IN THE COURT OF APPEAL

AT NYERI

(Coram: Shah, O'Kubasu & Keiwua JJ A)

CRIMINAL APPEAL NO 42 OF 2003

BEATRICE WANJIRU KINYUA.....……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal from the conviction and sentence of the High Court at Nyeri)

JUDGMENT

The appellant Beatrice Wanjiru Kinyua ("the appellant") was charged with murder contrary to section 203 as read with section 204 of the Penal

Code in that on the 21st day of June 1999 at Kirogo Village in Kirinyaga district of the Central province she murdered Rose Wakuthi Muriuki (the deceased). The appellant denied the charge and as a result tried before the

High Court at Nyeri (Juma J) where she was convicted as charged and sentenced to death as prescribed by law.

The appellant has field a supplementary petition of appeal through her lawyer Mr Nderi in which she cited the following grounds of appeal:-

"1. The learned judge erred in law and in fact in failing to properly direct himself on the alibi defence raised by the appellant.

2. The learned judge erred in law and fact in failing to warn himself of the danger of convicting on uncorroborated evidence of a minor.

3. The learned judge erred in law in convicting on uncorroborated evidence.

4. The learned judge erred in misdirecting himself on the totality of the evidence."

It was the prosecution's case that on the material day (21st June, 1999) Eliud Kimotho (PW1) came home from school at lunch time together with his younger sister (the deceased herein). The two children ate lunch prepared by their mother and then PW1 went outside and sat under a cassava tree. The

deceased remained in the house preparing to light fire.

From where PW 1 was under the cassava tree he saw the appellant come with a knife and stab the deceased. It was the evidence of PW1 that he rushed to the window of the kitchen and saw the appellant holding the deceased's mouth as the appellant stabbed the deceased on the neck with a knife. PW1 rushed to the *shamba* where his mother and other women were harvesting beans. PW1 reported to his mother what had happened and his mother told him to go and call his father. Even before the father of the deceased was called, he arrived home only to find the window of his house open. The door was open too. James Muriuki Kimotho (PW2) the father of the deceased got into the house and found the deceased lying on her back with legs dangling. He turned her over and found blood oozing from her neck. Shortly thereafter, the mother of the deceased and PW1 arrived at the scene. This incident was reported to Wanguru police station by James Kimotho (PW2) and this report was received by PC Grace Irungu (PW5) who then reported to the Officer Commanding Station. On the same day the appellant was apprehended by members of the public who took her to Wanguru police station. The appellant had been beaten by members of the public when it was alleged that she was the one who had murdered the deceased.

Dr Joseph Etagala Juma (PW4) conducted the postmortem examination on the body of the deceased. PW4 found stab wounds on the left side of the neck, on the shoulder blade and on the back of the head. In his view, the cause of death was due to severe haemorrhage. He produced his report as an exhibit (Exhibit 1).

In her defence, the appellant denied killing the deceased as she stated that she was not at the scene of crime at the material time. In a sworn statement, she testified that she left home at about 7.00 am and never returned until 7.00 pm. She called her son John Mwangi (DW2) to support her testimony that she was not at the scene of crime.

In his submission before us, Mr Nderi for the appellant advanced what we consider to be essentially three main grounds of appeal, viz, that the learned Judge erred in failing to warn himself of the danger of convicting on the evidence of a child of tender years; there was no independent evidence corroborating the evidence of PW1 and that the learned judge erred in disbelieving the alibi put forth by the appellant in her defence.

This being the first (and last) appeal it is our duty to subject the evidence adduced to a fresh and exhaustive scrutiny so that we can draw our own conclusions on the conflicting evidence. In *Okeno v R* [1972] EA the predecessor of this Court made the following observation as regards the function of the first Appellate Court:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] EA 336) and to the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

(*Shantilel M Ruwal v R* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424".

As we consider this appeal, we shall be guided by the above stated principals. We have before us an appeal in which the appellant's conviction was based on the evidence of a child of tender years. In his judgment the learned trial judge made the following observations.

"It will be noted that the prosecution's case was based solely on the evidence of PW1, a young boy of 12 years. He was the only person who witnessed the killing of his sister. I have to consider carefully whether PW1might have been mistaken as to the identity of the killer. The killing took place in broad daylight. PW1 however young he was, could not have mistaken the accused person as they live in the same village and has known her for a number of years. The young boy knows the accused person as his aunt. PW1 immediately rushed to go and inform his mother and told he who had stabbed his sister. At the police station, he also gave the name of the accused as the person he saw stab his sister. When the members of public came to their house, he also told them what happened. It is as a result of his statement that the accused was arrested. I am therefore satisfied that PW1 Eliud Kimotho was not mistaken when he identified the accused as the person who stabbed his sister."

