GREEN MUSHEKE KUYEWA v THE PEOPLE (1996) S.J. 8 (S.C.)

SUPREME COURT
NGULUBE, C.J. CHIRWA AND MUZYAMBA, JJ.S.
23RD JANUARY AND 20TH FEBRUARY, 1996.
(S.C.Z. JUDGMENT NO. 2 OF 1996)

Flynote
Criminal law - Murder - Proof of - Circumstantial evidence - Evidence of young child together with other circumstantial evidence.

Headnote
The appellant had been convicted in the High Court of murdering a young girl. The evidence presented to the Court consisted of evidence (by a young girl) that she had seen the deceased in the company of the appellant shortly before she disappeared; that when a policeman requested the appellant to accompany him to a police station without giving any reasons therefor, he ran away; and that the appellant and a subsequently deceased co-accused had led the police to the place where the decomposing body of the deceased child was found. On appeal it was argued that the Court should not have accepted the evidence of the child particularly as she had been present with her aunt at the time of seeing the deceased and appellant together and her aunt had not been called as a witness and that the evidence of the appellant having run away was not evidence of guilt, who testified that the appellant tried to escape after he was asked to accompany the officer to the Station. The prosecution case was further that the appellant and the late co-accused led the police to the place where the decomposing body of the child was. The appellant appealed on grounds that the prosecution evidence was wrongly received.

Held:
(1) That what was a child of tender years was not defined and it was largely for the good sense of the trial court: the witness had given acceptable evidence which was corroborated. No assumption either way could be made about the absence of the aunt to testify: there was nothing to show that she maight have given evidence favourable to the appellant.
(2) That although the evidence of running away was not on its own conclusive evidence of guilt, it was clear that the trial Judge had relied upon the totality of the various pieces of evidence. The evidence was sufficient upon which to base a conviction.
Appeal dismissed.

Cases referred to:
1. Chibwe v The People (1972) Z.R. 239
2. Chewe v The People (1974) Z.R. 18
3. Mpofu and another v The People S.C.Z. Judgement No. 5

For the appellant: Mr. V.A.L. Kabonga, Director of Legal Aid
For the respondent: Mr. J. Mwanakatwe, Principal State Advocate

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Judgment

NGULUBE, C.J.: delivered the Judgment of the Court.

The appellant was sentenced to suffer capital punishment in consequence of his conviction on a charge of murder. The particulars of offence alleged that the appellant and another man (since deceased), on 30th January 1990 at Mongu murdered Sanana Nyambe. The deceased was a school girl aged nine years and the evidence, especially the postmortem report, showed that she was the victim of a gresome murder in which certain parts and organs were removed from the body. The evidence showed that the deceased duly attended class at her school on 30th Janaury 1990 and knocked off at 15.40 hours when class was dismissed. She did not return home to her gradmother (PW1) and she was missing from class on the next day. Her mutilated body was found on 6th February 1990.

The prosecution case was that PW3 - a thirteen year old girl who attended the same school as the deceased - recounted how she and her aunt had on 30th Janaury,1990,met the appellant walking in company of the deceased. She knew the deceased as a school mate and gave an accurate description of what the deceased wore and what she carried. Apart from her bag, the deceased was said to have been also carrying the appellant's white shoes. The witness knew the appellant before and described what he wore. Above all, PW3 described how her aunt had stopped to greet each other with the appellant and to find out where the appellant was coming from and his responses. The evidence of PW3 received on oath after a voire dire and was the subject of submissions on behalf of the appellant. The other prosecution evidence was that given by PW7, a police officer, that upon requesting the appellant to accompany him to the Station and when he had not yet explained to the appellant in what connection the request was made, the appellant pretended to buy cigarettes but suddenly ran away, was chased and caught after the witness fired a warning shot in the air. The prosecution case was further that the appellant and the late co-accused led the police to the place where the decomposing body of the child was. The witness PW9 recounted how the appellant and the late co-accused each particupated in the leading while each accused the other to have killed the deceased. All these aspects formed the basis for submissions and arguments in this appeal.

The learned Director of Legal Aid has criticized the reception and acceptance of the evidence of PW3. As to the latter aspect, it was argued that the evidence might have been untrue and that in any event it was possible that the appellant and the deceased later parted company and went their separate ways. We accept that if this evidence had stood alone, it would not have been a satisfactory foundation on which to rely for an inference of guit on such a serious charge. There was, of course nothing to support the suggestion that the witness was not truthful. On the contrary the learned trial judge had noted on the record that the young witness was "calm, fluent and composed" whilst in the witness box and that, in view of the other evidence in the case, she had been corroborated. The criticism relating to the reception of PW3's evidence was on the argument and submission that no proper voire dire had been conducted. The authority cited for this was *Chibwe v The People* (1) and the argument was that the record should have shown the actual questions put, the answers given and the conclusions reached by the court.

It was submitted that in default the evidence of PW3 was wrongly received and we should discount it. The learned trial judge kept the record in narrative rather than verbatim fashion, both of which are perfectly legitimate ways. It is obvious that what were recorded as answers given by PW3 in the voire dire were the amalgam of the questions asked and the responses elicited. We do not see that the detailed discussion recorded can be regarded as an inadequate inquiry. The learned judge came to the conclusion that the child witness fully understood why she was in court and the nature of the oath of a witness. We are unable to fault the court below.

In any case, as we said in *Chewe v The People* (2) what is a child of tender years is not defined and it is largely for the good sense of the trial court. The rationale behind the caution attaching to the evidence of children of tender years can no longer legitimately extend to any irrational assumption that all children are untruthful. The witness gave acceptable evidence which was corroborated.

The appellant complained in his own written argument that PW3 should not have been relied upon in the absence of any evidence from her adult aunt who was with here but was not called as a witness. There is nothing on the record to explain the non-calling of the aunt or what had become of her, especially that she was on the list of witnesses supplied under the summary committal procedure. In the circumstances and since all we have to go by is the case record, we can make no assumptions either way. There is nothing on the record to show that the defence raised an issue or made any request in that behalf or that she might have given evidence favourable to the appellant. We do not accept the appellant's arguments on this issue.

The next point taken up by the learned Director of Legal Aid concerned the evidence of PW9, the police officer who said the appellant and the late so-accused each led the police to the body and accused each other of the murder.The learned Director asked us to extend the principle in *Mpofu and Another v The People*(3) to the evidence of mutual accusations by suspects so that the exact words used by each should be stated. In *Mpofu*, we reiterated the principle that where a number of accused persons are alleged to have led the police to where incriminating evidence is found, it is essential for the trial court to ascertain the role played by each so as to indicate precisely who had the guilty knowledge. In the instant case, PW9 had stated what each suspect did, thus satisfying the principle in *Mpofu*. With regard to the suspects accusing each other, the principle in *Mpofu* has no application. It is not uncommon that when witnesses narrate what someone said the substance is given rather than the very words verbatim. There is, in truth, no merit in the submission.

With regard to the evidence of PW7 that the appellant took to his heels when an innocent person would not do so, the submission was that, standing on its own, it would not be conclusive evidence of guilt. This is a valid submission. However, as the learned Principle State Advocate correctly submitted, it was clear that the learned trial judge relied upon the totality of the various pieces of evidence.

There was in this case a very strong circumstantial case which the learned trial judge amply described and relied upon. The appellant was the last person seen with the child after she knocked off from school; he attempted to flee from the police when asked to accompany the officer PW7 who had, at that stage, not even disclosed why the appellant was to go to the police station; the appellant effectively played his part in leading the police to the badly mutilated and decomposing body of the child. Furthermore, he and the dead co-accused accused each other, which was evidence against the maker of the incriminating accusation.The circumstantial case had attained such a degree of cogency the inference could not be resisted that the appellant was guilty of the murder.

The appellant personally filed an alaborated written submission which we have considered. He has largely argued against the acceptance of the prosecution evidence as being credible. He has not demonstrated how the court below which had the advantage of seeing and hearing the witnesses at first hand had made any mistake in accepting the witnesses as telling the truth. He himself had opted to remain silent, a course he was perfecly entitled to take. However, the trial court could not then start to speculate what defences or explanations the appellant might have had. Its duty was to come to a decision on the only evidence it had heard.

The appeal against conviction is unsuccessful. With regard to the appeal against sentence,

such sentence is still mandatory unless the case is covered by extenuation or other statutory exemption. The learned Director made a bold submission that there was no malice aforethought. If that were the case, the capital charge itself would not have stood. But in fact the post mortem report and the via testimony described horrific mutilation in the typical fasion of what have come to be described as ritual murders. The learned trial judge had fully considered these matters and concluded that capital punishment was warranted. We agree. The appeal against sentence is also dismissed.

Appeal dismissed
