IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 231 OF 2011

BETWEEN

EMILY NEKESA COSMAS ………………......APPELLANT

AND

REPUBLIC ………………………………….RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma, (Muchemi, J.) dated the 20th day of June, 2011

in

HCCRA NO. 44 OF 2006)

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JUDGMENT OF THE COURT

1. **Emily Nekesa Cosmas,** the appellant, was charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code.** It was alleged that on the night of 12th and 13th November, 2006 at Malakisi Village in Bungoma District, she murdered **Isabella Namucheka Masinde,** hereinafter referred to as *"the deceased"*. After a full trial before the High Court at Bungoma, **(F. N. Muchemi, J.),** the appellant was found guilty as charged, convicted and sentenced to death as by law prescribed.

2. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this Court. In her memorandum of appeal filed through **J. O. Makali & Company Advocates,** the appellant faulted the learned judge for convicting her in the absence of direct evidence linking her to the commission of the offence; for convicting her on circumstantial evidence that did not reach the required threshold; for convicting her on the basis of suspicion which cannot be a substitute of proof beyond reasonable doubt; for convicting her of murder without addressing her mind to the constitutive elements of the said offence; and for disregarding her evidence tendered in defence.

3. What were facts that led to the appellant's conviction? The deceased was an eleven years old girl who was staying with her older sister, the appellant, in the appellant's house at Malakisi. On 12th November, 2006 the appellant left her baby under the care of the deceased and went to the market. When the appellant returned home at about 6.00 p.m. she found her baby alone in the house.

4. The appellant went to the house of her neighbour, **Yashina Salim, PW 2,** and told her that she had returned from the market and found her baby alone; that she would discipline the deceased when she returned home. Later on in the evening the appellant told PW 2 that someone had stolen her money and property from her house. On the following day the appellant told PW 2 that she was going to her parent's home and left the keys to her house with PW 2 to be given to the appellant's husband, **Cosmas Watibwa, PW 1.**

5. Later in the day PW 2 saw PW 1 and she offered the keys to him but he refused to take them. PW 1 went away and after about 30 minutes returned with police officers. PW 2 was questioned as to how she had come by the keys and she explained that they had been given to her by the appellant. PW 2 learnt that the body of the deceased had been found near a store within the home compound of the appellant. At the material time, no one else was living in that home except the appellant and the deceased, who was taking care of the appellant's baby.

6. PW 1 testified that on 11th November, 2006 he was at his Malakisi home where his second wife, the appellant, was living. On the following day he left for Bungoma, where his first wife was residing. In the course of the day, the appellant arrived with the baby; she informed him that their store had been broken into and some property stolen by their nephew, **Eric Wanyonyi.** PW 1 told the appellant they should go to their Malakisi home to find out the extent of the theft but she refused, instead she said she was proceeding to her parents' home to look for her young sister, the deceased, who she said had disappeared from home.

7. PW 1 went to his Malakisi home alone. He found the door to the store missing. Within the home compound, PW 1 saw heap of fresh green leaves; he removed them, only to realize that they had covered the deceased's lifeless body. He went to Malakisi Police Station to make a report. The police told him that the appellant had earlier reported that the store had been broken into but had not said anything about the deceased.

8. Senior Sergeant **Titus Wanjala, PW 6,** told the trial court that when they accompanied PW 1 to the scene, they found the body of the deceased in a trench covered with fresh leaves.

9. Police Constable **Mulango Tali, PW 5,** then based at Bungoma, scenes of crime section, went to the scene on 13th November, 2016. He was accompanied by the Officer Commanding Station, Malakisi Police Station. PW 5 testified that the deceased's body showed some bleeding from the nose; the inner pants were at her lower left leg; the clothes indicated some struggle; and it appeared that the body had been dumped at the scene after the killing.

10. A post mortem report that was produced by **Dr. Habel Alwang'a, PW 8,** revealed that the cause of death was cardio-respiratory failure due to head injury with intracranial bleeding as a result of assault.

11. In her sworn statement of defence, the appellant stated that on 12th November, 2006 she left her house at around 5.30 p.m. and went to a neighbour's house. When she returned she found the deceased and her baby in the house, however, her clothes and bags that contained Kshs.3,000/= had been stolen. When she asked the deceased who had stolen the said items, the deceased said that she had no idea and immediately thereafter ran away from the house and did not return. The appellant went to bed and in the morning went to make a report at Malakisi Police Station. She then went to her parent's home and notified them, but before that she had also told her husband about the incident. She denied having murdered the deceased.

12. In cross examination, the appellant alleged that on the material night she wanted to beat up the deceased, but she did not; that as the deceased was running out she hit herself against a metallic door; and that she did not bother looking for the deceased throughout the night.

13. The learned trial judge found that there was sufficient circumstantial evidence that connected the appellant to the death of the deceased. She rejected the appellant's defence and held that there was medical evidence that the deceased had multiple abrasions on the forehead, nasal bridge and both upper

anus as a result of assault; that the appellant had told PW 2 that she would discipline the deceased; that assuming the deceased had merely disappeared, the appellant would have gone looking for her on the material night; that the appellant had reported to the police about the alleged break-into her store but not about her missing sister; and that the appellant's use of excessive force against the deceased was a manifestation of malice aforethought.

14. Arguing the appeal, the appellant's counsel, **Mr. Murunga,** submitted that the learned judge erred in convicting the appellant of murder without any direct evidence or sufficient circumstantial evidence. Counsel cited this Court's decision in **Omoro v Republic [1994] KLR, 496** where the Court held that before an act can be murder, it must be aimed at someone; and in addition it must be an act committed with one of the following intentions:-

> a. the intention to cause death;
>
> b. the intention to cause grievous bodily harm;
>
> c. where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse.

15. As regards sufficiency of the circumstantial evidence, Mr. Murunga submitted that the trial court did not ascertain the relationship between the breaking into the store and the death of the deceased, saying that to prove a case based on circumstantial evidence only, there must be an unbroken chain of evidence and every element making up the unbroken chain of evidence must be adduced by the prosecution, as held by this Court in **Mwendwa v Republic [2006]** 1 KLR 133.

16. **Mr. Mulati,** Senior Principal Prosecution Counsel, opposed the appeal. He submitted that even though there was no direct evidence connecting the appellant to the commission of the offence, the circumstantial evidence that was adduced by the prosecution was sufficient to warrant a conviction on a charge of murder. He cited the evidence of PW 2 where the appellant had told her that she was going to discipline the deceased; that on the following day the appellant reported to the police about theft of her properties from her store but not about the disappearance of her young sister, the deceased; the appellant's abrupt decision to go to her parents' home; and the nature of the injuries sustained by the deceased which caused her death. He urged this Court to uphold the conviction and sentence.

17. We have considered the record of appeal and the submissions by counsel. It is trite law that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt, see **Simon Musoke v Republic [1958]** E.A.75**, Khadija Mwaka Yawa v Republic [2008]** e KLR.

18. It is not in dispute that there was no direct evidence to convict the appellant of the death of the deceased. What we must therefore consider is whether the circumstantial evidence that was adduced against her was sufficient; and if so, whether the evidence pointed to the commission of the offence of murder.

19. On the day preceding the night, the deceased went missing, the appellant had gone to the market leaving the deceased with her child. Upon her return, she found the child alone. She was upset at that and according to PW 2, she vowed to discipline the deceased for leaving her baby unattended. Later that evening, she told PW 2 that someone had stolen her money and some other property; on the following day she told PW 2 that she was going to her parents' home but said nothing about her late sister's whereabouts.

20. The appellant's utterances and actions towards her husband, PW 1, were also suspicious. She refused to return with him to their Malakis home, preferring instead to go to her parents' home, apparently to look for the deceased. The appellant had reported the break into the store, but had not mentioned that the deceased had gone missing.

21. The nature of the injuries that the deceased had sustained and which led to her death were consistent with assault. She had multiple abrasions on the forehead and bridge of the nose; both upper arms and bleeding from nostril. PW 8 concluded that the head injury that led to the internal bleeding was as a result of assault.

22. The appellant told the trial court the deceased hit her head against a metallic door when she was running out.

> The question is - even if that was so, why was the deceased running out that evening, if not to escape from the appellant's beating?

23. In our view, taking into consideration the totality of all the above, there was sufficient circumstantial evidence that pointed to none else but the appellant as the only person who must have assaulted the deceased. In **Rex v Kipkering Arap Koske & Another (1949) 16 EACA 135,** the predecessor to this Court cited **Wills on circumstantial evidence** 6th edition page 311 where the learned author stated:

> **"In order to justify 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."**

We believe the necessary threshold of circumstantial evidence was attained in the matter that was before the trial court.

24. Having come to the above conclusion, the next issue for our determination is whether in assaulting the deceased, the appellant had malice aforethought, which is defined by **section 206** of the **Penal Code** as follows:

> **"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**
>
> **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;**
>
> **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;**
>
> **an intent to commit a felony;**
>
> **………………………………… "**

25. From the circumstances that led to the death of the appellant's young sister, we believe that the appellant's intention in assaulting the deceased was to punish her for leaving her baby unattended. However, the appellant, in a fit of rage, occasioned the deceased fatal injuries. In such circumstances we are unable to uphold the appellant's conviction on the charge of murder. Based on our evaluation of the evidence we are not satisfied that the prosecution established that the appellant had malice aforethought. The appellant committed manslaughter, we so find.

26. Consequently, we hereby quash the appellant's conviction of murder contrary to **section 203** as read with **section 204** of the **Penal Code** and substitute it with a conviction of manslaughter contrary to **section 205** of the **Penal Code.** Similarly, we set aside the death sentence and substitute it with sentence to imprisonment for a term of fifteen (15) years from the date of conviction by the trial court, considering that the appellant has been in custody since November, 2006.

DATED and Delivered at Eldoret this 24th day of March 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL