



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 31 OF 2017**

**(CORAM: R. E. ABURILI - J.)**

**NAO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against conviction and sentence on a judgment delivered on 19/9/2016*

*in Ukwala SRM Cr. Case No. 577 of 2016 at the SRM's Court, before Hon. G. Adhiambo, SRM)*

**JUDGMENT**

1. The Appellant in this appeal is NAO, a lady aged 25 years who has a hearing impairment. She is dumb and deaf. She only communicates with the court through a special interpreter. She was charged before *Ukwala SRM Cr. Case No.577 of 2016* vide information dated 19/9/2016, with the offence of **Manslaughter** contrary to **Section 202 as read with Section 205 of the Penal Code, Cap 65 Laws of Kenya**. She pleaded not guilty. After a full trial, the appellant was found guilty as charged. She was convicted and sentenced to serve life in prison.
2. The deceased victim of the alleged unlawful killing by the appellant was **SA**, the appellant's biological child, a daughter aged 3 years. It is alleged that the child was killed on 30/8/2016.
3. PW1, EAO the accused person's biological mother and caretaker of the accused and the deceased child testified that on the morning of 30/8/2016, she left her house at 7.00 am and went to buy vegetables. She returned at 7.30 am, gave tea to the 2 children of the accused. The children were SO and SA (deceased). She then went to the farm to weed and returned to her house at about 10.30 am. She had left the deceased child with her mother Nancy the accused. The other child SO had gone to school.
4. The accused was left lying on the bed and appearing to be in foul mood. That on the previous day, she had gone to visit her boyfriend and found his wife had visited him so she returned in bad mood. PW1 returned to the farm at 10.30 am and found when the accused had dressed up the deceased and was preparing to leave with the deceased as she had packed the child's clothes.
5. PW1 called back the deceased and gave her more tea to take. The accused person lamented to PW1 that it was the latter who had refused the accused to marry her boyfriend that is why he had brought back his wife. The accused therefore left with the deceased, carrying a black paper bag, which she still had in court at the time of hearing of the case and that she started feuding with his sister-in-law. The bag had her child's clothes and that she warned her sister-in-law-Nyagem against touching that paper bag - she was using gestures. That the accused person left 2 bags in the bushes and left with the black paper bag in the company of the deceased child.
6. PW1 left for the market to sell vegetables at 3.00 pm and on returning home at 7.00 pm, she found a dead child lying at her doorstep. Initially, she thought the child was lying there fatigued as a result of walking with her mother the whole day only to call her and when she did not respond, PW1 lit a torch in the face of the deceased and was shocked to see a bloodied face. She raised an alarm and people came to the scene. Close to the child, PW1 found a club of a tree branch. Later the police came and took away the body to the mortuary. The accused was arrested the following day and taken to the police. She had blood in her hands. PW1 witnessed postmortem on the body of the deceased. She was given the body of the child who was her granddaughter for burial.
7. In cross-examination by the accused, PW1 stated that she questioned the accused why the latter was leaving with the child. She also denied chasing the accused by throwing clothes at her. She also denied frustrating the accused. She stated that the deceased's father used to give the accused person money but that it was PW1 who used to maintain the children of the accused from her own pocket.

8. She also stated that the accused was not helping with chores and was fond of leaving home. That they prevented Nancy from marrying her boyfriend because she was related to him.
9. In re-examination, PW1 denied knowing another man. She stated that when she left home, she left behind Nancy's sister-in-law. Further, that Nancy's boyfriend lived in Segha but was related to them.
10. PW2, Chrispine Onyango Odhiambo testified that he was the Assistant Chief of Ligala sub location and recalled that on at about 8.00 pm he received a report from a member of the public to the effect that the accused NO who is deaf and dumb had assaulted her daughter SA to death.
11. PW2 rushed to the scene, found the deceased lying outside PW1's house, and confirmed that the child was dead. He then called the In-charge of Segha Police Station and notified him of what had transpired. The police arrived after about 30 minutes and removed the body of the deceased to Segha Mission Hospital.
12. He identified the tree branch allegedly used by the accused to hit the deceased child. He never found N at the scene of crime until the following day is when she was arrested and taken to the police. He had known the accused for about 20 years.
13. On being cross-examined, he stated that he did not know the boy whom the accused alleged stabbed the deceased. That he never found the said boy or the deceased at the scene. He denied any knowledge of the accused's mother chasing her from home and or failing to take care of the accused and or her son. He denied knowledge of any bad blood between the accused and her mother. The accused then explained that she had used a small stick to discipline her child but that it was the man who used the big branch of a tree to hit her child on the neck. PW2 denied that the child was burnt.
14. PW3, No. 58136 CPL Kennedy Mwando Muli of Segha Patrol Base testified that on 30/8/2016, he received a report at 22.00 hours from the In-charge, Inspector Muriithi who directed him and CPL Bitok to go to the scene of murder at Nyaleng Village and on arrival, he found PW2 and a member of the public. They were shown the body of the deceased aged about 3 years SA lying in a pool of blood and beside the body was a big stick. That PW1 narrated to PW3 what had transpired from the time the accused had left with the child in the morning and how she returned only to find the dead child lying on the ground with the accused missing. PW3 stated that the following day on 31/8/2016, members of the public arrested the accused and took her to Segha Police Patrol base. She had 2 bloodstained clothes in her black bag which were retrieved. The postmortem was conducted on the deceased's body on 12/9/2016.
15. On being cross examined, PW3 stated that if the child had been cut by somebody else in the presence of the accused, then the accused could have asked for help. He denied acknowledge of the boy who allegedly alerted the police of the murder.
16. PW4, Dr. Bernard Odhiambo from Ambira sub-county hospital conducted postmortem on the deceased's body on 12/9/2016 and found that the deceased as a female child aged about 3 years, in good nutrition, 90 cm height, had child about 2 weeks prior to the autopsy.
17. On examination, he found swelling (*haematoma*) on the right side of the head, black eye, swollen, right cheek, swollen right side of the head, bled from both ears, right hand had a healing bruise, left knee had a bruise that was healing. Internally, all systems were normal. She had a temporal extradural *haematoma* depressed skull fracture on the parietal and temporal region. There was intracranial bleeding on the parietal. PW4 concluded that the cause of death was raised intracranial pressure secondary to depressed skull fracture due to blunt trauma. He produced the post mortem report as Exhibit 2.
18. On cross-examination, PW4 stated that he did not know who hit the baby and that there were no wounds occasioned by a sharp object. He maintained that the injuries noted were occasioned by a blunt object and trauma. That he carried out an autopsy in the presence of CPL Muli and two family members who identified the body.
19. PW5, No. 85472 PC Peter Mwaura of Ugunja Police Station testified that on 30/8/2016 he was at the station when some members of the public from Ugunja Township reported that a middle aged woman who was suspected of having murdered her child in Sihai Area had been seen in Ugunja. That upon conducting a search in the bag that she had they found some blood stained clothes. They arrested her and handed her over to the police at Segha Police Post who handed her to Ugunja Police Station. She was charged with the offence.
20. In cross-examination, PW5 reiterated his testimony and denied being bribed by the salonist to arrest her. He denied that the accused was found with any knife or stick at the time of her arrest.
21. On being placed on her defence, the accused person gave sworn testimony and said that she had 3 witnesses to call but after testifying she closed her case without calling the said witnesses.
22. In her sworn testimony, the accused testified as DW1 and told the court that she had been chased from where she was living with her mother who fends for her. She stated that someone else used a stick to kill her baby and that she ran away because she was scared. That her baby was killed by a drunk person who threatened her with a knife and she escaped to her girlfriend's place but her girlfriend also chased her that's why she carried her deceased child's clothes in a bag. That her other siblings beat her up for letting cows stray and destroy maize.
23. She denied killing her child but stated that she was just disciplining the baby with a small stick. That she ran away because she was holding a bleeding baby hence she got scared, placed her down in front of her mother's home and escaped on a motor bicycle.
24. On being cross-examined, the accused stated that on the material day, there were 3 people at the compound namely, a small boy, the boy who killed her baby and an expectant lady.

25. That the boy who used a big stick to kill her baby did so in the presence of the small boy and that after that he threatened her with a knife thus forcing her to escape to a friend's place. The friend is a salonist in Ugunja, but that her friend called the police. That she carried the baby after the baby was hit and a lady told her to run away. That she was with 2 other ladies. She admitted being found with a bag containing blood stained clothes for the baby and that her clothes were blood stained too. She changed the story and stated that only her clothes were stained and were in her bag. She stated that she did not run and report to the police and instead ran to her salonist friend who sometimes gave her work and paid her so that her friend could call the police.

26. In her detailed judgment, the trial court framed one single issue of whether the accused person did on 30/8/2016 unlawfully kill SA. The trial magistrate found and held that the Prosecution's witnesses never saw the accused hit the deceased child but that circumstantial evidence tendered and the testimony by the accused was that she hit her child while disciplining her and that her uncorroborated defence that a man stabbed the child could not be believed as PW4 an expert witness testified that there were no stab injuries on the deceased's body.

27. The trial court found that the allegation by the accused that a boy stabbed her child was untruthful and inconsistent. She found the accused to have been a dishonest witness who dodged from telling the truth as she never told anyone in the neighborhood that someone had stabbed her child or that a boy hit her child with a big branch. The trial magistrate concluded that the evidence on record irresistibly pointed to the accused as the person who killed her child. She convicted her and after mitigations meted out a deterrent sentence of 20 years in prison. Dissatisfied with the conviction and sentence meted out on her, the appellant now a convict has approached this court by way of a petition of appeal stating: -

**1. That I am a first offender.**

**2. That the sentence imposed upon me was too harsh.**

**3. That the court did not consider circumstances of the case.**

**4. That I did not understand the nature of charge (gravity).**

**5. That I was not warned of the harsh sentence that would befall me.**

**6. That I did not understand some of the issues interpreted by the sign language interpreter due to complexity of the sign language.**

**7. That the court did not consider the fact that I am deaf and dumb.**

**8. That the court did not consider that I am a young mother struggling with the reality of unwanted child thus the psychological trauma.**

28. The appeal was filed on 16/3/2017. The judgment, conviction and sentence was passed on 7/12/2016 in **Ukwala SRM Cr. Case No. 577 of 2016, Republic vs NAO**. The appeal was filed after 4 months of the date of judgment and sentence. There is nothing on record to show that the appellant herein sought and obtained leave of court to extend or enlarge time for filing of the appeal.

29. In addition, what this court gathers from the petition of appeal is that the 8 grounds of appeal all challenge sentence and are framed in the form of mitigations and none of the grounds thereof attack the conviction of appellant.

30. However, in her submission before this court with the help of a sign language interpreter, Nancy Odipo who took oath to interpret accurately the appellant submitted that she wants to be freed and that she did not want to return to court again. She also did not want to go to her home as her family ignored her while she was in prison. That they never visited her. That she will go to her friend's home.

31. That she was at home doing nothing whereas her siblings had things to do. That she dropped out of school in Class Two. She had two children a boy and the girl who died.

32. She stated that she never killed her child but that it was her boyfriend who killed the child. She urged the court to rely on her petition to help her.

33. In response, Mr. Okachi, Senior Principal Prosecution Counsel (SPPC) submitted on behalf of the State, that he left it to the court to decide the appellant's fate.

34. This court then ordered for a Probation Officer's social inquiry report on the appellant's antecedents. On 17/12/2018, the Probation Officer Siaya County Ms. Catherine Amimo filed a Probation Report leaving the matter to the court to decide.

35. The interventions proposed to the appellant who appears to have killed her child out of anger following her disagreement with her relative boyfriend are:-

**(1) Advise on interpersonal relations, trauma counselling, and reconciliation with the victim.**

36. Her mother and caregiver is said to have forgiven her and that her family members welcome her back home but the leadership involving the Assistant Chief have issues with her and feel that she should be rehabilitated before being released into the society.

37. The court record also shown that she had one other child a boy.

38. Further, the trial record shows that at one time, the appellant attempted to commit suicide while in custody and had hallucinations of being raped by a young boy while she was in the police cells which matter was investigated and dismissed as a lie.

39. The appellant is a lady of special needs. She has a disability of being deaf and dumb. She is not schooled enough to appreciate her disability status and therefore the society might find it very difficult to understand her. She deserves to be assisted to acquire social skills which will enable and empower her to live an independent life. She has scores to settle with her mother and siblings possibly because she had an intimate relation with her relative which relationship was opposed by her mother.

40. She lived with her widowed mother. She is bitter because the relatives have not visited her in prison since she was arrested and later jailed. Her mother gave evidence against her.

41. Albeit the appeal was filed out of time, this is a special case of a person with disabilities. She is deaf and dumb. In the premise, it may have been very difficult to give her support from prison and even paralegals may not have been in a position to assist her due to lack of interpreters in sign language in prison.

42. That being the case, I would exercise judicial discretion, admit her appeal out time, and deem it duly fixed within the 14 days stipulated by Law.

43. And as the Petition of Appeal only challenged sentenced meted out on her and sets out mitigations, having considered the sentencing remarks by the trial court and the report filed by the Probation Officer, Siaya County, I am persuaded that the appellant deserves psycho social support to manage her anger and to live in harmony with her family members.

44. She needs to be helped to engage in useful work that will keep her busy, be guided, and counselled to be a law-abiding citizen.

45. Having said that, the sentence meted on her by the trial court is lawful. Maximum sentence provided for in law is life imprisonment. The trial magistrate who had the advantage of seeing and hearing the witnesses and who observed the appellant's demeanor was in a better position to decide and exercise her discretion on appropriate sentence to be meted out on the appellant who appear to have given the trial court difficult time during the trial.

46. However, my own observation of the appellant is that she has learnt hard lessons in prison and hence she wants to be set free. The court on appeal has power to review the sentence meted out on the appellant.

47. Albeit the appellant maintains her innocence, the evidence convicting her was overwhelming that she was the only person who could have killed her child, as she never explained why she never reported to the police the person who allegedly killed her child with a knife. The Doctor who performed the autopsy ruled out the use of any sharp object. The appellant's evidence was contradictory throughout. She could not be believed. This court has no reason to interfere with the conviction of the appellant by the trial court.

48. On sentence, the appellant has been in prison for now close to 3 years less only 4 days today. She has learnt her lessons in prison. She can be accorded an opportunity to reform outside prison.

49. Accordingly, I shall exercise discretion and set aside the prison term of 20 years imposed on the appellant NAO and substitute that prison sentence with an order that the Appellant **NAO** shall serve Probation Sentence for 3 years under close supervision, guidance and counselling of Siaya County Director of Probation Services. There are conditions attached to Probation Sentence as the Probation Officer who shall be making quarterly report to this court shall be at liberty to recommend termination of probation and the appellant shall be returned to prison to complete the 20 years' imprisonment.

50. The Probation Officer should work closely with the appellant's mother and close relatives to assist the appellant find suitable work to do to fend for herself and her child who is in her mother's custody.

51. **Orders accordingly.**

***Dated, Signed and Delivered in Open Court at Siaya this 12<sup>th</sup> Day of March 2019.***

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Okachi SPPC for the State

The Appellant NANCY Atieno Osamo in person

CA: Brenda and Modestar