



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

KISUMU

(CORAM: NYARANGI, MASIME & GICHERU, JJ.A.)

CRIMINAL APPEAL NO. 206 OF 1987

BETWEEN

PITALIS OLAL MAMBIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Omolo, J.) dated the 30th day of October, 1987

in

H.C.CR. CASE NO. 24 OF 1985

JUDGMENT OF GICHERU, J.A.

Pitalis Olal Mambia, the appellant, was convicted of murder contrary to section 204 of the Penal Code by the superior court. He was sentenced to suffer death in the manner authorised by law. He now appeals to this court against that conviction and has put forward 7 grounds of appeal. According to his counsel, of these grounds, only grounds 2 and 7 are of substance. They are:

"2.That the learned trial judge erred in law in his findings and convicted the appellant on the charge of murder without going into the appellant's mental status as per the evidence of P.W.1."

"7The learned trial judge erred in law in his judgment which was based on the prosecution evidence which evidence was not proved on the standard required in criminal law."

Counsel argued these two grounds only.

As regards ground 2 of appeal, counsel submitted that the appellant should have been subjected to psychiatric examination, his having not raised the defence of insanity notwithstanding. Indeed, according to counsel, it was incumbent upon the trial court to clear this issue.

In response thereto, counsel for the respondent submitted that the evidence accepted by the trial court indicated that the appellant was conscious of what he was doing and was clear-minded when he committed the offence for which he was convicted.

Concerning ground 7 of appeal, counsel submitted that the prosecution case against the appellant was doubtful. He queried the plausibility of the appellant having committed the offence in question on 19th June, 1984 in the full view of the deceased's mother and yet remain in the same locality until 22nd June, 1984 when he was arrested.

To this, counsel for the respondent submitted that the case against the appellant rested on the evidence of the deceased's mother Caren Waore Adoyo (P.W.3), whom the trial judge found to be a credible witness. Despite the appellant having been arrested on 22nd June, 1984, her evidence was properly relied upon.

The evidence available before the trial judge was that the appellant entered into a levirate union with P.W.3 after the death of her husband in 1981. At the time of this union, P.W.3 had five children by her late husband. Amongst these children was Morris Babu, the deceased, who was the last born.

The appellant and P.W.3 lived together in the latter's house in the homestead of her father-in-law. In May, 1984 P.W.3 lived together in the latter's house in the homestead of her father-in-law. In May, 1984 P.W.3 asked the appellant to leave her house. This, according to her, was because the appellant was of intemperate disposition.

On 19th June, 1984 at about 4.00 p.m. while P.W.3 was with the deceased at home, the appellant went to her and told her that that day he would do to her something which would show her that they had completely left each other. He then walked to the gate where the deceased was playing. Appellant took out some folded paper from his hip-pocket and from it he put something in the deceased's mouth. P.W.3 asked the appellant what he was giving to the deceased. Appellant did not respond. Meanwhile, the deceased started crying. He fell down. Appellant ran into a nearby millet plantation. As he did so, he tried to push back into his hip-pocket the folded paper he had. It fell down. P.W.3 picked it. In the meantime, the deceased was frothing in the mouth and was passing stool at the same time. P.W.3 took the deceased to Ahero Police Station. From there she took him to New Nyanza General Hospital where he died on arrival. He was 5 years old when he died.

Dr. Ibrahim Amira (P.W.8) who carried out post-mortem examination on the body of the deceased on 21st June, 1984 www.kenyalaw.org 3 found the said body puffed up on the face with a frothing mouth. Its abdomen was distended. According to this witness, the deceased's cause of death was uncertain. He, however, suspected it to be due to chemical toxication. Consequently, he removed pieces of liver, spleen, pancreas, heart, brain and stomach contents from the deceased's body and handed them over to the police for onward transmission to the Government Chemist for analysis. These, together with the paper dropped by the appellant and picked by P.W.3 as is mentioned above were taken to the Government Chemist, Nairobi. The paper contained some purple crystalline powder. On chemical analysis, Joseph Stephen Thiga Waganagwa (P.W.2), the Government Analyst, detected furidan (carbofuran) in the purple powder and in the stomach contents of the deceased. This, according to him, is a carbamate pesticide which is very toxic when ingested by human beings or any other living animal. With this result, P.W.8 concluded that the deceased's death was due to chemical toxication.

In his judgment, the trial judge found that the deceased died on poisoning. He also formed the impression that P.W.3 was a simple village woman who was essentially a witness of truth. He accepted her evidence and then concluded:

"The accused gave poison to the young boy because he wanted to punish P.W.3. There is absolutely no evidence that the accused is in any way insane or had taken any liquor that day. No issue of provocation can possibly arise for the deceased boy had done absolutely nothing to the accused. The only fault of the deceased appears to be that he was the son of P.W.3 who had apparently offended him by asking him to leave her house. He had left three weeks back and when he returned on 19th there is no evidence to show P.W.3 did anything else to him. His giving the poisonous substance to the deceased was, in these circumstances, clearly malicious."

Accordingly, the trial judge found the appellant guilty of the murder of the deceased.

Taking the entire evidence available before the trial judge, I consider that the evidence of P.W.3 merited acceptance. The trial judge cannot therefore be faulted for accepting it.

Clearly, there was no evidence before the trial judge that the appellant was insane. There was also not the slightest indication that he was at the material time the influence of alcohol. Indeed, there does not emerge from the entire evidence adduced at the trial of the appellant the probability that he was insane or that he was under the influence of alcohol at the material time.

Regarding provocation, **section 207 of the Penal Code**, where relevant, is in the following terms:

"207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation....., and before there is time for his passion to cool, he is guilty of manslaughter only."

This section applies to those cases which would be murder but for the provisions of the said section. It requires that the act causing death be done in the heat of passion caused by sudden provocation and before the passion thus aroused has had time to cool. It denotes an emotional state which has been caused by the act of the person against whom the act causing death is directed and is such as to deprive an ordinary person of self-control. Clearly, it must be a retaliatory act that has developed as a result of the wrongful act or insult. In certain circumstances, it would be difficult to say if an appellant acts partly in desperation or in sudden fear or whether he acts wholly in anger. The main element is the sudden reaction which causes such an overpowering emotion as to deprive the appellant of self-control. Each case must, however, be considered on its own facts and the law set out in this section applied to those facts. When applying the provisions of this section, the provocation must be considered and judged by the standard of an ordinary person of the community to which the appellant belongs. See the case of **Yovan v. Uganda**, (1970) E.A. 405.

In the instant appeal, the deceased did nothing to the appellant that would have triggered a sudden reaction causing such an overpowering emotion as to deprive him of self-control. The deceased's only misfortune was that he was the son of P.W.3 who apparently had offended the appellant some three weeks back when she had asked him to leave her house. On the material date and time, P.W.3 did not do or say anything to the appellant that could have suddenly unleashed an emotional state such as would have deprived him of self-control and lead him to act partly in desperation or in sudden fear or wholly in anger. The only act by P.W.3 that may have offended him had taken place about three weeks back. That cannot on 19th June, 1984 at about 4.00 p.m. have caused him sudden provocation. There was nothing sudden about this act. Consequently in giving toxic substance to the unsuspecting 5 years old deceased, the appellant was, as was correctly held by the trial

judge, clearly malicious. Indeed, from his own utterances, this was a calculated and callous act of revenge. It is with some regret therefore that I must disagree with the majority judgment of the court as I am unable to find any possibility that the appellant was provoked in terms of section 207 of the Penal Code. In my view, the appellant was properly convicted of the murder of the deceased. I would therefore dismiss this appeal.

Dated and delivered at Kisumu this 5th day of December, 1990.

J.E. GICHERU

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JUDGE OF APPEAL