IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

(CORAM: VISRAM, KOOME & OTIENO-ODEK- JJ.A.)

CRIMINAL APPEAL NO. 67 OF 2013

BETWEEN

FREDA KANUI MUSA Alias **FRIDA KARUGU……..….. APPELLANT**

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.) dated 17th November 2011

in

H.C. Cr. Case No. 3 of 2009)

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JUDGMENT OF THE COURT

1. **FREDA KANUI MUSA** alias **FRIDA KARUGU**, the appellant, was charged with murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. The Information is that on the 25th day of December, 2008, at Munithu Location of Meru Central District within Eastern Province murdered Mercy Kagwira. The appellant was tried, convicted and sentenced to death.

2. The key testimony in support of the charge against the appellant was given by **PW 2 Doris Kairundi.** The witness testified as follows:

> ***"I come from Munithu in Meru. I knew Mercy Kagwira (deceased). She was married to my brother Stanley Mwirigi. I came to know Frida Kanui (accused) the day she stabbed Mercy. I can see her in court. It was 9.00 am when I saw her. On 25th December, 2008, just after 9.00 am I was at home. Mercy came to visit her child because she had disagreed with her husband a few months before about 3 months. After disagreeing, Mercy went to Nairobi. Then when she came to see her child, Mercy entered my house. The child was in the grandmother's house. She had brought clothes to her child. As we talked with Mercy, Frida came out of Mwirigi's house. I saw Frida come out of Mwirigi's house. From my house to Mwirigi's house is like from court entrance door to Judge's door, 10 metres. Our doors don't face each other but one can see clearly. Frida and Mercy were quarrelling over***

the husband. Mercy was saying she should be given back her house. Mercy was saying those things at my door step. Frida said she did not know anything about the house. It was my first time to see Frida when she came out of my brother's house. Frida stabbed Mercy as Mercy stood beside me. I saw Frida push me aside to reach Mercy. Frida hit Mercy and Mercy started protecting herself. In less than few minutes, I saw Frida pull out a knife from her waist she first stabbed Mercy on her hand: in a flash, Frida stabbed Mercy on the neck and left the knife stuck on the neck. Frida then ran away. I can identify the knife…. I cannot tell how deep the blade entered Mercy's body because there was no blood. Frida ran into my auntie's house and locked herself in. My aunt's name is Jane Mukwamunene. We screamed and people came. The members of the public tried to break the door of the house …... As people tried to break the door my aunt pleaded with them to wait for the police. Police came and arrested Frida from the house. Mercy's body was also carried away. When Mercy was stabbed, she took few steps (shows 3 metres) then collapsed. Mercy could not be helped because she died in less than five minutes. Mwirigi was not present at the time of the incident. He had gone to fetch water before the quarrel began, Mwirigi came back and found Mercy already stabbed. Mwirigi was afraid and he ran away. He has never returned to date. Mwirigi got a shock and ran away. After this incident we started crying and had no chance to ask Mwirigi about his relationship with Frida. It is Frida who started the quarrel".

3. **PW 3 Isaac Murangeri** testified as follows:

"I live in Munithu. I sell in my shop. I know Mercy Kagwira (deceased). She was my brother Stanley Mwirigi's wife. I did not know Frida before that day. I first saw her the day she stabbed Mercy. She is here in court. She had a small child. She had no child that day. On 25th December 2008 I was at home. Mercy Kagwira came to bring clothes for her child for Christmas. Mercy went into my sister Dorothy's house. I was outside my house which is in the same compound. I saw Frida come out running from Stanley Mwirigi's house. I was not aware there was anyone in Mwirigi's house. I heard Frida ask Mercy "will you ever abuse me again?' Within no time Mercy fell down. I did not hear Mercy answer Frida. I saw Frida stab Mercy with this knife. When Mercy fell down, I saw a knife stuck on her neck, that knife was eventually pushed out by gushing blood. I had not seen the knife before then. Frida wanted to run away but I blocked her and she fell down. She then ran into Jane's house. She is called Jane Mukwamugambi or Jane Mukwamunene. She is my aunt. Police came in 20 minutes after the incident. Mwirigi was a distance away in a shamba. He came after Mercy had been stabbed. When he came he started crying. As I speak, Mwirigi is in Maua for the last 3 months. When police came they found Mercy dead. They carried her body and arrested Frida. I later made a statement with the police. Frida has been in custody for over 3 years and she has a child (accused has 8 months old child). I cannot say that Frida was my brother's wife. The one I knew was Mercy who had one child. I had not seen Mwirigi bringing girlfriends at home".

4. PW 4 Joseph Mugambi is the father to the deceased. He testified that he knew Mercy Kagwira as the wife to his son Stanley Mwirigi. That on 30th December, 2008, he went for post mortem on the body of the deceased. He identified the body. That prior to this, in August, 2008, the deceased and his son Stanley Mwirigi were living amicably. However, in August, 2008, they disagreed and Mercy left and went back to her home. Later she got a job in Nairobi. On 25th December, 2008, she came to visit her child in PW4's home. PW4 was not at home then, but he said he was not aware of any other relationship between his son and other women.

5. PW1 Dr. Makandi Mutwiri, a medical doctor produced a post-mortem report conducted on the body of the deceased. The post mortem was done on 30th December, 2008. The findings are that the deceased was an African lady 20 years old and of petite body frame. Externally she had a cut wound on the head which was approximately 4 cm up to the scalp; there was deep cut wound on the left anterior neck around 5 cm from the clavicle with injuries to the large blood vessels of the neck extending interior

to the chest cavity. Internally there was haematoma on left chest. The cause of death was massive internal haemorrhage secondary to the cut wounds.

6. The appellant gave a sworn testimony in her defence. She testified that on 25th December, 2008, she was at her home with her husband whose name she gave as Mwirigi. That she woke up and decided to go and draw water; that when she returned and reached her door, she was pulled backwards and when she looked she saw a person drawing a knife and she was stabbed; that she was stabbed again on her palm; that she struggled with the girl who stabbed her; she did not know her name; she is the deceased in this case; that they were outside the house and she stood up and ran inside the house and she was arrested; that Mwirigi had married her (appellant) and they lived together in her home area for 3 years then in Mwirigi's home for six months; that she lived with Mwirigi for 3 years at her parents' home at Maua. That it was the deceased who came to her home; that she was not aware the deceased had been living with Mwirigi; that when she went to Mwirigi's house she did not find any child and they were living in the house just the two of them. That she knew Dorothy Kairuthi, (PW2), who used to live at her husband's house. That she did not see Dorothy on the material day; that she did not talk to the deceased; the deceased just pulled her backwards and they struggled over a knife and she slid and fell on it; that she did not see where the knife cut her; that it was the deceased who had the knife.

7. The trial Judge held that the appellant committed the offence with malice aforethought. In convicting the appellant, the court expressed as follows:

> ***"....according to PW2 and PW3, the accused reached into her waist, removed a knife and stabbed the deceased on the neck. She left the knife still stuck on the deceased's neck and ran to PW2 and PW3's aunt's house where she locked herself. The prosecution has shown that the accused carried the knife in her waist before the attack. The prosecution's evidence clearly establishes that the accused premeditated the attack on the deceased. The prosecution's evidence also established that the accused struck the deceased on the neck. That was proof that the accused had formed the intention to either cause death or grievous harm to the deceased. Malice aforethought was, therefore, proved in all the circumstances of the case. The accused in her sworn statement stated that it was the deceased who had a knife and who aimed the knife at her from behind. The accused claimed that the deceased followed her to Mwirigi's house when she attempted to stab her. The accused said there was a struggle between them before she escaped to Mwirigi's aunt's place. The accused's defence that it was the deceased who had the knife is not true. There was no evidence that could suggest that PW2 and PW3 were lying against the accused. Both witnesses said they had not seen the accused before that day and that they were unaware she was in Mwirigi's house. I considered the demeanour of both witnesses and found them truthful witnesses worthy of belief…I find that the prosecution has proved its case against the accused person beyond reasonable doubt. I reject her defence and find the accused guilty of murder contrary to Section 203 of the Penal Code and convict her accordingly".***

8. Aggrieved by the conviction and death sentence, the appellant has lodged the instant appeal before this Court. In home-made memorandum of appeal dated 29th October, 2012, the appellant raises seven (7) grounds *to wit:*

> ***a) the learned trial Judge erred both in law and fact in failing to make a finding that malice aforethought was not proved and she ought to have substituted the charge of murder to the lesser charge of manslaughter;***
>
> ***b) the learned trial Judge erred both in law and fact in failing to observe that PW2 and PW3 eyewitnesses were lying and that their evidence should be disregarded;***
>
> ***c) the learned Judge erred in failing to note that the prosecution failed to summon vital witnesses who should have been independent witnesses and not related to the family of Mwirigi;***

d) the learned Judge erred both in law and fact in failing to note that the prosecution failed to summon the accused husband who could have clarified many conflicting facts in the adduced evidence;

e) the learned trial Judge erred in convicting the appellant and sentencing her to death when she was pregnant;

f) that the death sentence is unconstitutional as it deprives the appellant the right to life under Article 26 (1) of the Constitution and violates the right against severe punishment in Article 50 (2) of the Constitution;

g) that the appellant's defence was rejected without sufficient reasons.

9. At the hearing of the appeal, the appellant was represented by learned counsel **Ms Jacqueline Nelima** while the State was represented by Senior Prosecution Counsel, **Mr.Jackson Makori.**

10. Counsel for the appellant relied on the home made grounds of appeal emphasizing that *mens rea* for murder was not proved beyond reasonable doubt. It was submitted that there was no malice aforethought and the prosecution did not prove the appellant intended to kill. The trial court was faulted for failing to evaluate the evidence and find that it was the deceased who went to the house where the appellant was living with Mwirigi; that this conduct on the part of the deceased was provocation and it was the deceased who went to cause the fight; it was submitted that there was no evidence on record to support the notion that it was the appellant who had the knife; counsel submitted that it is not clear where the knife came from; that the trial Judge erred in failing to consider that there was a quarrel, fight and struggle between the deceased and the appellant and this was provocation that ought to have reduced the charge to manslaughter. Counsel cited the case of ***R -v- Okwany & Another, (2003) KLR 2005 Vol. 1 833-836; Veronica Anyango Okumu – v- R., (2003) CA. (2009) Vol 47 at p.35; Alex Mzee Landi – v- R., (2007) CA (2008) vol. 43 pgs 43-44 and Omoro – v- R., (1987) KLR 1994 at pages 496-504*** in support of the submissions.

11. The State in opposing the appeal submitted that the trial court found PW2 and PW3 to be reliable and honest witnesses; that account of what happened on the fateful day as stated by PW2 and PW3 were consistent and corroborative of each other; that the act of stabbing the deceased on the neck meets the definition of malice aforethought; that the deceased simply demanded her house back when she went to visit her child on Christmas day; that it was the appellant who came out of Mwirigi's house and went to attack the deceased; that the appellant's defence was a mere denial and an afterthought; that the appellant was not a wife to Mwirigi but simply a girlfriend who was enraged upon seeing the wife returning back; that the appellant intentionally stabbed the deceased with the aim of causing death; the deceased was a petite lady and the force used and extended by the appellant was excessive; that the Court should take judicial notice of the big size of the appellant; that the case of ***Veronica Anyango Okumu –v- R., (supra)*** cited by the appellant is distinguishable as the appellant and deceased were co-wives. In response, counsel for the appellant submitted that during the quarrel and struggle between the appellant and the decreased, emotions ran high and provocation should be considered to reduce the charge to manslaughter.

12. This being a first appeal, we are reminded of our primary role as the first appellate court namely, revisiting the evidence that was tendered before the trial Judge, analyzing the same independently and then drawing a conclusion bearing in mind the fact that we neither saw nor heard the witnesses and make an allowance for that. See the case of ***Muthoka and another versus Republic, (2008) KLR 297***. ***In OKENO V. R., [1972] EA 32 at p. 36*** the predecessor of this Court stated:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R., [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (SHANTILEL M.

RUWAL V. R., [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see PETERS -V- SUNDAY POST, [1958] EA 424.".

13. We have reassessed the evidence on the record, the grounds of appeal presented to us for determination by the appellant as well as the rival arguments presented by both sides. There are three critical issues in this appeal; first, did the appellant commit the *actus reus?* Second, did she have the requisite *mens rea* for the offence of murder? and third, does the appellant have a credible defence?

14. The offence was committed in the morning in broad daylight at about 9.00 am. The evidence against the appellant is primarily by PW 2 and PW3 who gave eye witnesses account and testified that it was the appellant who stabbed the deceased to death. The appellant was identified by PW2 and PW3 and she never escaped from the scene of crime. She was arrested at the *locus in quo*; there is no dispute as to the identity of the person who stabbed the deceased; the trial Judge did not err in finding that the appellant committed the *actus reus* for the offence of murder. On our part, we are satisfied that the identity of the person who stabbed the deceased was proved beyond reasonable doubt to be the appellant.

15. The critical issue in this appeal is whether in committing the *actus reus,* the appellant had the requisite *mens rea*; did the prosecution prove malice aforethought beyond reasonable doubt? The trial court in finding that the prosecution had proved *mens rea* beyond reasonable doubt stated as follows:

"The prosecution has shown that the accused carried the knife in her waist before the attack. The prosecution evidence clearly establishes that the accused premeditated the attack on the deceased. The prosecution evidence also established that the accused struck the deceased on the neck. That was proof that the accused had formed the intention to either cause death or grievous harm to the deceased. Malice aforethought was therefore proved in all the circumstances of the case".

16. On our part, we have considered the evidence on record and the appellant's contention that the deceased provoked her; we have considered and evaluated the evidence relating to the struggle between the deceased and the appellant; we take into account that the trial court which observed the demeanour of PW2 and PW3 found that these two witnesses were truthful and worthy of belief; we note that the appellant submitted that she was provoked by the deceased. We have no reason to doubt the credibility of PW2 and PW3 as established by the trial Judge. Our re-assessment of the evidence on record shows that it was the appellant who came from Mwirigi's house and went to where the deceased was standing with PW2.

17. The fact that the appellant was having a knife tucked at her waist has caused us concern. When the appellant shoved and pushed aside PW2 and started attacking the deceased, the inescapable inference is that she intended to assault the deceased and no one else. If at all there was any provocation, when the appellant removed the knife from her waist and started using it on the deceased, she was no longer the victim of provocation but taking control of the situation and being in charge. When you take control of a situation, you are conscious and acting intentionally. The appellant by having the knife tucked at her waist had already formed the intention and preparation to use it. If a person whilst sane and unprovoked in preparation to cause harm to another arms herself with a knife or any other dangerous weapon with intent to use it, knowing it is a wrong thing to do, and then instigates a quarrel with that other and then uses the knife thus carrying out the intention to use the knife, she cannot rely on a self-instigated quarrel and call it provocation as a defence to a charge of murder, not even as reducing it to manslaughter. She cannot say that she got herself into a quarrel and was incapable of intent to kill. You cannot rely on a self-sought, self-initiated or self-instigated quarrel and call it provocation and allege it is a defence to murder. The preparation and wickedness of the mind before she got into the quarrel is enough to condemn her, coupled with the act which one prepared for and intended to do and did in

fact do, namely to use the knife and causing harm.

