IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO 41 OF 2003

JAMES WANJOHI KINYUA ……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

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

on 8.11.2001 in HCCCr No 16 of 1991)

JUDGMENT

James Wanjohi Kinyua (the appellant herein) was convicted of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to death as mandatorily prescribed by the law.

The particulars of the charge were that on the 25th June, 1998 at Ngandu village in Nyeri District within Central Province the appellant murdered C G M. Prosecution called 8 witnesses to testify and two of these witnesses were children whose evidence was not taken on oath as the learned trial judge (Juma J) was of the view that both children (K J N (PW1) and C W (PW2)) were too young to understand the meaning of an oath.

It was the evidence of N (PW1) that he saw Wanjohi attack C with a *panga*. The young boy stated to the trial court that Wanjohi also attacked him with a *panga* and as a result he (PW1) escaped and went home. The young girl C W (PW2) told the trial court that as she was playing with K and C (the deceased) Wanjohi went to the house, took a *panga* and started cutting C. The young girl went on to state that Wanjohi also cut K.

The next witness to testify was B W M (PW3), the mother of the deceased, who stated that on 25th June, 1998 at about 11.30 am she was at home. She was able to see the deceased playing with N (PW1) and W (PW2). She saw the children move to the neighbour's home. The neighbour was Kinyua. (It should be pointed out that the appellant's names are James Wanjohi Kinyua). It was her evidence that these children normally went to that home to play as there was a child of their age called K in that home. PW3 then heard the child K cry and she went out to check only to find that K was bleeding from the head. The other child W (PW2) ran to her home. When PW3 went to check on her son C (the deceased) she found

that he had been cut on the left-side of the head. PW3 started screaming. The deceased was taken to Tumu Tumu Hospital where he was pronounced dead on arrival.

This incident was reported to Kerugoya Police Station and as a result PC Julius Ndegwa (PW4) proceeded to the scene where he found the appellant already apprehended by members of the public. PC Ndegwa (PW4) and his colleagues arrested the appellant. On being interrogated the appellant led the police to where he had hidden a *panga*. The *panga* was handed over to the investigating officer. P M W (PW6) the father of the deceased also testified to the fact that when the appellant was interrogated by police officers he (appellant) led them to where he had hidden the *panga*.

Inspector Magdalien Nderitu (PW8) is the one who recorded a charge and caution statement from the appellant. The statement was produced after a trial within a trial since the defence objected to its production on the ground that it had not been obtained voluntarily from the appellant. In that statement the appellant admitted having accidentally cut the deceased on the head and also injured the other boy Kevin.

Dr Moses Njue Gachoki (PW7) who conducted the postmortem examination on the body of the deceased observed that there was 61/2 long deep cut on the left upper head below the ear. In his opinion cause of death was torn brain and collection of blood in brain tissue – subdural haemorrhage.

When put to his defence the appellant in his unsworn statement said that he knew nothing about this case as on the material day he had gone to work at Hombe forest. He did not return until the morning of 27th June, 1998 when he was arrested.

The learned trial judge in his judgment stated *inter alia*:

“Counsel for the accused submitted that the *panga* was never sent to the Government Chemist for analysis. The accused’s conduct is inconsistent with his innocence.

If he had done nothing with that *panga* why had he to hide it in the bush"

The two children knew Wanjohi quite well after all they are neighbours. The fact that they could not identify him in court can be easily answered as the court room was full of people.

Counsel also submitted that motive was not proved. It is trite law that in murder cases the prosecution need not prove the motive for killing.

I am satisfied on the evidence adduced before me that the prosecution has proved its case against the accused beyond reasonable doubt. I find James Wanjohi Kinyua guilty of murder and I convict him accordingly”.

When this appeal came up for hearing on 13th May 2003 Mr A J Kariuki, counsel for the appellant, adopted all the grounds of appeal contained in the petition of appeal filed by the appellant. Mr Kariuki reminded us that the appellant’s defence in the superior court was that he knew nothing about this offence. He urged us to examine the entire evidence.

This being the first (and last) appeal it is the duty of this Court to evaluate the evidence as a whole and subject it to a fresh and exhaustive examination – see–*Okeno v R* [1972] EA. In that light, we have to remember that conviction was based on the evidence of two children of tender years which evidence required corroboration. From the evidence on record the two children (PW1) and (PW2) were playing

with the deceased when suddenly there was a cry. When the mother of the deceased went to check she found that the deceased had been cut on the head. The deceased was rushed to the hospital but died upon arrival.

In dealing with the evidence of children of tender years the learned trial judge adopted the correct procedure as set out in the decision of this Court *Johnson Nyoike Muiruri v R* [1982-88] 1 KAR 150 at p152. Hence the starting point must be the evidence of PW 1 and PW 2 who testified to the effect that they saw Wanjohi cut the deceased with a *panga*. It is significant to note that B W M (PW3) the mother of the deceased was at home on the material day when she saw the children going to the home of the appellant who was a neighbour. Shortly after that there was a cry and when PW3 went to check, she saw the children running. On checking on where the deceased was PW3 found that the deceased had been cut on the head. This led to the death of the deceased. Although

PW3 did not see the appellant cut the deceased the two young children said that they saw Wanjohi (who is the appellant) cut the deceased with a *panga*. As we consider the evidence of the two children (PW1 and PW2) we 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 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.”

In this appeal we find the evidence of the two children was corroborated by the evidence of B W M (PW3) who saw them playing and how they moved to the neighbour’s home. PW3 also saw the children running from where they had gone to play and one of them had been injured. On checking the whereabouts of the deceased PW3 found that the (deceased) had been injured on the head. Then there was the evidence of Dr Moses Njue Gachoki (PW7) who conducted the postmortem examination on the body of the deceased. The injuries found on the body of the deceased by the doctor (PW7) were consistent with the evidence of the two children. Hence on our part we are satisfied that the evidence of the two children was corroborated by independent evidence of Dr Gachoki (PW7).

There was then the issue of the charge and caution statement made by the appellant. This statement, as already stated earlier, was admitted after a trial within a trial. In that statement the appellant is alleged to have stated as follows:

“Yes it is true. I was cutting the banana stem for the cow when one child namely C G M was accidentally cut on the head and the other one K was injured slightly on the head. I then run away and hid the *panga* in the bush near the coffee plantations. I went to hide at Gachuiro. I went back home at around 3.00 pm. At around 7.00 am I was arrested”.

The statement amounted to confession but the appellant claimed that it was not voluntarily made. The learned trial judge after a trial within a trial was satisfied that the statement was voluntarily given. In his short ruling the learned trial judge stated *inter alia*:

“Accused states that he was beaten by Inspector Mbau with a *rungu* till he signed the statement. If one were beaten by a *rungu* one would have had swellings or bruises on the body. Accused never stated which part of his body was beaten. On the review of the evidence

I am satisfied that the statement was voluntarily given by the accused and received and recorded. I hold that the same is admissible in evidence”.

Considering the evidence adduced during the trial as a whole we are satisfied that the statement by the appellant was properly admitted. That evidence of confession has to be carefully considered before basing a conviction on it. In the celebrated case of *Tuwamoi v Uganda* [1967] EA at p 91 it was stated:-

"We would summarise the position thus– a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that confession is true. The same standard of proof is required in all cases and usually a Court will only act on the confession if corroborated in some material particular by independent evidence accepted by the Court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true".

It is to be noted that in his statement the appellant said that he hid the *panga*. Indeed, the appellant upon being arrested, and on being interrogated led the police to a place where the had hidden the panga. Again in that statement the appellant said that he accidentally cut the deceased on the head. The evidence of PW3 and PW7 was that the injuries that led to the death of the deceased were found on the head.

Taking all this evidence into consideration we come to the conclusion that there can be no doubt that it was the appellant who caused the death of the deceased. As Mr Kariuki for the appellant, correctly pointed out it was upon the prosecution to prove its case against the appellant. Mr Kariuki urged us to examine the entire evidence. We have now examined the entire evidence and our conclusion is that it was the appellant who cut the deceased on the head as narrated by the two young children (PW1 and PW2) whose evidence was corroborated by that of the mother of the deceased (PW3) and the doctor (PW4) who conducted postmortem examination on the body of the deceased.

What has caused us some anxiety was whether the evidence on record disclosed the offence of murder or manslaughter. In view of what the appellant said in his charge and caution statement that he accidentally cut the deceased and as there was no evidence in rebuttal the appellant ought to have been given the benefit of doubt. In that case we hold that the learned trial judge ought to have considered this aspect of the case and it is our view that had he done so, he would have convicted the appellant of manslaughter rather than murder.

That being our view of the matter we allow the appeal, quash the conviction for murder and substitute therefore a conviction for manslaughter contrary to section 202(1) as read with section 205 of the Penal Code. We sentence the appellant to twelve (12) years imprisonment to be served from the date of conviction by the trial court.

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

P.K. TUNOI

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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