Those were the findings of the learned trial judge. On our part we have to

consider the evidence as narrated during the trial and make our own conclusions.

It must be noted that the appellant's conviction was based mainly on the evidence of a child of tender years, Eliud Kimotho (PW1) who was aged 12 years at the time he gave evidence. The young boy was examined as to whether he understood the nature of an oath. The learned trial judge was satisfied that the child understood the nature of an oath and hence the child gave evidence on oath. The learned trial judge very properly adopted the correct procedure in such a situation as set out in *Johnson Nyoike Muiruri v R* (1982 – 88) I KAR 150 at p 152. Hence the starting point is the evidence of young Eliud Kimotho (PW1). This young boy testified how he heard his sister scream and how he went to the window of their house and saw the appellant holding the deceased's mouth as she (appellant) stabbed the deceased on the back of her neck. On seeing this the young boy ran away to alert his mother who was harvesting beans with other women. As we consider the evidence of this young boy we must bear in mind the decision of the predecessor of this Court in *Kibangeny Arap Kolil v R* [1959] EA 92 in which it was stated at pp 95 & 96:

"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."

One of the main grounds of appeal was that the learned trial judge erred in law by failing to warn himself of the danger of convicting on the uncorroborated evidence of a minor. In summing up to the assessors the learned trial judge said that there was need for corroboration in respect of the evidence of the young boy. Since the learned trial judge was the author of that warning on the need for corroboration it cannot be said that he failed to warn himself. He knew that there was need for corroboration and that is why he warned the assessors. In our view, the learned trial judge cannot be faulted on the issue of corroboration. On our own assessment of the evidence we are satisfied that there was corroboration of the evidence of the young boy. This is to be found in the evidence of his father (PW2) who testified that when he turned over the body of the deceased there was blood oozing from the back of her neck. But even more important is the evidence of Dr Juma (PW4) who conducted the postmortem examination on the body of the deceased. His evidence was to the effect that the deceased had stab wounds on the left of her neck, on shoulder blade and back of the head. This is independent evidence which corroborates what the young boy had stated in his testimony.

In addressing us, Mr Nderi for the appellant complained that the defence of alibi put forth by his client was not properly considered. In his judgment this is what the learned trial judge said on the issue of alibi:

“The accused in her defence raised the defence of alibi to the effect that she was away from home from morning until evening and could not have killed the deceased. It is not for the accused person to prove her alibi rather it is for the prosecution to displace the defence of alibi.

The burden of proof always remains with the prosecution throughout the whole case.”

From the foregoing we are satisfied that the learned trial judge had the correct approach on the defence of alibi. He considered prosecution evidence vis-a-vis what the appellant and her witness (DW2) said and in the end the learned trial judge was satisfied that the defence of alibi was false. (see *Ssentale v Uganda* [1968] EA 365).

We have carefully considered the evidence of the young child (PW1), his father (PW3) and that of Dr Juma (PW4) and taking that evidence and that of other witnesses in its totality have come to the conclusion that the appellant’s guilt was proved beyond any doubt. In concluding his judgment the learned trial judge who had the benefit of seeing and hearing the witness said:

“The evidence of PW 1 Eliud Kimotho was straight forward and was given with the innocence of the child.

He vividly demonstrated to the Court what part of the body of the deceased that he saw the accused stab. He stated that he saw the accused stab the deceased on the neck and did not wait to see what went on further but rushed to tell his mother. In giving his evidence PW4 Dr Juma Etangala said that the deceased was stabbed on the left side of the neck the shoulder blade and on the back of the neck. The postmortem report tallies with the evidence of PW1.”

Having given exhaustive examination of the entire evidence as recorded by the trial Court and having evaluated the same, we have come to the same conclusion as did the learned trial judge, that the prosecution had proved its case against the appellant beyond any reasonable doubt. In view of the foregoing, we accordingly order this appeal to be and is hereby dismissed.

Dated and delivered at Nyeri this 16th day of May, 2003

A.B. SHAH

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

M.M.O. KEIWUA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR