Case Number:	Criminal Case 3 of 2015
Date Delivered:	09 Mar 2017
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Jessie Wanjiku Lessit
Citation:	Republic v Johnstone Ayoro Ondego [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO 3 OF 2015

LESIIT J

REPUBLIC……PROSECUTOR

VERSUS

JOHNSTONE AYORO ONDEGO…….....……..ACCUSED

JUDGEMENT

1. The accused **Johnstone Ayoro Ondego** has been charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

"**On the 30th day of November, 2014 at Ndubuini in Dagorreti within Nairobi County murdered Delvis Njuguna Macharia"**

2. The prosecution called six(6) witnesses in total.

3. The brief facts of the prosecution case were that the accused person was working as a watchman at Ndumboini area within Uthiru. On the material day he clobbered a child on the head who is the deceased herein. The prosecution case was that the accused clobbered the deceased because he threw stones towards the gate the accused was manning. The deceased thereafter succumbed to the head injuries he suffered while undergoing treatment at Kenyatta National Hospital.

4. The accused opted to give a sworn statement in his defence. He stated that on the fateful day, he arrived at his work station at around 7.55 pm. He said that he heard stones being thrown at the gate followed by a knock. He proceeded to open the gate upon which a man pulled him out by the neck. On getting out, he met three men who ordered him to give them all that he had. He decided to fight back and stated that the children that were heading home might have been hit by any of the people he was struggling with including himself. In cross-examination, the accused stated that the rungu that was produced in court was in the police car which PW6 used when he arrested him. The accused alleged that he was being implicated for the murder charge because the incident had happened at his place of work.

5. Mr. Ndungu Counsel for the accused in his submissions urged the court to find that since PW1 was a minor when he testified and was not able to understand the meaning of an oath, it created doubt as to the level of his intelligence. Counsel urged that the evidence of PW1 lacked corroboration and fell below the test set under **section 119(1)** of the **Oaths** and **Statutory Declarations Act**. Counsel further urged that there were inconsistencies in the evidence of PW1 in regard to the injury inflicted on the deceased. Counsel urged that PW1 testified that the deceased was hit on the head and ribs, yet the findings of PW5 the pathologist was that the injuries sustained by the deceased were only to the head.

6. Mr. Ndungu urged that the conditions of identification were not favourable for positive identification. Counsel urged that PW2 stated that she sent the kids to the shop after 7.15 pm, and that by that time it was already dark. Counsel urged the court to note that the accused in his defence stated that the lights in the area had gone off.

7. The learned Prosecution Counsel Ms Wafula submitted that the prosecution proved its case against the accused person. Counsel urged that even though PW1 was a minor, a voire dire examination was carried out by the court and was satisfied that he could testify. Counsel urged that the evidence of PW1 received corroboration from the evidence of PW2 who testified that when she went to where the accused worked after the incident, she heard the accused tell the police as he surrendered the murder weapon that he had hit the deceased.

8. Wafula submitted that the evidence of the pathologist, PW5 was in tandem with the evidence of PW1 in that he formed the opinion that the cause of deceased death was severe head injury due to blunt force trauma. Counsel urged that the weapon used was recovered from the accused within one and a half hours after the incident.

9. Regarding malice aforethought, Ms Wafula urged that the accused was reckless and did not care if his action could cause death and that in the circumstances he used excessive force.

10. The issues for determination are:

a. Whether PW1 was possessed of sufficient knowledge to testify, and whether he understood the nature of an oath, and finally whether his evidence required corroboration.

b. Whether the conditions of lighting at the scene of incident were conducive for a correct identification, free of error and mistake.

c. Whether the evidence of PW1 regarding the manner in which the accused injured the deceased was consistent with the pathologists finding on the cause of death.

d. Whether the prosecution has established that the accused had formed the intention to cause death or grievous harm to the deceased.

e. Whether the accused defence was reasonable, credible and logical.

11. **As to whether PW1 was possessed of sufficient knowledge to testify, and whether he understood the nature of an oath, and finally whether his evidence required corroboration.** It is important that I begin by defining who a child of tender years is. **Section 2** of the **Children Act** defines a child of tender years **"means a child under the age of ten years**".

12. There has been debate whether the definition of a child of tender years under **section 2** of the **Children Act** applies to **section 19** of the **O&SD Act**. In a recent decision of the Court of Appeal sitting in Nyeri in ***Patrick Kathurima v Republic, [2015] eKLR*** it was observed:

"Whereas the question of whether a child is of tender years remains a matter for the good sense of the court as was stated by this Court in MOHAMMED –VS- REPUBLIC [2008] IKLR (G&F) 1175, we see no reason for departing from the observation made in KIBANGENY –VS- REPUBLIC (Supra) that the expression "*child of tender years*" for the purpose of Section 19 of the [Act] means, *"in the absence of special circumstances, any child of any age, or apparent age,*

of under fourteen years." **That indicative age has been followed by courts ever since, See, for instance, JOHNSON MUIRURI –VS- REPUBLIC [1983] KLR 445, where this Court, in respect of a $13^{1}/_{2}$ year old child approved the step taken by the trial court;**

"The learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth".

"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes''.

13. What constitutes a child of tender age is a matter for the good sense of the judge to decide. In the instant case, PW1 was aged 10 years when he testified and less than a year younger when he witnessed the incident. He was therefore a child of tender age.

14. Section 19 of the **Oaths and Statutory Declarations Act**, provides that:

"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, 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, 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 into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

15. From a clear reading of **section 19** of the **O&SD Act**, it is the duty of the court to form an opinion whether a child of tender years presented as a witness *is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. The Act does not set out the means of forming that opinion, or the principles applicable in the exercise of determining the intelligence or understanding required to justify the reception of evidence. There are a myriad of cases discussing how to access whether a child was possessed of sufficient knowledge to testify and understands the duty to tell the truth. On this point the celebrated case of* **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445,** Madan, Porter JJ & Chesoni Ag. JA held:

(1) "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

(2) It is important to set out the questions and answers when deciding whether a child of tender

years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

(3) When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

(4) A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

(5) The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

16. *In the instant case, I carried out a voire dire examination of PW1 and at the end of that examination I formed an opinion that PW1 was possessed of sufficient knowledge to justify receipt of his evidence and that he understood the duty to tell the truth. I also satisfied myself whether he understood the meaning of an oath. I formed the opinion that he did not understand what an oath is. Consequently I ruled that PW1 could testify but not on oath.*

17. **As to whether the evidence of PW1 required corroboration**, **section 19** of the **O&SD Act** stipulates that *such evidence once received in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing, shall be deemed to be a deposition within the meaning of that section. Secondly in* ***Muiruri*** *case, supra, it was held that corroboration of the unsworn testimony of a child is required to found a conviction. Thirdly it will suffice to state that the nature of corroboration required is material and independent corroboration. I will get back to this later.*

18. **As to whether the conditions of lighting at the scene of incident were conducive for a correct identification, free of error and mistake.** On the issue of identification we have the evidence of PW1 himself. In his unsworn statement, PW1 stated that on 30th December, 2014 at around 6.45, PW2 the mother sent him and the deceased to buy some food for supper. On their way they met a neighbour's child by name Kennedy. PW1 stated that he left the deceased and Kennedy together. PW1 stated that on coming back to where he had left the deceased and his friend Kennedy, he saw the deceased and Kennedy throw stones that hit a gate. PW1 stated that he saw the watchman get out of the gate and chase the deceased and Kennedy. PW1 saw the accused get hold of the deceased and Kennedy, proceeded to hit the deceased legs and on the deceased falling on the ground, the accused hit the deceased on the head and ribs. In cross examination, PW1 explained that he was able to clearly see the accused clobbering the deceased as it was not dark.

19. PW2 a mother to the deceased and PW1 stated that on 30th December, 2014 at around 7.15 pm she sent PW1 and the deceased to buy some tomatoes. After a span of about 45 minutes, she became anxious as they had not returned yet. PW2 stated that soon thereafter PW1 came back running and asked her to get out of the house quickly because Delvis the deceased had been hit by a watchman and had fallen on the road. On PW2 enquiring from PW1 what the deceased had been hit with, PW1 replied to her that it was a club.

20. A club was recovered from the accused. PW6, a police officer who recovered the weapon from the accused testified that PW1 took him, another police officer and PW2 and another to a gated premises where the accused was working as a watchman. PW1 identified the accused as the culprit. He also

identified the club as the weapon used to hit the deceased. While at the scene with PW1 and PW6 and others, PW2 testified that she heard the accused admit that he hit a child that day.

21. Apart from this evidence I did find that the accused admitted most of the facts constituting this offence both in his sworn statement and by his conduct. In his defence the accused stated

“I was on duty working. The deceased was not involved in the wrestling. He was not part of it. He was just passing by when he was involved. I am very sad that he lost his life in a fight which was not his… I think the child was hit by the club as me and one of the 3 men wrestled to take control of it.”

22. Having considered the accused sworn defence I find that it was an admission of most of the facts. The accused admits the deceased was at the place of his work. He admitted that he hit him. He acknowledges that the deceased was not part of the scuffle leading to him being hit. The accused therefore admits the deceased was at the scene of incident, that he, the accused hit him with a club.

23. The accused however denied that he hit the deceased with the club produced in court as P. Exhibit 4. He said that the club he hit the deceased with was a plastic one which he did not hand over to the police. I find that the accused admitted the incident took place. That corroborated PW1’s evidence. It was an admission. In the circumstances I find that the evidence of the child of tender age, PW1 was corroborated by independent and material evidence.

24. **Whether the evidence of PW1 regarding the manner in which the accused injured the deceased was consistent with the pathologists finding on the cause of death.** PW1 stated that he saw the accused hit the deceased on the head and the ribs. He also said that all this time he was with the deceased, the deceased was crying and complaining of headache.

25. PW5 a pathologist based at K.N.H produced the report she completed after conducting post mortem examination on the body of the deceased. This was on 2nd of January, 2015. The pathologist noted injuries on the nervous system which were acute haemorrhages in frontal subarachnoid haemorrhage; acute global subdural haematoma and features of increased intracranial pressure with tonsila haerniations. PW5 formed the opinion that the cause of death was severe head injury due to blunt force trauma due to assault.

26. The pathologists finding at post mortem is in tandem to PW1’s evidence of where he witnessed the accused hit the deceased. The accused admits as much in his defence. The defence took issue with failure by the pathologist to find injuries on deceased legs or ribs. That in my view is inconsequential as the primary duty of the doctor was to find the cause of death.

27. **As to whether the prosecution has established that the accused had formed the intention to cause death or grievous harm to the deceased.** The prosecution’s case was that the accused over reacted against the deceased and another child when they threw stones at his gate. The accused is said to have come out with a club, attacked both children. The deceased was hit severely on the head. **Section 206** of the **Penal Code** sets out what constitutes malice aforethought thus:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not,

b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) An intent to commit a felony;

d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

28. The accused overreacted in his actions towards the deceased and the other child with him. In my view, he was trying to discipline the children. However he used excessive force, first with a heavy and blunt club, and hitting at sensitive part of the body.

29. **As to whether the accused defence was reasonable, credible and logical.** The accused admitted that he hit the deceased. He however denied using the club exhibited in court as P. Exhibit 4. The accused stated that it was PW6, a police officer he had a grudge with before this incident who had P. Exh. 4 in his car.

30. Regarding the club PW1, 2 and 6 all said that it was the accused who handed over the club to the police from his sentry at the gate. I noted that in cross examination of each of these witnesses, none of them were questioned about the club. No suggestion was put to them that the accused did not have it the club. Or that PW6 planted it on the accused having come with it in his car. The accused denial regarding the club was an afterthought and was not true in all the circumstances of the case.

31. The accused also brought in the presence of three men saying he was a victim of an attack by three men. That in the ensuing struggle as the men tried to rob him is when the deceased who was passing by was hit. The issue of three men at the scene did not feature anywhere until at the accused defence. Even during cross-examination of PW1 no suggestion was made to him that three men apart from the deceased were at the scene. I find the introduction of three men an afterthought. To that extent I find that accused defence that he hit the deceased accidentally, and with a plastic club unreasonable, illogical and incredible. I find the accused's defence partly admitted the incident but qualified it as indicated in this judgment.

32. Having carefully considered the entire evidence, I find that the prosecution has proved beyond any reasonable doubt that the accused attacked the deceased, hit him severely on the head causing him injuries from which he died. I find however that the prosecution failed to prove malice aforethought. For that reason I find that the charge of **murder** contrary to **section 203** of the **Penal Code** was not proved.

33. I find that the prosecution has established the lesser charge of **manslaughter** contrary to **section 202** of the **Penal Code**. Consequently, I substitute the charge against the accused from **Murder** contrary to **203** of the **Penal Code** to **Manslaughter** contrary to **section 202** of the **Penal Code**. I find the accused guilty of the substituted charge of **Manslaughter** under **section 322** of the **Criminal Procedure Code,** and convict him accordingly.

DATED AT NAIROBI THIS 9TH DAY OF MARCH, 2017

LESIIT, J

JUDGE