



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, SICHALE & KANTAL, J.J.A.)

CRIMINAL APPEAL NO. 8 OF 2016

BETWEEN

MILLICENT ATIENO OTIENO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (Majanja, J.) dated 22nd October, 2015 in HC. CR.C. No. 97 of 2014)

JUDGMENT OF THE COURT

This is a first appeal from the conviction and sentence of the appellant, **Millicent Atieno Otieno**, who was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** at the High Court of Kenya, Migori. Particulars in the Information were that on 10th October, 2014 at Osaka estate in Migori County she murdered Millicent Akinyi. Being a first appeal, and as has been established in a long line of cases from this Court such as the case or **OKENO v REPUBLIC [1972] E.A. 32** it is our duty to re-evaluate the evidence and draw our own conclusions from that evidence. We are not bound to follow the findings of the trial court but we must remember that the trial court has had the advantage of hearing and seeing witnesses and observing their demeanour.

The appellant was the wife of a man called **Bernard Otieno**.

In the early morning of 10th October, 2014 Millicent Akinyi (the deceased) reported to her place of work where she used to prepare meals for customers. **George Okinyi Abonyo (Abonyo – PW1)** visited the deceased at that place accompanied by the appellant's husband and were served food. The appellant covered in a "leso" or "kikoy" presently arrived, and appeared cheerful. She asked her husband whether the deceased was his younger wife and he replied in the affirmative. According to this witness and also according to the evidence of **Maureen Achieng Ochuka (Achieng – PW5)**, who was also present, the appellant approached the deceased complimenting her over her beautiful features. The appellant pretended to extend her hand in greetings but suddenly produced a knife with which she stabbed the deceased in the chest. The deceased tried to flee but she collapsed a few feet away and upon being rushed to the nearby Ombo Hospital by Abonyo and her husband she was pronounced dead.

Abonyo and Bernard Otieno reported the matter to Migori Police Station. **No. 2005006116 APC Abdirahman Ismail (PW3)**, stationed at the District Commissioners office, Migori, was telephoned by an administrator at Ombo hospital and informed that there was tension at the hospital as a result of the events that had taken place leading to the deceased's death. He rushed there with a colleague where he arrested the appellant and took her to Migori Police Station where she was re-arrested by **No. 75725 PC Paul Masai (PW4)**, detained and later charged with the said offence.

The other prosecution witness called was **Dr. Niran Chauhan (PW2)** of Migori Referral Hospital. He performed a post-mortem on the body of the deceased where he found a stab wound at the sub-clavicular area just below the neck. There was blood in the pericardium of the heart, the left and right atrium was ruptured and cause of death was due to haemorrhage secondary to the stab wound. He stated in cross-examination that the sharp weapon penetrated the intercostal muscles straight into the heart creating a 6-8 cm deep wound.

That was the case made out by the prosecution and the trial judge found that there was a *prima facie* case. Put on her defence the appellant informed the trial court that on the fateful day she was on her way to work when she was surprised to find her husband, Bernard Otieno, holding the deceased in a romantic embrace. She confronted her husband who let go the deceased and walked away without talking to her. The appellant then asked the deceased who she was but instead of answering, the deceased attacked the appellant. They were fighting when the deceased picked up a weapon with which she attempted to stab the appellant but the appellant fought back. The deceased walked away crying that she was injured and fell down. When the appellant reached where the deceased was she found her seriously injured; she raised an

alarm and members of the public assisted the appellant to take the deceased to hospital where she died.

Of the evidence of Abonyo the appellant testified that he (Abonyo) was a bad man, a drunkard, who always misled her husband. She denied committing the offence. The trial judge (Majanja, J.) analysed the evidence by both sides and in a judgment delivered on 22nd October, 2015 he found that the case for the prosecution proved the charge. He convicted the appellant and sentenced her to suffer death.

Those are the findings that provoked this appeal through Amended Memorandum of Appeal drawn by the appellant's lawyer, **Emukule John Mark** filed in court on 2nd July, 2019. There are 5 grounds of appeal set out which range from an attack on the trial judge who is said to have ignored the defence given by the appellant; that there was a shifting of the burden of proof and that the prosecution did not prove the case; that the judge erred in relying on evidence of a single witness which evidence was hearsay evidence; that the judge erred in convicting the appellant in the absence of evidence of Bernard Otieno which evidence is said to have been key to the case and, finally, that the death sentence meted out as a mandatory sentence was unconstitutional.

Mr. Emukule, learned counsel for the appellant, relied fully on written submissions which he had filed on behalf of the appellant. Of the death sentence imposed counsel submitted that the mandatory nature of that sentence was unconstitutional and urged us to reconsider the same.

Mr. L.K. Sirtuy, learned Principal Prosecutions Counsel, in opposing the appeal, submitted that the prosecution had established its case through eye witnesses and that evidence was corroborated. On sentence counsel left the matter to us.

We have considered the record of appeal and submissions made.

The trial judge considered the case and concluded that there was direct evidence through Abonyo and Achieng who witnessed the appellant stabbing the deceased early in the morning. They both knew the appellant and the deceased before that incident.

On our own evaluation of the evidence we have reached the same conclusion as the trial judge. The appellant met the deceased in the company of her husband, Bernard Otieno, and when the man confirmed that the deceased was his younger wife the appellant, who all along was concealing a sharp knife, produced it and stabbed the deceased. As confirmed by the medical evidence, the stabbing was so deep that it reached the heart leading to excessive bleeding; the heart stopped pumping and the deceased must have choked to death in her own blood. All elements of the offence of murder, that is, proof of death and cause of the deceased's death; that the cause of her death was as a result of the direct consequence of the appellant's unlawful act; and that the unlawful act was committed with malice aforethought as defined by **Section 206** of the **Penal Code** were proved to the required standard.

On the appellant's complaint in the Memorandum of Appeal that a witness, Bernard Otieno was not called – we note that the record shows from evidence of witnesses including the appellant that the said Bernard Otieno was the appellant's husband. In the event he was not a compellable witness as the provisions of the Evidence Act protects spouses from testifying against each other in criminal court. The ground of appeal has no merit at all and is dismissed.

The appeal on conviction fails and is dismissed.

Counsel for the appellant has raised as a ground of appeal the sentence of death that was imposed by the trial judge. Upon conviction the appellant, in mitigation, pleaded that she was a mother of young girls; that she found herself in a difficult position and she prayed for mercy. The trial judge considered this mitigation but found that the offence of murder attracted a mandatory death sentence. The trial judge was entitled to do so as that was the legal position at that time.

The Supreme Court of Kenya was asked in **Francis Kariako Muruatetu v Republic [2017] eKLR** to answer the question whether imposing a death sentence as a mandatory sentence was constitutional in Kenya. That court considered that question and returned the verdict that it was unconstitutional to provide a mandatory death sentence. That finding has freed courts in Kenya to consider the circumstances of each case, the mitigation circumstances, if any, and impose an appropriate sentence including the death penalty where deserved.

We have considered the circumstances of the case before the trial court. The appellant was married to Bernard Otieno. She appears to have been offended when she learnt that she had a rival in the marriage, the deceased. She decided to take out revenge on the rival but in doing so she went overboard when she armed herself with a sharp knife which she used to kill the deceased. She cried to the judge for mercy, saying that she had young children. Considering all these facts we think that a sentence of a term of imprisonment is deserving in this appeal. We set aside the sentence of death imposed by the trial court and substitute thereof a sentence of 15 (fifteen) years imprisonment with effect from the date of the appellant's conviction.

Dated and delivered at Kisumu this 21st day of November, 2019.

HANNAH OKWENGU

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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.

DEPUTY REGISTRAR