnt the deceased's body.

Thus, once again, we are satisfied that there is evidence from yet another witness (PW8) to corroborate the evidence of the two boys. We cannot, but observe again as we did earlier, that if the deceased was killed elsewhere, how did his body come to be in the appellant's house? Although there was no onus on him to prove anything the appellant has not explained how the body of a dead man came to be in his house. The only thing he said was that there was a dead body in a ditch at the nearby potato plantation. In the light of the evidence available, we are satisfied that this version was rightly rejected by the learned trial judge.

Before we conclude this judgment, we want to say something about assessors. As we mentioned earlier, the three assessors, after the summing up, returned, each one of them, opinion of "not guilty". In his judgment the learned trial judge, did not follow the opinions of the three assessors. This course of action he was entitled to take because, under section 322 (2) of the Criminal Procedure Code Cap 75 Laws of Kenya, a trial judge is not bound to conform to the opinions of the assessors. Here therefore, the learned trial judge was in law, entitled to reject the assessors' opinions on the case.

It is, however, an equally firm rule of practice that, where a judge disagrees with the opinion of assessors, he should give reasons for doing so. The rule is important because assessors are part of the trial and their opinions are entitled to due weight and respect though not binding upon the judge.

Similarly, where, as here, the three assessors return a unanimous opinion, the need to give reasons for disagreeing with them, is even greater.

We find absolutely no reference by the learned trial judge in his judgment to the opinions of the assessors. He gave absolutely no reasons for disagreeing with them. This however, is a curable omission and, on its own, it cannot vitiate the judgment or the conviction in the circumstances of this case.

We have said enough in this judgment to cover all the points that arose. We believe that we have given full and adequate consideration to each one of them. We are satisfied that, though a number of irregularities were occasioned in the manner we have demonstrated in this judgment, those irregularities did not occasion any miscarriage of justice to the appellant.

There was sufficient evidence to corroborate the evidence of the two main witnesses namely PW4 and PW5. Accordingly, we are satisfied that the appellant was proved beyond all reasonable doubt to have committed the offence with which he was charged and he was properly convicted. We uphold the conviction. The sentence is legal.

We order that this appeal be and is hereby dismissed.

B.CHUNGA

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CHIEF JUSTICE

P.K, TUNOI

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JUDGE OF APPEAL

A.ALAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR