REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 116 of 2008

AGNESKASYOKA IBRAHIM.....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Meru (Sitati, J.) dated 18th January, 2003

in

H.C.Cr. C. No. 110 of 2003).

****

JUDGMENT OF THE COURT

1. **AGNES KASYOKA IBRAHIM**, the appellant, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The allegation against her was that on 2nd April, 2003 at Gitu Village, Mukinduri Location in North Meru District within Eastern Province, she murdered **EGNESIOUS MUGAMBI** (the deceased). She pleaded not guilty but after trial before the High Court at Meru (Sitati J.), she was convicted and sentenced to death. This appeal is against both that conviction and sentence.

2. In the three grounds of appeal in hersupplementary memorandum of appeal, the appellant has raised three points. They are that there was no corroboration of the two minor witnesses' testimony; that the learned trial Judge erred in failing to realize that the case against the appellant was based on suspicion; and that the case against the appellant was not proved to the required standard.

3. The background facts of the case were that the appellant was married to one Ntongai. The couple's house was in the same compound as that of Ntongai's brother and his wife. The two couples often shared food. On the material date, that is on 2nd April, 2003, Lucy Kawira Peter (Kawira), PW1, who was Ntongai's brother's wife, prepared tea early in the morning for the family and kept some in a thermos flask for people whom she expected to go and help her with shamba work. After taking tea she went to her shamba leaving the appellant in her (Kawira's) house preparing food for the workers and taking care of Kawira's child, the deceased. She left the remaining tea in a thermos flask on the table in her house.

4. At about 11.30 a.m. that morning, she went back to her house to fetch drinking water and tea for Ntongai. At home she served some of the tea to the deceased's friend one Fridahwho had apparently gone to visit the deceased and took the rest to the shamba. She claimed that when

Ntongai took some of that tea, he started complaining of stomachache and dizziness. When Kawira herself tasted the tea, she found it bitter. She then immediately ran back to her home only to find the deceased and her friend Fridah, whom she had served with some of the tea from the flask, lying down writhing in pain. She raised an alarm and all the people who had taken the tea were rushed to hospital and treated but the deceased died on the same day.

5. The star witnesses in this case were FridahKendi, PW2, and LilianGacheri, PW3. PW2 was 12 years old and PW3 was 14. It was not clear if PW3 was also in school. They both testified that they went to Kawira's house and on finding nobody there, they proceeded to the appellant's house in the same compound. They found the appellant washing clothes. After a few minutes the appellant went into her house and came back with a cup and teaspoon. The teaspoon had a flour-like substance. She poured that substance into the cup, mixed it and went to Kawira's house claiming she was going to fetch tea for her child. PW2 claimed that the appellant stayed in Kawira's house for about 3 minutes but according to PW3, she took about 10 minutes.

6. Both of these witnesses said one could not see the door to Kawira's house as it faced the opposite direction. There were also other houses in between which obstructed the view of the door to Kawira’s house.

7. After a short while Kawira came from the shamba and went to her house. PW2 followed her there. When PW3 also wanted to go to Kawira's house, the appellant asked her to leave behind her baby who PW3 was carrying. Kawira served PW2 with some tea from a thermos flask and leftover food which she shared with PW3 when Kawira had returned to the shamba. Soon after drinking that tea, the two witnesses started feeling dizzy and had stomachache. As we have said they were later all rushed to hospital and treated and discharged but Kawira's child died.

8. Dr. Kimuli performed a post-mortem examination on the deceased's body. She stated in her report, which was produced by her colleague Dr. Isaac MwangiMacharia, PW6, that the body had no external injuries. Inside the stomach of the deceased, she noticed some brownish discolouration consistent with burns due to ingestion of poison. She opined that the cause of death was organo-phosphate poisoning.

9. The government analyst, Mr. Leonard Kariuki PW5, who examined the stomach and intestine parts removed from the deceased's body as well as some tea in a thermos flask, all of which had been handed over to him by PC. Patrick Muthama, found that all those specimen had methomfue, a government goat pesticide which is harmful to human beings when ingested. As we have stated, after trial, the appellant was convicted and sentenced to death thus provoking this appeal.

10. At the hearing before us, Mr. Nganga, learned counsel for the appellant submitted that the only evidence against the appellant was that of the two minor, PW2 aged 12 and PW3 aged 14. To found a conviction, the evidence of those children required corroboration. He said besides lack of evidence that it is the appellant who laced the tea in the thermos flask with poison, there was no evidence to corroborate that of the two minors. In his view therefore, the case against the appellant was based on suspicion, which, however strong, cannot be a basis for conviction. He faulted the trial Judge for ignoring the appellant's alibi defenceand urged us to allow this appeal.

11. On his part Mr. Kaigai, learned State Counsel, submitted that the sworn evidence of the two minors, which the Judge believed, was amply corroborated by the post-mortem report. Regarding the appellant's alibi defence, he said the same was displaced by the prosecution evidence. He dismissed as unfounded Mr. Nganga's contention that the case against the appellant was hinged on suspicion.

12. We have considered these rival submissions and read the record of appeal. This being a first appeal, we are duty bound to re-evaluate the evidence on record and satisfy ourselves that it supports the appellant's conviction. In doing that, we should however, never loose sight of the fact that the trial court which had the advantage of watching and hearing the witnesses testify and

therefore better placed to assesstheir demeanor, is the best judge in matters of fact. That notwithstanding, however, if, after re-evaluation of the evidence, the appellate court is satisfied that the same does not justify a conviction, it has to interfere with it.

13. In discharge of our said duty, we havecarefully read the record of appeal and re-evaluated the evidence on record. We disagree with counsel for the appellant that the evidence of the two children requires corroboration. The evidence that requires corroboration is, according to **Section 19** of the **Oaths and Statutory Declaration Act**, Cap 15 of the Laws of Kenya, that of children of tender years who do not understand the nature of an oath. In any case a child of tender years is defined by **Section 2** of the **Children Act** as one below the age of ten years. The children in this case were over ten years and gave evidence on oath. Their evidence does not therefore require corroboration.

14. Although the evidence of the two children does not require corroboration, we find that it cannot sustain the appellant's conviction. This is because nobody saw the appellant pour the poisonous substance into the thermos flask. It should be recalled that the minors testified that one could not see the door to Kawira's house from the appellant's where they were. The prosecution is therefore relying on circumstantial evidence that if the children saw the appellant mix something in a cup, she must be the one who laced the tea with poison. That evidence, however, does not add up. We find it inconceivable that the appellant, an adult woman intent on poisoning a family could go into her house and come out with poison in a tea spoon, pour it into a cup and mix it in the open in the glare of witnesses and then go into Kawira's house and lace the tea in the thermos flask with it.In the circumstances, we find that the trial judge misapprehended the import of the minor's evidence. We also find that the learned Judge did not consider the fact that Kawira having not locked her house when she left for the shamba, a third party could have had access to it and laced the tea with poison.

15. For these reasons, we allow this appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 13th day of December 2012

J.W. ONYANGO OTIENO

….....
JUDGE OF APPEAL
W. KARANJA
….....
JUDGE OF APPEAL
D. K. MARAGA
….....
JUDGE OF APPEAL
I certify that this is a true copy of the original.

REGISTRAR