REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 58 OF 2018

SABINA NJERI WAMBURU...APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

{Being an appeal against the Judgement of Hon. E. Nyongesa – SRM Gatundu dated and delivered on the 13th day of August 2018 in the original Gatundu Senior Principal Magistrate's Court Criminal Case No. 1551 of 2015}

JUDGEMENT

The appellant is serving a sentence of ten (10) years imprisonment for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

The particulars of the charge were that on 11th December 2015 in Gatundu North Sub-county within Kiambu County the appellant unlawfully killed Simon Muiruri Kamau.

Her appeal, which is vehemently opposed is against the conviction and the sentence. The gist of the appeal is that the evidence adduced by the prosecution fell short of proving the charge beyond reasonable doubt; that the conviction went against the weight of evidence and was based on theories; that the court relied on uncorroborated evidence to convict the appellant and that the trial Magistrate shifted the burden of proof to the appellant and decided the case on considerations not known to the law. On the sentence it is contended that the same is harsh and excessive.

The appeal was canvassed through written and oral submissions. Counsel for the appellant condensed the thirteen grounds of appeal into two broad clusters. On the evidence he submitted that it was doubtful that the panga produced in evidence was the one that had been used to cut the deceased. He drew the attention of this court to the fact that there was reference to two pangas; one which was kept by the deceased in the bedroom for security and the one that the accused was using to cut grass with and which she allegedly used to cut the deceased. Counsel argued that the latter could not have been the one produced given it was rusted and had no blood yet the one used was blood stained. Counsel also argued that since the post mortem indicated a sharp panga must have been used to inflict the cut, it was imperative to produce it and it was a fatal omission. Counsel also discounted the evidence of the star witness. He submitted that the witness, Pw1, was not credible and her evidence was not reliable as she had admitted she had lied to her father's friends when they inquired where he was. Counsel also discredited the evidence of the witness on the ground of her demeanour at the time her grandmother (Pw3) found her. The latter is recorded to have described Pw1 as not crying and having a strong heart. Counsel wondered how a daughter who loved her father so much could have been so strong in such circumstances. Counsel also queried why the star witness (Pw1) could not have had any blood yet it was her evidence that the scene was bloody and that she had tried to bandage her father's wound. Counsel submitted that Pw1 must have been coached by Pw3. He submitted that there was no sufficient evidence upon which the trial Magistrate could convict and urged this court to accept the explanation given by the appellant and quash the conviction.

On the sentence, Counsel submitted that considering the condition of the appellant at the time the incident occurred, the fact that there was an altercation between her and the deceased caused by the latter, the age and condition of the children of the union and how their lives are likely to be affected the sentence of ten years is excessive. He urged this court to consider a non-custodial sentence or reduce it to the period already served.

On his part, Counsel for the respondent submitted that all the prosecution required to prove was that the death of the deceased was occasioned by acts of the appellant. He submitted that that was proved beyond reasonable doubt. Counsel submitted that Pw1 and Pw3 were victims of the offence but not antagonists as they were painted by Counsel for the appellant. Prosecution Counsel submitted that the evidence of Pw1 who was an eye witness was corroborated by the doctor (Pw9) when he testified that the injury was consistent with a cut by a sharp object. Counsel contended that the weapon was produced in evidence. He contended that Pw1 was neither a liar nor was she coached by Pw3. He urged this court to find that Pw1's testimony was informed by what she saw and the only reason she had not disclosed the whereabouts of the deceased was because the appellant had warned her not to do so. Counsel contended that Pw3's reaction was only natural but it does not mean she is fixing the appellant. Counsel further submitted that there were no inconsistencies in the case for the prosecution. He contended that the evidence that the deceased fell on a panga was inconsistent with the defence. He urged this court to

dismiss the appeal and uphold the conviction. On the sentence, Counsel submitted that the same is lenient and it should be affirmed.

In reply Counsel for the appellant reiterated his submission that the weapon was not produced; that there was no evidence that the panga produced in court is the one that cut the deceased as it was clear from the evidence of Pw1 that there were two pangas. Counsel also reiterated his submission that the evidence of the doctor was not consistent with the panga that was produced in evidence. He contended that the evidence adduced was not reliable and that the injuries were consistent with falling on a panga but not being cut.

My duty as the first appellate court is to re-consider and evaluate the evidence in the court below so as to arrive at my own independent conclusion. I have in so doing taken into consideration that I did not see or hear the witnesses giving evidence **(seen Okeno v Republic [1972] EA 32).** I have also considered the submissions and cases cited at the hearing of this appeal.

My view of the evidence in the court below is that the appellant and the respondent were in agreement that the deceased's death arose from loss of blood (exsanguination) due to severed femoral vessels (large artery in the left thigh) due to a cut with a sharp object. The only point of departure is whether the injury was inflicted intentionally by the appellant or whether it was sustained accidentally by the deceased falling on a panga as maintained by the appellant.

The star/key witness in this case was nine-year-old SW, the daughter of the deceased and the appellant. Pw1 told the court that on the material day she was at home with her small sister SW and her parents; that she heard her parents quarrelling in the bedroom from about 7am then saw her mother getting a panga from the cowshed outside the house and cut the deceased with it on the leg. She stated that their mother passed them in the sitting room and went to the cowshed then came back carrying a panga. Pw1 testified that after cutting the deceased their mother left him bleeding and went to prepare breakfast. It was she who tried to give the deceased first aid. It was also her evidence that her mother warned her not to tell anyone what she had witnessed. Counsel for the appellant submitted that it would not be safe to convict on the evidence of Pw1 who is a child without corroboration. Counsel also submitted that this court ought to note the inconsistency in the testimony of Pw1 and find that she was not honest and credible.

I am in agreement with Counsel that a conviction based solely on the evidence of children would be unsafe save in sexual offences where the victim is a child. **Section 124 of the Evidence Act** provides that such evidence as was adduced through Pw1 would require corroboration. The evidence of Pw1 being evidence of a single witness must also be weighed bearing in mind the principle that **"there is need for testing with great care the evidence of a single witness respecting identification, especially when conditions favouring a correct identification are difficult"** ***(see Owiti v Republic [1984] KLR 733).*** I have applied the above two principles to the evidence of Pw1. On the need for corroboration my finding is that Pw1's evidence was corroborated by a lot of other material evidence. The appellant for one conceded that the deceased sustained a cut on his left leg but attributed it to his falling on a panga. The post mortem also affirmed that the cause of death was the severed femoral vessels due to a cut wound with a sharp object. The pathologist who performed the post mortem noted that the deceased had a large cut wound at the back of the left lower thigh gaping with several muscles (hamstrings), blood vessels and nerves. He described the wound as 11cm horizontally, 7cm vertically and 6cm deep and the location of the wound as 43cm from the heel. The evidence of the pathologist as well as the appellant's defence confirms to me that Pw1 saw the injury; that her testimony was based on what she witnessed and that she was honest. Her evidence was therefore credible and reliable. As to that evidence being that of a single witness she knew her mother well and all this took place in their house and in the morning when the house was well lit and there can be no possibility of mistaken identity and neither could she have mistaken what she saw her doing. She stated that the appellant went outside and returned with a panga which she used to cut the deceased. She explained why she was hesitant in telling her father's friends the truth. It would not be unexpected of a child of that age to keep a secret when asked by a parent to do so and I am satisfied that she did not do it out of dishonesty but because the appellant had asked her to do so and she did not want to get her in trouble. I find that she was very consistent in her statement to the police which is to be found at page 13 of the Record of Appeal. She was candid enough to state why she did not reveal the deceased's whereabouts to his friends. She also told the police the same thing she told the court – that the appellant returned with a panga and cut her father on the left leg felling him to the ground. In my view it is the appellant's version of what transpired that is not convincing. Unless the panga had its sharp side (blade) facing upwards it is unlikely that it would have cut someone falling on it and even then it would have had to have been put in that position intentionally to hurt someone. I have also considered the question raised by Counsel concerning the panga produced in evidence. It is my finding that as the defence admitted that the injury that caused the death of the deceased was caused by a panga cut, it is immaterial whether the actual panga was the one tendered in evidence.

In the upshot it is my finding that the charge against the appellant was proved beyond reasonable doubt and that the conviction was safe and there is no justification to disturb it.

Regarding the sentence, Counsel submitted that the same was harsh and excessive. The appellant was charged with manslaughter and the sentence prescribed for the offence is life imprisonment. I am not persuaded that the sentence of ten (10) years meted by trial Magistrate is harsh or excessive. The same is upheld and the appeal is dismissed in its entirety.

Signed and dated this 4th day of November 2019.

E. N. MAINA

JUDGE

Signed and delivered in Kiambu this 14th day of November 2019.

C. W. MEOLI

JUDGE