BNG v Republic (Criminal Appeal 102 of 2019)
[2023] KECA 1047 (KLR) (24 August 2023) (Judgment)

Neutral citation: [2023] KECA 1047 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 102 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

AUGUST 24, 2023

BETWEEN

BNG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nyeri (A. Mshila, J.) dated 27th June 2019 in Criminal Appeal No. 5 of 2014)

JUDGMENT

1. The following facts do not appear to have been in dispute before the learned Judge. The appellant BNG was the adopted daughter of PW 1 MGK and his wife (the deceased) EWK. PW 1 is a retired principal of [Particulars Withheld] Teachers College. The deceased suffered from arthritis, had had knee and hip replacement and used crutches. The appellant was 32 years in 2019, which meant she was about 27 in 2014. She was a mother. She went to school up to form four, but in several schools. She was a discipline child, and took drugs and alcohol. She was expelled from various schools. She did not know that she had been adopted until about 2000 or 2011, and this made her quite angry. She ran away from home for a while to go and look for her biological mother.

2. The family lived at [Particulars Withheld] in Nyeri County. On the evening of February 23, 2014, the deceased was found dead in the family house, in the appellant's bedroom. The door to the room had to be broken to gain access. The body of the deceased was found with stab wounds, and was bleeding. When on February 24, 2014Dr. Obriero Okoth (PW 4), a pathologist, conducted a postmortem on the body at Nyeri Provincial General Hospital, he found the diaphragm had 42 cut and stab wounds which had penetrated the body's internal organs. There were massive left neck soft tissue injuries. The cause of her death was multiple injuries in the chest which had resulted from the multiple stab and cut wounds.

3. The appellant was before the High Court at Nyeri charged with murder contrary to section 203 as read with section 204 of the *Penal Code* in respect of the deceased. She was found to be fit to plead, and denied the charge. The learned Judge (A. Mshila, J.) received the evidence of six prosecution witnesses and sworn testimony of the appellant. In a judgment delivered on June 27, 2019, the appellant was found guilty of the charge and was sentenced to 30 years' imprisonment. She was aggrieved by the conviction and sentence and preferred this appeal, whose grounds were as follows:-

> " 1) The learned Judge erred in law in relying on circumstantial evidence to convict the appellant when such evidence does not irresistibly point to the appellant to the exclusion of all others. A miscarriage of justice was thereby occasioned.
>
> 2. The learned Judge erred in law in relying on circumstantial evidence to convict the appellant when the evidence does not satisfy the legal requirements of circumstantial evidence to warrant the conviction of the appellant. A miscarriage of justice was thereby occasioned.
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> 3. The learned Judge erred in holding that the letters D exhibit 9 and D exhibit 5 established malice aforethought on the part of the appellant. A miscarriage of justice was thereby occasioned.
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> 4. The learned Judge erred in law and fact in not finding and holding the prosecution had failed to prove the actus reus and malice aforethought beyond any reasonable doubt. A miscarriage of justice was thereby occasioned.
>
> 5. The learned Judge erred in not holding that the prosecution had not proved its case beyond any reasonable doubt. A miscarriage of justice was thereby occasioned."

4. During this appeal, the appellant was represented by Mr. Wahome and the Republic was represented by Mr. Ng'etich.

5. The record shows that the prosecution witnesses were PW 1, his maid JWN (PW 2), a villager GMG (PW 3), PW 4, investigating officer Constable Daniel Makeko (PW 5) and a psychiatrist Doctor Mwenda (PW 6). PW 6 conducted the appellant's mental assessment. The appellant was the only witness for the defence.

6. The evidence of PW 1 was that on February 22, 2014 he and the deceased went for prayers in Muranga and did not return home until about 6.00 pm on February 23, 2014. On April 22, 2014, while going to Kiriaini, they had received a cellphone message that was sent by a pastor, Mrs. Mbao, who had in turn been sent by PW 3. PW 3 had been sent the message by the appellant. According to PW 3, the appellant had sent him two phone messages. One said that the demons in her were furious and uncontrollable, and the second said that she was going to make her parents life a hell on earth. PW 1 and the deceased were quite disturbed by the messages, and reported to Nyeri Police Station on their way back on February 23, 2014.

