IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), SICHALE & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 122 OF 2018

BETWEEN

EWN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Nairobi (**Lesiit, J.**) dated 27th October, 2015*

in

H.C. CR. A. No. 108 of 2014)

****

JUDGMENT OF THE COURT

The appellant was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63) Laws of Kenya.** The particulars of the offence were that between the months of September 2014 and 30th October 2014 in Kasarani within Nairobi County she murdered **TWN**.

The appellant who was tried by **Lessit, J.** was convicted and sentenced to death in a judgment delivered on 8th May, 2017. Being dissatisfied with those findings the appellant has filed this appeal premised on Supplementary Grounds of Appeal drawn on her behalf by her lawyer, **Ratemo Oira & Co. Advocates** and filed in this Court on 20th February, 2019. These grounds may be summarised as follows: that there was no evidence led by the prosecution to establish identification of the appellant as the person who murdered the deceased; that conviction was based on doubtful evidence which was in any event, not evaluated; that the trial Judge erred in law and fact by relying on circumstantial evidence and by ignoring the defence tendered by the appellant; and lastly:

> ***"8. THAT the appellant urge (sic) this Honourable Court to consider the sentence and the mitigating factors in accordance with the decision of the Supreme Court of Kenya, Petition No. 15 of 2015; Francis Karioko Muruatetu & Another v Republic."***

We are therefore asked to quash the conviction and set aside the sentence. This is a first appeal from the judgment of the High Court in its original jurisdiction. It is now trite law that it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld – see **Okeno v Republic [1972] EA 32.** In the more recent case of **David Njuguna Wairimu v Republic [2010] eKLR** this Court reiterated this duty and pronounced itself thus:

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trail court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the***

decision."

The background facts as brought out by prosecution witnesses were that: on or about 22nd September 2014, **KNW, (PW1 – N)** left her daughter, the deceased under the care of her cousin, the appellant, and travelled to South Sudan to work as a beautician and a hair dresser. On 30th October 2014, N called the appellant who informed her that the deceased had a cold and was under medication. The following day (31st October, 2014) the appellant called N and requested her to travel back home as the deceased was not doing well and had been admitted at Neema Hospital. Upon arrival, N went to the home of the appellant where she was informed that her daughter, TN had died.

On 3rd November 2014, N went to Kenyatta University Mortuary where the body of the deceased was. She noted that the deceased had marks on her face, both elbows, knees and shoulders. She also observed that some wounds had healed while others were fresh. She became doubtful of what she had been told by the appellant on the cause of death and requested for a post mortem which was conducted after she made a report at the Kasarani Police Station. Upon the post mortem being conducted, the deceased's body was buried in Muranga.

HW (PW2 – W) testified that she was the appellant's cousin. She stated that before the deceased and her mother N started living with the appellant, they were living with her. She further testified that on the fateful day, she was at home when her son, JK came running and informed her that the deceased was sick and had been carried away by two women. When she went out to check, she saw the appellant with another neighbour carrying the deceased. The appellant told her that the deceased was unwell. She had followed the appellant to Neema Hospital where she learnt that the deceased had died. Upon arrival at the hospital and observing the body, she also noted that the child's body had fresh and healed wounds.

RWM (PW3 – W) was present with N at Kenyatta University Mortuary when the post mortem was being carried out. She testified that the doctor informed them that the child died after being physically tortured.

GGK, (PW 4 - G) went to the hospital upon being informed of the deceased's condition only to learn that the child had died.

The investigating officer, **PC NK (PW5)** on his part testified that upon the report of the death of the deceased being made, he commenced investigations. He initiated the post mortem and was also present when it was being conducted. He noted that the body had wounds and that the findings of the doctor contradicted with the report that the appellant had first made; that the child died while on a portee. He recorded statements from the witnesses. On 12th November 2012, while accompanied by other police officers he arrested the appellant and charged her accordingly.

Dr. Dorothy Njeru (PW 6) is the pathologist who conducted the post mortem on the body of the deceased. She noted that the deceased had deep injuries that went beyond the skin on both upper limbs, both elbows, the scalp, buttocks as well as the private parts. Internally, there were bruises around the genital areas, extensive bleeding on the skin covering the head into the brain. The deceased lungs were heavier than normal due to a bacterial infection.

The doctor formed the opinion that the cause of death was due to multiple injuries due to blunt force trauma and the injuries were suggestive of child battery.

PC David Kipchumba, (PW 6) took photographs of the deceased and processed them at Criminal Investigations Department headquarters. He noted injuries on the body of the deceased. He prepared a report which he produced in Court as part of the evidence.

That was the evidence led before the trial court which, upon analysis, the Judge found that the appellant should be placed on her defence.

The appellant, in a sworn statement, denied committing the offence. She testified that she was living with the deceased while the mother was working in South Sudan. She further testified that the child was always in and out of the hospital even before her mother N travelled to Sudan. She bought creams and medication for the deceased on various occasions but the deceased's condition did not improve. She further testified on how the deceased collapsed and was pronounced dead at the hospital. She denied battering the deceased or beating her at all.

The appellant called two witnesses. **GAA (DW2)** the appellant's husband testified that he worked in Machakos and was only at home two days in a week. He stated that the deceased had a skin disease and the blisters would itch. He kept reminding her not to scratch herself. When she scratched herself, she would turn red.

TAM (DW 3) was a neighbor to the appellant who ran a shop. She stated that the deceased used to scratch herself and had black patches on her body. She also used to see the deceased and talk to her. The deceased did not at any time tell her that the appellant or anyone else was beating her.

As we have stated, the trial Judge convicted the appellant and sentenced her.

This appeal came up for hearing before us on 13th November, 2019 when learned counsel **Mr. Ratemo Oira** appeared for the appellant while **SPPC Gitonga Muriuki** appeared for the respondent.

Mr. Oira abandoned all grounds of appeal only arguing ground 8 which we have set out in full in this judgment. This ground related to the death sentence imposed by the trial court and, as we understand it, counsel is asking us to interfere with it in line with the holding by the

Supreme Court of Kenya in the case of **Francis Karioko Muruatetu** (supra) where that court held that providing for a mandatory sentence for the offence of murder was unconstitutional.

Mr. Gitonga on his part submitted that despite the **Francis Karioko Muruatetu** case (supra) the death sentence is called for in light of the aggravating factors in the case that was before the trial court. Counsel submitted that the appellant tortured a minor who was under her care to death and so the sentence is deserved.

The issues for our determination are firstly, whether the elements of murder were established; secondly whether the trial court shifted the burden of proof to the appellant, and finally, the sentence awarded by the trial court.

We shall analyse these issues even as we note that counsel for the appellant abandoned all grounds of appeal arguing only ground 8 relating to the sentence. On whether the elements of murder were proved, instances when malice aforethought is established are provided for in **Section 206** of the **Penal Code as: -**

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance: -***
>
> ***(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> ***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
>
> ***(c) an intent to commit a felony:***
>
> ***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

It was explained by this Court in the case of **Isaack Kimani Kanuachobi V Republic** [**2013]** eKLR that:-

> ***"There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic v Kiprotich Leting & 3 Others (2009) eKLR HCCC NO. 34 OF 2008)."***

This court has therefore to analyze the evidence in light of these essential elements required to be proved by the State against the appellant for a guilty finding to be made.

On the death of the deceased and the cause of death, we find that the death of the deceased was proved beyond reasonable doubt through the evidence of the witnesses. The cause of death was proved by the pathologist, Dr. Dorothy Njeru whose evidence was not shaken at all. The doctor gave graphic details of how the deceased was an infant aged one year and 10 months, was battered repeatedly suffering various injuries some fresh, others older. These injuries comprised bruises, abrasions, scars and contusions (deep seated). The doctor found:

> ***"There were multiple extensive deep contusions seen on both upper limbs (hands) meaning they were deep seated which were beyond the skin. There were similar deep injuries on both lower limbs, to the knees, both elbows, the scalp i.e skin covering the head, the gluteal region or buttocks as well as the groin on private parts. Internally we found bruising around the genital areas. There was bleeding that was extensive and involving the entire scalp – skin covering the head, subgaleal hematomata. There was bleeding into substance for the brain especially on frontal and subdual hemorrhage on parietal region and multiple fecal subarachnoid hematomata. In short there was bleeding in the brain…."***

The doctor formed the opinion that the cause of death were multiple injuries due to blunt force trauma and that the injuries were suggestive of child battering. The doctor further testified that the injuries she saw were at various stages of healing, meaning they had been caused at different times and some were fresh while others were at various stages of healing:-

> ***"It means the injuries had not been caused as a one off but at different occasions."***

The grim picture painted by the pathologist is one where an innocent child was battered repeatedly for reasons that we shall never know. The child suffered injuries all over the body leading to her unfortunate death.

On whether the prosecution proved that the appellant committed the unlawful act that caused the death of the deceased and whether the accused had malice aforethought, we are satisfied from the nature of injuries sustained by the deceased that they were inflicted with the requisite malice aforethought. The facts of the case as we have already seen were that the deceased was left by her mother N in the custody of the appellant when N went to South Sudan to find employment. The deceased was merely one year and 10 months old by the time of death. The appellant was expected in the circumstances to take over the role of a mother and take care of the child. She instead turned into a

beast who, from the evidence, would batter the child and then purchase creams and ointment to apply to the wounds, only for the battering to start all over again. The doctor found fresh and old wounds, some even to the private parts, some affecting the brain. The child must have suffered intolerable pain.

The trial judge relied on circumstantial evidence to find that it was the appellant who battered the child and the battering which led to the death of the deceased was accompanied with malice aforethought. We have set out the definition of malice aforethought earlier in this judgment. For the same to be proved there has to be an intention to cause death of or to do grievous harm to any person, whether that person is the one actually killed or not; knowledge that the act or omission causing death will probably cause the death or inflict grievous harm to any person; an intent to commit a felony: an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed the felony.

The trial court found as fact that the deceased child was left by her mother in the custody of the appellant (they are cousins) for the 1½ months that N was away in South Sudan; that the deceased suffered various injuries that the appellant would not have failed to see, and;

> ***"The only inference that the court can make is that it is the accused, who had sole custody of the deceased at the time the injuries were inflicted and who inflicted the injuries. With due respect, the accused denied that the deceased was never battered cannot be true, reasonable or believable."***

Of the defence offered by the appellant, the trial Judge found it to be an afterthought.

We have gone through the defence given by the appellant and her witnesses and do not find it plausible at all.

The prosecution evidence, albeit circumstantial, proved beyond reasonable doubt that the appellant abused or battered the child on various occasions inflicting such serious injuries that the child died. Malice aforethought was proved and we agree with the trial Judge that the prosecution proved the case as required in law and conviction was properly entered. There was no shifting of the burden of proof in the case at all.

Finally, on whether the death sentence awarded is appropriate, the appellant referred us to the case of **Francis Karioko Muruatetu** (supra) asking us to interfere with that sentence. The Supreme Court of Kenya was asked in that case to answer the question whether it was constitutional for Parliament to impose a mandatory minimum sentence on a charge of murder. The court returned that courts should be free to consider particular circumstances of each case and give an appropriate sentence. It was therefore wrong for Parliament to impose a mandatory minimum sentence of death in offences of murder. That judgment has freed courts from the position that obtained before that judgment and courts are now able to look at each case, circumstances thereof, mitigation offered, amongst other considerations, and give an appropriate sentence.

What, then, are the circumstances here and was the sentence of death given by the trial court proper?

The trial court noted that the appellant was remorseful for the offence; was an orphan; she has two children aged 5 years and 1½ years; that the appellant had been in custody during pendency of the trial; that the appellant had learnt skills while in prison including making soap and yoghurt; that the appellant had gone through rehabilitation while in prison and, finally, that the appellant pleaded for a non-custodial sentence. The Judge however took a serious view of the case considering that the appellant battered an innocent child left in her care until the child died of the injuries the appellant inflicted on her. The Judge found that to be inhuman, heinous and callous, actions which the Judge found she could not countenance.

We have revisited the record and we need not repeat the facts of the case. The appellant, a cousin of the mother of the deceased, agreed to take custody and care of the deceased child when the child's mother went away to look for greener pastures. The society expected the appellant to be the child's mother during the mother's absence. Instead of taking in that role the appellant became a terror to the child – she battered her repeatedly inflicting the injuries found by the pathologist finding which the trial Judge agreed with. The innocent child for children of that age do not commit any sins calling for punishment - who was defenceless was battered until she died. We think that the Judge reached the correct conclusion as the sentence of death was deserved in that case. We disagree with counsel for the appellant that the appellant is entitled to any other sentence. The appeal has no merit and we dismiss it in its entirety.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR