IN THE COURT OF APPEAL
AT NAKURU
(CORAM: OMOLO, GITHINJI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 253 OF 2009

BETWEEN
MERCY CHEMUTAI .....APPELLANT
AND
REPUBLIC ..... RESPONDENT

(An appeal from a sentence and conviction of the High Court of Kenya at Kericho (Ang'awa, J) dated 4th November, 2009

In

H.C. Cr. C. No. 39 of 2008)
****

JUDGMENT OF THE COURT

Mary Ang'awa, J tried and convicted the appellant, Mercy Chemutai on an Information that had charged the appellant with the offence of murder contrary to ***section 20***3 as read with ***section 204*** of the Penal Code. The particulars contained in the Information were that on the ***15th October, 2008*** at Kyogong Village in Bomet District of the then Rift Valley Province, the appellant murdered Geoffrey Kipkirui, hereinafter the deceased. Upon convicting the appellant the learned Judge duly sentenced her to death, but before doing so, the Judge had called for a probation report on the appellant. She received the report which recommended that the appellant be placed on probation. But for some unexplained reason, the learned Judge simply rejected or ignored the probation report and sentenced the appellant to death.

The Court has just dealt with two appeals from the same Judge which she heard and determined while she was presiding over the High Court at Kericho. Those cases in which judgments are being delivered to-day with the present one are those of **JOSEPH KIPKORIR SANG VS. REPUBLIC**, Criminal Appeal No. 148 of 2009 and **SIMON KIPKORIR KOECH VS. REPUBLIC**, Criminal Appeal No. 42 of 2010. The circumstances surrounding the commission of the offences in those cases are remarkably similar to those prevailing in the present appeal. In all the three appeals, there was an element of provocation as well as drunkenness. In all of them, the Judge either did not deal at all with those elements or dealt with them in an improper manner.

In the appeal before us, the deceased and the appellant were neighbours. The appellant was a married woman and as at the date of the probation officer's report i.e. 30th October, 2009, the appellant was 27 years old. At the time of his death, the deceased was approximately 21 years old.

On the day of the incident, the appellant's sister, one Winnie Chepkirui Korir (PW5) had come to visit the appellant. Winnie decided to take the appellant's father-in-law , one Thomas Soi who was about 80 years

old, to a neighbouring home for a drink. The two went to the home of Gladys Juma (PW4) and took some local liquor there. According to the appellant her husband had been arrested on an allegation of stock-theft and earlier in the morning she and her father-in-law had gone to the police station where the husband was being held. It appears that the deceased was at the home of Gladys and at some point in time, either within or outside the home of Gladys, the deceased attacked the 80 year old Thomas Soi. Winnie raised an alarm which the appellant heard and the appellant ran to the scene. She found the deceased attacking her 80 year-old father-in-law and she demanded from the deceased why he (deceased) wanted to cause her more trouble, apparently referring to the fact that her husband was already in trouble. It is not quite clear from the evidence of the appellant whether she ran to the scene carrying a knife or if she ran back to her house and collected a knife from there. Whatever may be the correct position, the appellant did stab the deceased on the chest and his death was due to the stabbing. In the appellant's sworn evidence, the appellant told the Judge:-

"----------. I heard screams. They were persistent. I went to investigate. I heard the screams of my sister. I found Winny. I asked them what happened. He began to abuse me. He began to mention my husband and the cow. Geoffrey told me that you can say anything, you are unable to look after your husband and he is looking after cows. He began to tell me. He then beat me. I then cried. He removed a knife we struggle (sic) with the knife. The knife stabbed him. He took the knife from his pocket after a struggle. I had no grudge with him. When we had struggled with the knife I did not want to kill him. The witness said I had a knife. I say I had no knife. It is he who had the knife. When the witness said I had a knife it is because they were all from one family. The people were many. My sister spoke in court and we were beaten."

The learned Judge was of the view that the appellant had the knife. But it was established that the appellant found the deceased attacking his 80 year old father-in-law and to add insult to injury when she asked the deceased why he was attacking the old man, the deceased made unpleasant remarks about the arrest of the appellant's husband and that the appellant was unable to care for her husband who had now turned to cows. We understand this to mean the appellant was saying that the actions of the deceased sorely provoked her and in the heat of passion, she stabbed him. In her judgment, the learned trial Judge did deal with the issue of provocation but in the end rejected it on the basis that the appellant stated in her evidence that there was a struggle between her and the deceased over the knife and that the stabbing of the deceased was accidental. There was accordingly no issue of provocation. But the learned Judge did not expressly say that the deceased did not utter the words the appellant said he did. Those words, if uttered, were clearly insulting to a woman who was already under stress due to the arrest of her husband and the deceased was implying that the arrest was the fault of the appellant who had failed to take care of her husband.

As we have pointed out, it is clear to us that even the learned Judge was at first not prepared to pass a sentence of death upon the appellant and instead called for a probation report. We think the Judge must have called for the probation report because she thought the circumstances surrounding the offence did not warrant a conviction for murder. For our part, we are satisfied on the material before us that the deceased had sorely provoked the appellant, taking into account all the surrounding circumstances of the case. But she used excessive force on the deceased and caused his death. The appellant ought to have been convicted of the lesser offence of manslaughter, not murder.

Accordingly, we allow the appellant's appeal to the extent that we set aside the conviction for murder under ***section 203*** of the Penal Code and substitute therefor a conviction for manslaughter under ***section 202*** of the Code. We also set aside the sentence of death imposed pursuant to ***section 204*** and substitute it with a sentence of **10** (ten) years imprisonment pursuant to ***section 205*** of the Code. The sentence of imprisonment shall run from the 4th November, 2009, when the learned Judge imposed the sentence of death. Those shall be the Court's orders in the appeal.

Dated and delivered at Nakuru this 23rd day of February, 2012.

R.S.C. OMOLO

.....
JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR