REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEALNO. 85 OF 2010

WENDOH, J

FRIDAH KAGENDO MBAE…….....APPELLANT

V E R S U S

REPUBLIC……..RESPONDENT

JUDGMENT

FRIDAH KAGENDO MBAE the appellant herein, was charged with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. The particulars of the charge are that on 8/7/2008 at Kianjogu Location Miruriiri sub location, Kanyuruko village in Imenti South District, within the Eastern Province, unlawfully killed Erick Koome. She was found guilty convicted and sentenced to serve 18 years imprisonment.

Aggrieved by the said conviction and sentence, she filed this appeal citing the following grounds.

1. **That the trial court ignored the grudge that existed between the accused and the complainant.**

2. **That the court relied on evidence of one family.**

3. **That the prosecution failed to call crucial witnesses.**

4. **That the trial court disregarded the appellant's defence**.

At the hearing of the appeal the appellant seemed to abandon the appeal on conviction and sentence to only ask for leniency for the offence she committed blaming it to the circumstances she found herself in because together with the deceased, they are rejected by both her husband and her parents together.

The appeal was opposed by the Learned Counsel for the State Mr. Mulochi who submitted that the prosecution adduced sufficient evidence to found conviction. He said that the evidence of the appellant's husband PW3 was in harmony with that of PW2,4 and 5 and that there was sufficient circumstantial evidence in support of the charge. He relied on the decision of **Daniel MuthomiM'Arimi v. Republic CRA 166/2011** where the court relied on the case of **Abanga v. Republic CRA 32/1990**where the court of Appeal set out the three tests that the prosecution need to satisfy before the court can found a

conviction on circumstantial evidence. As to the sentence, the counsel submitted that the maximum sentence for manslaughter is life imprisonment but the court was lenient when it handed the appellant 18 years imprisonment.

This being the first appellate court, it behooves me to review and evaluate the evidence of the trial court afresh and arrive at my own determination.

PW1 Christine Kawira, a girl aged 12 years gave unsworn evidence to the effect that on 10/7/2008 about 9.00 am she spotted a child in a water tank. She informed her grandmother PW2 Jane Rose Mwimbi. PW2 said she was with PW1 and while passing by a water tank, PW1 climbed the steps on the tank then ran after her to tell her that she had seen the body of the child in the tank. PW2 raised alarm, people went to rescue the child PW2 did not view the body. PW3 Kenneth Kimathi, testified that the appellant was his wife and that when he married her, she had a 3 year old son called Erick Koome. In February 2008 they got a child by name Makena and the appellant took the son to the biological father end of March where she stayed for 3 months. She returned on 8.7.2008 with Makena alone and on being asked where the boy was, she claimed to have left him with the father at Kinoro so that he could be taken to school. On 10.7.2008 about 9.00 am, he heard screams and was informed that a child had been found in a tank. He went to the scene and identified the body as that of Erick Koome. He was arrested along with the appellant and was released after 2 months whereas the appellant was charged.

Doctor Isaack Macharia PW4 of Meru General Hospital told the court that on 6.6.21008, he performed a post mortem on Erick Koome, who was aged 6 years. He did not see any injury on the body save for water in the upper part of the airways; fracture of the 1st and 2nd bones of the neck and damage to the spinal cord. He formed the opinion that the boy died of injuries to the neck.

PW5 Andrew Gitonga is the Assistant Chief of Mirurir Sub location. On 10.7.2008 he was informed by the Area Chief to proceed to the water tank where he found the body of the deadchild, he called police to retrieve it from the tank. He learnt from the people that the child may belong to the wife of Kimathi, PW3, whom he questioned.He later arrested the appellant. PW5 is the one who called PW6 John Wanadaba of Igoji Police Post.He went to the scene and retrieved the body. The body was taken to Meru General Hospital and on same day the chief took the appellant and PW3 to the station.

When called upon to defend herself the appellant told the court on oath that she had a son. She got a boyfriend whom she lived with for 5 months but he asked her to take the son to the father. She had conceived by then and asked him to accept the child but he refused. She informed her aunt about it and her aunt told her to take the child to the father. She went back to the boyfriend who chased her with the child at night. She took the child to the father but he denied siring the child. The mother did not want her at home and she was told she killed the child.

In cross examination, she said that she went back to the boyfriend with the child and he never got lost and was arrested at the market.

The instant case entirely rests on circumstantial evidence because nobody witnessed the murder. In the case of**ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)**the court set out the 3 criteria to be established before a court can found a conviction on circumstantial evidence. The court said:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**
>
> **i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**
>
> **ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
>
> **iii. the circumstances taken cumulatively, should form a chain so complete that there is no**

escape from the conclusion that within all human probability the crime was committed by the accused and none else."

In this case, nobody witnessed what happened to the child before it ended up in the water tank. PW3 told the court that the appellant had taken the child to the father. In fact the appellant did admit that she had done that but the father refused to accept paternity. She did not return with the child to PW3's house. What happened to the child between PW3's home and the place she took the child? In criminal matters,the burden of proof always rests with the prosecution to prove their case beyond any reasonable doubt. There is no doubt that the said child was in company of the appellant after which his body was found floating in a water tank. Section 111 of the Evidence Act places the duty on the appellant to explain what happened to the child having been the last person with the child. In her testimony she did not discharge that duty and although she said that the child never went missing, she avoided telling the court what happened to the child. The duty imposed by section 111 Evidence Act does not mean that the duty of the prosecution to prove its case beyond any doubt is being shifted to the appellant. It is because of her peculiar circumstances that she is the one who was last with the child and should offer some reasonable explanation.

One of the grounds raised in the petition is that vital witnesses to the case were not called. The appellant never substantiated this ground and it is unknown who was not called as a witness. In any event section 143 of the Evidence Act is clear, that even one witness can prove a fact unless a particular law requires that there be more than one witness.

As to whether the trial court considered the appellant's defence, it is clear that the court did when it said;

"In her defence she was not able to complete her case by stating how the boy met his death when she got to the point she appeared to be in somber state, had no courage to face up and she continuously faced the floor unable to gather courage and state how she killed her own son."

The court then went on to say that the circumstantial evidence was strong pointing irresistibly to the guilt of the accused person and was not open to any other explanation than the guilt of the accused.

I totally agree with the finding of the trial court.The conviction was sound and cannot be disturbed.

The appellant also complains that the sentence is harsh and excessive. Under section 205 of the Penal Code,the appellant is liable to life imprisonment upon conviction on a charge of manslaughter. I am of the view that the sentence is fair and I decline to interfere with it. In the end I dismiss the appeal in its entirety.

It is so ordered.

DATED AT MERU THIS 27th DAY OF FEBRUARY 2015.

R. P. V. WENDOH

JUDGE.

Appellant in person

Ms. Kigira for State

Jane/Kirimi Court Assistant