7. When PW 1 and the deceased returned home at 6.00 pm they found the appellant who did not appear to be in good mood. She asked PW1 about her daughter's homework which he had kept in his bedroom. He brought to her and she begun doing homework with her daughter. The deceased changed and went to rest in her usual sofa set. He left the house to go and check on his farm. He took another granddaughter along. This was until PW 2 later ran to him to ask him where the deceased was. He replied that he had left her in the house. PW 2 told him that she was not able to trace the deceased. He came home and searched all the rooms for the deceased. She was not in the house. He rung her but

she was not picking the phone. He found the appellant's bedroom door was locked. He was helped by a passerby to break into the bedroom. They found the deceased's body in a pool of blood. She was dead. The appellant was not at home.

8. PW 2 told the court that during the day she and PW 1's grandchild S went to the Aberdares to watch animals. They left the appellant at home. They returned at about 6.30 pm. She went to the toilet as S went to the house. S came out saying that the appellant had sent her to the shop for cigarettes. S told PW 2 that she had noted that the appellant's hand had blood. PW 2 waited for S to return. They entered the house. There was blood on the grill and on the kitchen floor. S went in to give cigarettes to the appellant. PW 2 and S sought to investigate the cause of the blood. The appellant violently opened the door and they ran away. The appellant came out of the house and walked away. Her daughter wanted to follow her but she ordered her back. The appellant was in a hurry. She went away and did not return. PW 2 entered the sitting room and saw blood on the cushions. She called the deceased's number but got no response. She ran to inform PW 1. They looked for the deceased, and went up to the neighbors. They did not find her. Neighbors came and helped to break into the appellant's room whose door was locked. The deceased was found in a pool of blood, dead.

9. The evidence of PW 3 was that he was PW 1's neighbor and knew the appellant well as they went to church together and he would counsel her. He stated that she knew the appellant as a drunkard who had got saved. On February 20, 2014 at 8.00 pm he received text messages from the appellant, one saying the demons in her were furious and uncontrollable and the other saying that she would make her parents life hell on earth. These are the messages that were eventually passed over to PW 1.

10. The appellant denied in sworn statement that she killed the deceased, and stated that she had no reason to kill her. She testified that she was always friends with the deceased. She managed a juice and fruit shop in Nyeri town. On February 21, 2014 she left home and went to Nyeri town where she ended up with her friends to do drugs, chew miraa and smoke bhang. She was too intoxicated that night and she did not return home. She ended up returning home two days later, on February 23, 2014at 3.00 pm. She did not find people at home. She was quite drunk. She went to bed to sleep. She was in bed when she realized that her 11-year-old daughter was also in the bed. She woke up to go to the kitchen to look for food as she was very hungry. She could only find fruits. She returned to town, to Majengo where at about 4.00 pm. she found a man in whose home she stayed until February 25, 2014. On the material day in the evening she was watching T.V in a club. She watched news in which PW 1 and the deceased's pictures were shown. The news was that the deceased had been killed and she was being looked for. She did not believe what she was watching. She took drinks and smoked bhang outside the club. While standing outside the door she heard men talking, saying that they would kill her with stones. She got scared of returning home. When walking towards the stage, she saw three men hurriedly coming towards her. She ran to Nyeri Police Station and surrendered. She denied having written the messages that PW 3 talked about.

11. When she was cross examined she stated that it was while going to join Form 1 while aged 14 that, while she was going through PW 1's documents that she discovered that she was an adopted child. She had a brother who was also adopted. She is the one who broke the news to him. She said that she took the news well. However, she admitted that that was when –

> " my trouble started when I discovered these were not my biological parents."

She went to state that she ran away from home to go and look for her biological mother. Further, she stated that –

> " my mother used to tell me some words confirming that I was adopted which I did not like. I was not happy with those words."

This was in reference to the deceased.

12. When she heard on T.V. that the deceased had been murdered, her name was not mentioned but –

> " it made me think it was me."

Her photograph was not in the news. She continued drinking despite the news that her mother (the deceased) had been murdered. She stated as follows:-

> " The news never bothered me. I saw my father on T.V with a picture of my mother. I continued to drink even after I saw the news on T.V."

13. There were many letters written between the appellant and PW 1 and the deceased. In the majority, there were letters expressing love between parents and their daughter. In some of them, however, the appellant expressed deep hatred for the deceased. For instance, in letter (D. Exhibit 5), the appellant wrote –

> " Mum I hope that all is well with you am gone just as you wanted No more embarrassment in the village. The outcast is gone – Hope I am not being rude. Next time. I pray that I will be fine and alive by the time we meet again Papa – you are the only one I sympathized with you – though I do not have anything else to do."

14. On September 13, 2005 (D. exhibit 9) she had written to say –

> " I hate Mum."

15. In one of the text messages to PW 3 she had said –

> " Have anger. Makes me feel like killing anyone that crosses my path."

She said that she did not recall writing the message. She was referred to the cellphone number that sent the message. She responded that she did not recall if the number was hers.

16. The learned Judge considered all this evidence and came to the conclusion that the prosecution witnesses had told the truth and that the appellant had not. She found that there was overwhelming circumstantial evidence that it was the appellant who had caused the death of the deceased. The appellant was punished by being sentenced to serve 30 years in jail.

17. The appellant was aggrieved hence this appeal.

18. This is a first appeal. In *Okeno v Republic* [1972]EA 32, the duty of this first appellate court was explained in the following terms:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA.(336)

and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

19. The trial court was alive to the fact that there was no witness called to say that he or she saw the appellant attacking the deceased. According to the prosecution, the deceased was found dead in a pool of blood in the appellant's bedroom, which had to be broken into to gain access.

20. It is trite that the guilt of an accused person can be proved by either direct or indirect evidence (*Ahamad Abolfathi Mohammed and another v Republic* [2018]eKLR). In the instant case, the trial court found that the circumstances surrounding the case conclusively pointed to the fact that the appellant had willfully and unlawfully caused the death of the deceased. The court made reference to the decisions in *Sawe v Republic* [2003]KLR 364, *Abanga Alias Onyango v Republic,* CR. Appl No 32 of 1990 (UR) and *Bodole Abala Kone v Republic* [2019]eKLR, all of which point to the requirement that the prosecution must lead firm and cogent evidence regarding the circumstances from which the inference of guilt is sought to be drawn. These circumstances must irresistibly point to the guilt of the deceased, and to no other person and to no other inference. There must be no other co-existing circumstances weakening or destroying the inference of guilt (*Simon Musoke v- R* [1958] EA 71). The circumstances must be such that they leave the court with no doubt about the guilt of the accused.

21. It was the submission by Mr. Wahome that the appellant's conviction was based on inadequate and contradictory evidence, and that the threshold for a conviction on the basis of circumstantial evidence was not met. He submitted that, when PW 1 said that he came home to find that the appellant was not in a good mood he was not asked to expound on what he meant. Then, the trial court had made an inference of guilt based on what S had allegedly said and yet she had not been called to testify. Counsel doubted the sequence of events. Further, he submitted that the police had recovered a blood stained knife and blood samples at the scene but had not subjected them to DNA testing, a point that had weakened the prosecution case. Lastly, that the letters D exhibit 5 and D exhibit 9 that the court had relied on had been written about 12 years prior to the date of the alleged offence and therefore provided very weak evidence regarding motive.

22. On the other hand, Mr. Ng'etich for the Republic submitted that the evidence regarding the conviction had been properly analysed, and was therefore safe; that the inculpatory facts were incompatible with the innocence of the appellant and incapable of explanation in any other way. His case was that the evidence of PW 1 and PW 2 placed the appellant at the scene at the material time; the deceased's body was found in the appellant's bedroom; and, to show the guilty intention, the appellant had attacked the deceased using a knife on her vital organs.

23. The trial court accepted the evidence as tendered by PW 1, PW 2 and PW 3 and did not believe the version given by the appellant. It was found that the evidence of PW 1 and PW 2 placed the appellant at the scene at the material time. Subsequently, the appellant was seen with blood on her hands. She then left her bedroom hurriedly. The deceased was found missing. She was later found in the appellant's bedroom in a pool of blood. She was dead. The court then relied on the text message sent to PW 3 by the appellant. All these facts led to the conclusion, in the court's view, that the appellant was the one who had violently and intentionally caused the death of the deceased.

24. We have considered the recorded evidence, the reasoning by the trial judge and her conclusions on that evidence, and the rival submissions. We agree that had the prosecution called S, and had it subjected the knife and blood samples to forensic examination, that would have made proving its case a lot easier. Nonetheless, we still consider that there was ample, sufficient and conclusive evidence to show that the appellant murdered the deceased.

25. The trial court believed PW 1 and PW 2. It found that there was no reason for them to give false evidence against the appellant. It was common ground that in all the correspondence between the appellant and her parents, she had a very soft spot for PW 1. PW 1 equally loved the appellant. Despite her tumultuous life, he was fond of her as his daughter. She said as much in her letters. The trial court correctly found, in our view, that when PW 1 and PW 2 testified that the appellant was home after 6.00pm on the material date it was true. When PW 1 went to the shamba, he left the appellant at home. When PW 2 returned home, she found the appellant at home. She hurriedly left her bedroom, after suspicious blood had been seen. She did not return home that day. The body of the deceased was found in that bedroom after the door was broken. She was dead in a pool of blood.

26. The appellant failed to return home for two days. Even when there was news on T.V. about the death of the deceased, she states that she was not bothered. She did not seek to return home to find out what had transpired. Where she was, she continued to drink as if nothing had happened. All this evidence, taken together with the text messages that she had about a day or two earlier sent to PW 3, would, in our considered view, lead to the irresistible conclusion that she was the one who had stabbed her mother (the deceased) to death in her bedroom.

27. Her conduct before and after the death, her messages to PW 3, her previous confessions that she hated the deceased, and the fact that she used a knife 42 times to stab the deceased in vital areas of the body, would together point to acute motive and ill intention against the deceased. She wanted the deceased dead. There was malice aforethought. We do not at all fault the learned Judge's finding on the question of conviction.

28. Regarding sentence, Mr. Wahome's submission was that the punishment of 30 years in jail was manifestly harsh and excessive in the circumstances of the case. Mr. Ngetich's contention was that, given the nature of the offence, the sentence was reasonable and not excessive.

29. The learned Judge was alive to the fact that the maximum penalty for murder was death. However, she received mitigation, having considered the Supreme Court decision in *Francis Karioko Muruatetu & another -v- Republic* [2017]eKLR. She awarded 30 years in jail.

30. The question of the appellant's sentence has caused us a lot of anxiety. We are all aware that sentence should be left to the discretion of the trial court that has had the feel of the case, and considered the peculiar facts of the case. It was observed in *Thomas Mwambu Wenyi -v- Republic* [2017]eKLR that what sentence would meet the ends of justice depends on the facts and circumstances of each case, and that the trial court should keep in mind the gravity of the crime, motive for the crime, nature of the offence and all the attendant circumstances.

31. In *Bernard Kimani Gacheru -v- Republic*, Criminal Appeal No. 188 of 2000, this court expressed itself as follows:-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that

the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

32. The appellant was the adopted child of PW 1 and the deceased. When she learnt of the adoption she was quite angry that she had been kept in the dark by her adoptive parents all along. She ran away from home to go and look for her real mother. It is not known whether she found her before she returned home. She is a girl who changed secondary school four times. She was a discipline case. She was into drugs and alcohol. She was on and off in counselling sessions. She tried salvation. She was angry and restless. These were the circumstances under which she committed the offence against her mother, the deceased. She was herself a mother. We are of the considered view that, given all these facts, the jail term of 30 years was manifestly harsh and excessive. We reduce it to 12 years' imprisonment from the date of conviction.

33. To this limited extent, the appeal is allowed.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF AUGUST 2023.

J. MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR