IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 126 Of 2016

BETWEEN

MARGARET LICHA YOGO.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Homa Bay (Majanja J.) dated 24th June 2016 in

in

H C Cr. Case No. 20 of 2014)

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JUDGMENT OF THE COURT

The appellant jointly with Polycarp Onyango Yogo (now deceased) were charged with the offence of murder. The Information was that on the 27th day of March 2014 at East Kachieng Sub-Location in Ndhiwa District of Homa Bay County within the Republic of Kenya they jointly murdered DOO.

The prosecution case was founded on the testimony of an eye witnesses PW2 SOO a boy 14 years' old who after *voire dire* examination testified as follows:

> …. *Polycarp Onyango is D's father. D was our neighbour…. I recall on 27th March 2014, I was at home. I had gone to school. We left at 4.00 pm. I went to look for firewood. I went with D. Afterwards we went to play football. D sent some boys to come and catch him (sic). We told those boys to go away…..We told those boys not to catch D. His father came and left with him. D's father was alone. D tried to run away when he saw his father. His father chased him. He was trying to run to another home. He was caught near the hone. The home was for Adero.*
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> *We were afraid, so we stopped playing. We stood there watching. I saw D being taken to his grandmother's. He was held by his hand. From his grandmother's place, D was taken to his father's place. We were following them. He was taken near a window which he was accused of breaking it. The window was at his grandmother's home. D's father began to beat him. That grandmother was in her house. She did not come out.*
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> *D's father took him to his home and tied him on a tree next to his house. He continued beating him. D's grandmother came with a jerrican of paraffin. It was a yellow bottle made of plastic. She poured the paraffin on D. All over his body. When D's father was beating him, he was saying a thief is supposed to be killed……'s hands were tied to the tree and he was standing even when the paraffin was poured on him. He was still being beaten. He was wearing clothes. When Margaret poured paraffin she went back to her house. Margaret gave the matches to D's father. She did not talk. D was crying. Margaret is D's grandmother.*
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> *We were seated near a mango tree which was near the place. We were just seated. D' s father lit the match stick and threw it at D.*

… D started burning. The rope he was tied with burnt. The trousers did not burn. D's father was just standing watching. Margaret left just as D started burning. She was there when D's father lit the match. She did not do anything.

D started running when the rope burnt and he was set free. He started running toward my home. We also followed him. He was still burning. We helped him put off the fire…. He had fallen down when we were putting off the fire…..Another woman helped him and took him to the village elder…. Other people went to see D at the village elder's place. I did not see D again. He died.

PW6 Dr. Michael Ochola testified that he was a clinical officer attached to Homa Bay County Referral Hospital. He examined DOO on 1st April 2014 and filled a P3 Form. He was 12 years old. At the time of admission he looked sick and pale as a result of loss of blood. He had sustained 54% superficial burns on the anterior aspect of the trunk and also on the left and right hand. The injuries were five days old. He was admitted and treated. The degree of injury was classified as grievous harm.

PW7 Dr. Eddy Odhiambo Owour produced in court a post-mortem report by Dr. Misore Brendah who did an autopsy on the body of DOO. The post-mortem report indicated that the deceased died on 4th May 2014 at about 10.00 am. The body had burns on the upper torso above the waist line and septic burn wounds estimated at 57%. The cause of death was given as cardiovascular collapse due to septic shock and compartment syndrome as a result of the 58% wounds. In simple terms, the deceased suffered infection as a result of the burns as the skin could not protect the body functions.

The appellant in her unsworn statement of defence stated that on the material day, she had left home for the market. Upon her return she found that her son, (Polycarp) had assaulted his son (D) who was her grandson. Polycarp told her he was angry with the child because of what he had done. She told Polycarp that it was wrong to discipline a child in that manner. Later she heard the child had died and the police came and arrested her together with Polycarp and charged them with murder.

Upon evaluating the prosecution and defence evidence, the trial judge convicted the appellant for the offence of murder as charged. In convicting the appellant, the learned judge expressed as follows:

[21] What is clear and common ground is that the accused brought and drenched the deceased with paraffin. She committed the unlawful act that led to the deceased death. She must have known that by pouring paraffin on the deceased and setting him alight, in the circumstances when the deceased had been restrained on a tree while being beaten would lead to his death or at the very least in grievous harm to the deceased…..I am therefore satisfied that the prosecution proved malice aforethought as defined by Section 206 (b) of the Penal Code.

Aggrieved by the conviction and death sentence meted upon her, the appellant has lodged the instant appeal citing four grounds in a supplementary memorandum of appeal, *to wit:*

(i) The judge erred in convicting the appellant on unclear evidence as to the immediate cause of death.

(ii) The judge erred in failing to find that the prosecution had not proved its case beyond reasonable doubt.

(iii) The judge erred and failed to adequately evaluate the entire evidence on record.

(iv) The judge erred in sentencing the appellant to death yet the death penalty had been held to be unconstitutional.

At the hearing of this appeal, learned counsel Mr. Muwango holding brief for Mr. Teremwa appeared for the appellant. Learned counsel Mr. Peter Muia, Prosecution Counsel I, appeared for the State. Both parties filed written submissions in the appeal.

Counsel for the appellant rehashed the evidence of all prosecution and defence witnesses. It was urged that the learned judge did not properly evaluate the evidence as tendered before court; that whereas PW1 stated it was the appellant who set the deceased on fire; PW2 stated that it was the deceased's father (Polycarp) who set him on fire; that the testimony of PW1 and PW2 was contradictory and the learned judge erred in relying on the testimony of PW2; and that the testimony of other witnesses was largely circumstantial and hearsay.

It was urged that the deceased died on 4th May 2014 while admitted in hospital. This was thirty-eight (38) days after the incident had occurred and it is not certain whether it was the burns that caused the death of the deceased. Negligence and lack of immediate treatment could have been the cause of the septic infection that led to the death. The medical report produced in court pointed to the immediate cause of death as being different from the burns and causation was not proved between the burning and the cause of death.

It was further submitted that *mens rea* on the part of the appellant was not proved; that the learned judge relied on hearsay to prove malice aforethought; that the prosecution case was riddled with suspicion that it was the appellant who killed the deceased, but suspicion however strong cannot lead to a conviction.

Lastly on the death sentence meted upon the appellant, it was urged that the Supreme Court in the case of **Francis Karioko Muruatetu & another – v-Republic, SC Petition Nos. 15 & 16 of 2015,** declared the death sentence to be unconstitutional.

The State in opposing the appeal submitted that the trial judge properly evaluated the evidence on record. All the essential ingredients for the offence of murder were proved. Malice aforethought on the part of the appellant was proved to the requisite standard. Malice aforethought was proved taking into account the extent of injuries sustained by the deceased as confirmed by PW7. The identity of the appellant as one of the persons who committed the offence was proved through recognition. The appellant was grandmother to the deceased and there was no question of mistaken identity.

It was urged that the prosecution evidence was consistent in material particulars; that the appellant lived near where the body of the deceased was found; that the appellant was found with the deceased's belongings; that the number that had called the deceased was found to be the appellant's and when the appellant was called she had switched off her phone; and that neither cross-examination of the prosecution witnesses nor the evidence tendered by the appellant dislodged the prosecution case.

On the death sentence meted upon the appellant, it was urged that given the gruesome nature and circumstances under which the offence was committed, the appellant deserves no leniency. The State urged us to affirm the conviction and uphold the death sentence.

This is a first appeal. We have considered the grounds of appeal and the written submissions filed by both parties as well as the authorities cited. We have also considered the record of appeal and re-evaluated the evidence by the prosecution and defence.

It is not disputed that the deceased died on 4th May 2014. It is also not in dispute that the deceased was tied and tethered on a tree and burnt. It is also not in dispute that the appellant and Polycarp Otieno were at the scene of crime. The evidence of PW2 conclusively placed the appellant at the scene of crime.

The critical issue in this appeal is whether the appellant committed the *actus reus* and had the requisite *mens rea* for the offence of murder.

The testimony of PW2 is a narration of the sordid and gruesome events that led to the burning of the deceased. PW2 testified that it was the appellant who brought paraffin that was used to drench and douse the deceased. PW2 further testified that it was the appellant who passed on a match box to the deceased's father. Whereas there is conflicting evidence as to who between the appellant and the said Polycarp lit the match stick, it is not in dispute that the two were executing a common purpose and a common intention. When the appellant brought the paraffin, when the appellant brought the match box, the intention was very clear – to set the deceased on fire. The appellant was well aware and must have seen that the deceased was tied with a rope and tethered on a tree. From these undisputed facts, the appellant knew or ought to have known that the deceased who was tethered and restrained could do nothing to run or save himself from the impending fire. The match stick was lit and thrown at the deceased. He got burnt. PW2 further testified that the appellant walked away as if nothing untoward had happened. This is the sordid and gruesome part of the offence.

Having re-evaluated the eye witness account of PW2, we are satisfied that the appellant jointly with Polycarp committed the offence of murder as charged and she had the requisite *mens rea* to prove the offence of murder. It is the appellant who brought the incendiary material (paraffin and match box) to burn the deceased. From the eye witness account of PW2, we find that the learned judge did not convict the appellant on suspicion, hearsay or circumstantial evidence. The appellant was convicted based on direct evidence of an eye witness. We thus find that the trial judge did not err in convicting the appellant for the offence of murder.

In this appeal, it has been urged that there was no proof that the burns sustained and suffered by the deceased was the cause of death; that negligence and lack of immediate medical attention could as well have been the cause of death. The post-mortem report produced in court indicates in simple terms that the deceased died of infections due to burns on the skin which could no longer protect the body functions. The simple explanation of the medical cause of death proves causation and establishes that the burns inflicted upon the deceased by the appellant jointly with another was the cause of death.

On the death sentence meted upon the appellant, the law on the power and jurisdiction of an appellate court to interfere with a sentence passed by a trial court was correctly espoused in the case of **Ogalo s/o Owuora 1954 24**

EACA 70 *to wit* that an appellate court has power to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or that the sentence is illegal or manifestly excessive as to amount to a miscarriage of justice.

Comparatively, the general principles that an appellate court adopts in an appeal relating to sentence were authoritatively stated by **Nicholas J** in the South African case of ***R - v - Rabie*** **{1975} (4) SA 855 (A) at 857D-F** as follows:

1. *"In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-*

   (a) should be guided by the principle that punishment is "pre- eminently a matter for the discretion of the trial Court"; and

   (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

Further, in the case of **Alister Anthony Pareira – v - State of Maharashtra, {2012}2 S.C.C 648 para 69**, the Indian Supreme Court held that:

> *"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"*

The Supreme Court in **Francis Karioko Muruatetu & another – v-Republic, SC Petition Nos. 15 & 16 of 2015** held that a mandatory death sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case.

In the instant matter, we have considered the gory manner in which the deceased met his death. He died from the hands of his father and grandmother. Better a death caused by a stranger than by a parent and grandparent for the curse of generations to come loom yonder. The tethering of the deceased on a tree and the deliberate drowsing of paraffin on the deceased lead us to find that the appellant deserves no leniency. The Supreme Court in the **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015** did not outlaw the death penalty. Death sentence remains a lawful punishment in the law books of Kenya. The blood and soul of the deceased cry for punishment. We see no reason to interfere with the death sentence meted upon the appellant.

The upshot is that we affirm and uphold the conviction of the appellant for the offence of murder. We uphold the death sentence. This appeal has no merit and is hereby dismissed.

This Judgment is delivered pursuant to rule 32(2) of the Court of Appeal Rules since Odek, JA passed on before the delivery of the judgment.

Dated and delivered at Nairobi this 19th day of June, 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.

Signed

DEPUTY REGISTRAR