18. ***Section 206 (b) of the Penal Code*** defines malice aforethought to include "*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*." Applying the foregoing definition in ***Section 206 (b)*** to the facts of this case, the appellant had a knife tucked at her waist in preparation to use it and she did in fact use it on the deceased. As we have already stated, when the appellant removed the knife from her waist and started using it on the deceased, she was no longer the victim of provocation but taking control of the situation and being in charge. When the appellant stabbed the deceased on the neck, she had knowledge either that her act would probably cause the death of or grievous harm to the deceased or she was indifferent whether death or grievous bodily harm was caused. This knowledge or indifference on the part of the appellant constitutes malice aforethought sufficient for the charge of murder.

19. The other ground of appeal raised by the appellant is that death sentence is unconstitutional. In the case of***Joseph Njuguna Mwaura & 2 Others v Republic, Criminal Appeal No 5 of 2008,*** **this Court differently constituted held that the** decision in ***Godfrey Ngotho Mutiso v R., [2010] eKLR Criminal Appeal 17 of 2008,*** was per incuriam in so far as it purported to grant discretion in sentencing with regard to capital offences. This Court held that the offences of murder contrary to ***Section 203*** as read with ***204*** of the ***Penal Code***, treason contrary to ***Section 40*** of the ***Penal Code***, administering of oaths to commit a capital offence contrary to ***Section 60*** of the ***Penal Code***, robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code*** and attempted robbery with violence contrary to ***Section 297 (2)*** of the ***Penal Code*** carried the mandatory sentence of death. We dismiss the appellant's contention that the death sentence for the charge of murder is unconstitutional.

20. On the contention that the trial court erred in sentencing the appellant to death when she was pregnant, the record shows that when the appellant was arrested she remained in custody; three years after her arrest and whilst in custody she became pregnant and had an eight month old child during the hearing of her case. It is a mystery how the appellant got pregnant while in custody, as if this was not enough, the appellant got a second child while in custody. ***Section 211*** of the ***Penal Code*** provides that where a woman convicted of an offence punishable with death is found in accordance with the provisions of ***Section 212*** to be pregnant, the sentence to be passed out on her shall be a sentence of imprisonment for life instead of sentence of death. Under ***Section 212 (2)***, the question whether the woman is pregnant or not shall be determined by the Judge on such evidence as may be laid before him on the part of the woman or on the part of the Republic and the Judge shall find that the woman is not pregnant unless it is proved affirmatively to his satisfaction that she is pregnant.

21. In the instant case, the appellant was sentenced to death on 17th November, 2011; the record shows that on 6th December, 2011, the prison authorities gave the trial Judge a visit after the appellant had been sentenced and informed the court that the appellant was expectant. The trial court stated that this information came long after the sentence and the court was *functus officio* and interfering with the sentence would be tantamount to sitting on appeal on its own sentence. In our considered view, given the facts and information before the trial court, the court did not err in stating that it was *functus officio;* the trial of the appellant came to an end on the date of sentence and the court had no further jurisdiction on the matter. We note that even the appellant did not bring to the attention of the trial court that she was expectant. At the time of hearing this appeal, this Court was informed that the appellant had given birth to a second child. It is trite law that a pregnant woman cannot be sentenced to death, taking into account the specific facts of this case, we are satisfied that the death sentence meted on the appellant is an illegal sentence.

22. The totality of our evaluation of the evidence on record and the applicable law is that we dismiss the appellant's appeal against conviction. On sentence, we hereby set aside the death

sentence and substitute it under the provisions of ***Section 211*** of the ***Penal Code*** with a term of imprisonment for life. For avoidance of doubt, the conviction of the appellant for the charge of murder is upheld; the appellant is sentenced to serve life imprisonment. In this case, the appellant became pregnant twice while in the custody of prison authorities. We hereby direct that a copy of this judgment be sent by the Deputy Registrar to the Commandant of Prisons at the Headquarters in Nairobi to investigate how a woman in remand or prison can get pregnant.

Dated and delivered at Meru this 26th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR