IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 142 OF 2015

BETWEEN

MILDRED ILARIO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenyaat Kakamega (Sitati, J),

***dated 22nd July, 2015* in HCCR No. 11 of 2010)**

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JUDGMENT OF THE COURT

The appellant, **Mildren Ilario,** was arraigned before the High Court at Kakamega on 2nd July 2010 charged with murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code**. The particulars of the offence were that on 17th May 2010 at Masiga Village, Shinovi Sub-location, North Butsotso Location in Kakamega Central District, the appellant murdered **Patrick Pombo Mang'oli** (deceased), a 3-year old child.

The appellant denied the charge leading to a trial in which the prosecution called 6 witnesses in support of its case. During the trial it came to light that the deceased was a child of the appellant's co-wife. The appellant was the third of 3 wives of Hillary Were (PW1). The appellant was said to have murdered the deceased by poisoning him with a chemical as was evidenced by the report from the Government Chemist that was produced by **PW2, Dickson Mchana** a pathologist who was at the time working at Kakamega Provincial General Hospital, on behalf of **Dr. Nyikuri** who was a medical officer.

Another key prosecution witness was **PW3, Elizabeth Mang'oli**, another step child of the appellant, who placed her at the scene of the crime and pointed her as the one who called the deceased, mixed a yellow medicine or chemical into his porridge and gave him to drink. Soon after, the deceased started vomiting and crying. He was then rushed to hospital but did not return to their home alive.

At the close of the prosecution's case, the learned Judge found the appellant had a case to answer and placed her on her defence. The appellant gave a sworn statement and denied poisoning the deceased. She claimed that she was outside splitting firewood when her nephew came running to her with the news about the deceased vomiting through the nose and mouth.

Sitati, J heard the testimonies, evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced her to death.

Aggrieved by the judgment and sentence of the High Court, the appellant preferred the instant appeal, based on 7 grounds, which we summarize that the judge erred in law and fact by;

a) Relying on circumstantial evidence in arriving at the guilty verdict of the appellant.

b) Failing to consider the defence of the appellant or take into account that the prosecution failed to call crucial witnesses to testify.

c) Imposing a sentence that was manifestly harsh taking into account the mitigation on record.

During the hearing of the appeal, learned counsel **Ms Nabifo** held brief for **Ms Omwongo** who is on record for the appellant while the respondent was represented by **Mr Sirtuy**, the learned Principal Prosecution Counsel. The appellant filed written submissions, but there were no submissions on record from the respondent. Although **Mr Sirtuy** made his submissions orally, **Ms Nabifo** chose to rely on her submissions and did not highlight the same.

It was submitted that the learned Judge erred by relying upon circumstantial evidence which fell below the legal basis for a sound conviction. The evidence tendered in court did not prove that it is the appellant who cooked and laced the porridge with poison. Further, PW3 testified that there were other children, in the vicinity on the fateful day who would have been crucial in corroborating PW3's testimony, yet the prosecution did not call any of them to testify before the court.

The trial court also did not satisfy itself on whether the poison was ingested from the porridge since the deceased had taken other types of food before the said porridge. Also, the said porridge was prepared by his own mother. No expert testimony was tendered to state what kind of poison was ingested by the deceased and also no bottle of poison was ever found at the scene of the crime.

The submissions also stated that the prosecution's case had questionable gaps and inconsistencies that made it unbelievable. The said gaps ought to have been resolved in favour of the appellant. Lastly, it was opined that the learned Judge misdirected herself by sentencing the appellant to death without taking into account the mitigation on record. This Court was therefore urged to set aside the same and substitute it with a suitable sentence.

Mr Sirtuy argued that the evidence of PW3 clearly placed the appellant at the scene of the crime and fingered her as the person who administered the poison. Taking into account the circumstances he left the issue of sentencing to the Court.

We have considered the record of appeal as well as submissions made by the appellant and the respondent. We appreciate our role as a first appellate Court as was stated in ***REUBEN OMBURA MUMA & ANOTHER -VS- REPUBLIC [2018] eKLR;***

> ***"This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."***

We have distilled the issues to be considered as whether; the evidence tendered was circumstantial and inadequate; the prosecution's witnesses were sufficient; and whether the sentence imposed was harsh.

The appellant through the submissions of her Counsel, stated that the evidence tendered in court was circumstantial since there was no evidence tendered to prove that the appellant made and poisoned the porridge; it was not established whether the death was caused by the poison in the porridge; and not from any other food; it was also not established what poison killed the deceased and; no poison pills, liquid nor container were ever found. Circumstantial evidence is when there is no direct evidence linking an accused to the crime. It is nonetheless sufficient when the court before which the matter is placed is led to conclude that the evidence before it leads to no other inference than the accused is guilty of the offence charged. This was stated in ***JOAN CHEBICHII SAWE -VS- REPUBLIC [2003] eKLR;***

> ***"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

From the record, PW3, Elizabeth Mang'oli, the step-daughter of the apellant gave clear and cogent evidence as follows;

> *"We were in the house eating avocadoes. Mother came and took the child and said she was going to give him porridge. She went with the child to the house and gave the child medicine. She mixed the medicine with the porridge. I saw the porridge and yellow medicine. The yellow medicine was in a bottle that was in the house. Patrick took the porridge. Mother gave Patrick the porridge. Patrick started vomiting and crying. "*

The evidence of PW3, was corroborated by the evidence of PW1, Hillary Were, the father of the deceased who admitted to having a bottle of a chemical he used to kill ticks and wash cows. He testified that the contents of the said bottle were finished and he could not tell how the deceased got to ingest them. Further, the evidence of PW2, the pathologist established the cause of death was through chemical poisoning and specifically stated that the deceased had pesticide in his stomach.

We are satisified that there was direct evidence adduced in court that proved the guilt of the appellant. Moreover, the appellant was placed at the scene by her step-daughter who knew her very well and even referred to her as mother in her testimony. The appellant was identified by recognition, which has been held to be more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of an accused. See ***ANJONONI & OTHERS -VS- REPUBLIC [1980] KLR 57***. This limb has no merit and thereby fails.

From the foregoing, it is clear that the prosecution did not need more witnesses in order for it to prove its case beyond a reasonable doubt. In any case, **Section 143** of the **Evidence Act** provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. At any rate, this was not a case where the prosecution case was barely adequate so as to lead to the inference that had the other witnesses been called their evidence would have been adverse to the prosecution. See ***BUKENYA & OTHERS -VS- UGANDA [1972] EA 549***. Therefore this ground lacks merit and it too fails as does the appeal against conviction.

Finally, the appellant complained that the sentence was manifestly harsh in light of the mitigation on record. The appellant's mitigation was that she was very remorseful and a first offender. That she was 25 years old and had a young child aged 6 years. Having served 5 years in police custody as at the time of the sentencing, the trial court was urged to put that into consideration but it imposed the sentence of death on account of it being mandatory.

The Supreme Court in ***FRANCIS KARIOKO MURUATETU & 4 OTHERS VS REPUBLIC*** ***[2017] eKLR*** held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis. It was found that this took away judicial discretion to determine the appropriate sentence based on the facts of each case.

Thus, the appellant rightly complains that the learned Judge imposed on her a mandatory sentence without considering the mitigating factors surrounding her case. However, by the time the learned Judge delivered the judgment the aforementioned case had not been determined by the Supreme Court and she cannot be faulted for doing so.

We have agonized over the sentence appropriate to meet this case. No doubt it is as callous and cold act for the appellant, a mother herself, to have poisoned the deceased, a trusting and innocent child. This surely is a simple act of green eyed jealousy as one can find in the marital space, especially a polygamous one. Having elected to be the third wife of PW1, the appellant ought to have accepted her chosen station and braced herself for the constant reminder that she was not the sole owner of the man's affections. He had other wives and children. Those children called the appellant mother; that hallowed term, but in this instance she acted without the milk of human kindness. She fed a hungry child with poisoned porridge.

In mitigation the appellant pleaded, ironically, that the court should consider that she has a young child. She also stated that she was remorseful. She was also young at age 25. She must have been young and foolish, not too good at controlling her dark emotions.

Having borne all that in mind, we think that justice should be tempered with mercy and so we will set aside the sentence of death. In its place we order that the appellant shall serve a sentence of fifteen (15) years in prison, as from 22nd July 2015 when she was sentenced by the High Court.

Orders accordingly.

This judgment is given under **Rule 32(2)** of the **Court of Appeal Rules**, Odek, JA having died before he could sign it.

Dated and delivered at Kisumu this 31st day of January, 2020

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR