



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: OMOLO, GITHINJI & VISRAM, J.J.A.)

CRIMINAL APPEAL NO. 123 OF 2007

BETWEEN

RUTH WANJIRU MAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nakuru (Kimaru, J.) dated
15th June, 2007

in

H.C.CR.C. NO. 7 OF 2005)

JUDGMENT OF THE COURT

The appellant was tried by the superior court with aid of assessors on three counts of murder contrary to **Section 203** as read with **Section 204** of the Penal Code.

The Information alleged that on 2nd January, 2005 at Mugaa village, Miti Mingi, Nakuru the appellant murdered **P.K, F.K** and **V.N** respectively. The appellant was convicted after trial and sentenced to death hence the present appeal.

The prosecution called five witnesses, namely, **James Maina Mwangi** (PW1), the husband of the appellant (James); **Lucia Waithera Mwangi** (PW2) (Lucia); a neighbour, Maria Wanjiku Kegwee (PW3) (Maria) the mother of James and the mother-in-law of the appellant. **Dr. Paul Gachunga** (PW4) the pathologist who performed the postmortem; **Cpl. Peter Tere** (Cpl. Peter), (PW5) who investigated the case. The appellant on her part gave sworn evidence and called her brother **Peter Kariuki Chege** (Chege), (DW2) as a witness.

The following facts emerge from the entire evidence. The appellant's parents and her husband's (James) parents live at Mugaa Kiambogo in Nakuru where the appellant and James met sometime in 1996 and got married. At the time of the marriage, the appellant had one child **Benson Chege** who was 23 years at the time of the trial. After some time, the appellant and James had disagreement and the appellant left to live with her parents taking with her the only child of the marriage. In 1998 the appellant married one **Grace Wanjiku** (Grace) who bore two children, namely, P.K (K) and V.N. However, Grace left James sometime in 2000 after she got information that the appellant would return to the matrimonial home. The appellant returned to the matrimonial home sometime in 2000. She had been away for 5

years. She had already another child outside wedlock – F.K whom James agreed to support. The appellant and James had six children in all including L.N, the last one aged about 7 months at the time of the alleged murder. According to the evidence of James he took back the two children of Grace in 2003 and the appellant started looking after them.

On the morning of 2nd January, 2005 the appellant put a sufuria of “*githeri*” (mixed maize and beans) on fire in her kitchen. Thereafter she locked the kitchen and took three children, namely, P.K (aged 5 years) F.K aged 3 years and V.N aged 2 years (deceased children) to Maria to look after them as she attended church service. She left the house keys with Maria instructing her to be cooking the *githeri* in her absence. She then left for church at about 9.30 a.m. accompanied by her daughter L.N then aged about 6 years. Meanwhile, James locked the house and visited a neighbour. The appellant returned home at about 3 p.m. and called the three children from Maria’s house. The children did not go immediately. The children took the keys to the appellant after about 15 minutes and told her that they had eaten *githeri*, meat and soup at Maria’s house. The appellant opened the door and asked the deceased children if they wanted more food and they answered in the affirmative. The appellant thereupon served each of the deceased children with a spoonful of *githeri*. According to the evidence of Maria the appellant went to her house shortly after the children had left and told her to accompany her to her house and “*tell her what to do because the children were dying*”.

On arrival at the appellant’s house Maria found the deceased children writhing on the floor and she screamed. Meanwhile, the appellant sent Lucy Njoki to call James from the neighbourhood. James who was already on the way home was informed by Lucy Njoki that the children had taken poison. On arrival he found the children sprawled on floor defecating on themselves. Two of the deceased children, P.K and F.K died immediately and before they were taken to hospital. The third child V.N died on arrival at a dispensary. The bodies of the three deceased children were taken back to the house until the following day when Cpl. Peter collected their bodies in the afternoon. James found four plates of *githeri* in the cupboard and called Chege – the bother of the appellant.

Thereafter he asked Lucy Njoki to identify the food in the plates after which James sorted out the food. He placed the food that the deceased children had eaten in polythene papers which he had bought for that purpose and labeled them. He handed over the samples to Cpl. Peter on the following day.

Dr. Gachunga who performed the postmortem on the respective bodies of the deceased on 11th January, 2005 formed the opinion that the cause of death was cardiopulmonary collapse due to multiple organ failure attributed to acute poisoning. He took specimen from each body including the liver, stomach and its content including *githeri* and blood and sent them to the Government Chemist for analysis. He later received a Report dated 23rd February, 2005. The Report stated in respect of F.K, thus:

“Diazinon an organo – phosphorous pesticide was detected in the Githeri (Ex.B) and stomach of deceased. Organo phosphorus pesticides are harmful and poisonous to human when ingested”.

The incident was reported to Cpl. Peter of Elementaita police station by the chief of the area on the following day at 8 p.m. When Cpl. Peter went to the scene he found the bodies of the deceased children inside the house. He also found eight dead chicken near the house and related their deaths to that of the children. He took one chicken as a sample. There was also scattered *githeri* in the compound which he collected. This must be the exhibit marked B which was sent to Government Chemist for analysis. He also collected *githeri* from the house which James had preserved. Cpl. Peter caused the pit latrine to be searched where three whole oranges were recovered. Lastly, Cpl. Peter unsuccessfully searched for any chemical in the house and compound.

The appellant vehemently denied that she poisoned the children. She explained that when she called the children from Maria’s house they told her that they had eaten *githeri*, meat and soup and asked them whether they wanted more. She continued:

“They answered in the affirmative. I asked them to bring their eating bowls. I gave them each one spoon of food. Before 1st child could eat food he asked to be excused to go to the toilet. He returned

and told me that he was feeling stomachache. Before a moment passed he started vomiting. The two children also started vomiting. They started diarrhea. I started screaming. I asked my mother-in-law what she had given the child. She answered that she had given them normal food. The children fell on the ground. We started screaming I sent Lucy Njoki (my daughter) to go and call her father”.

After the summing up, the two assessors who had assisted in the trial exonerated the appellant and implicated her husband – James. The trial Judge (Kimaru, J) however disagreed with them and convicted the appellant.

The grounds of appeal in essence, question the credibility of the prosecution case, that, it is the appellant who poisoned the three children. Mr. Omwenga, the learned Principal State Counsel initially opposed the appeal but ultimately conceded the appeal saying that the evidence did not point at the appellant to the exclusion of anybody else.

This was a case dependant on circumstantial evidence. The principles upon which the court can base a conviction solely on circumstantial evidence is well settled and do not warrant repetition.

There was overwhelming evidence that the three children died of food poisoning.

The Government Analyst found that Diazinon, an argono-phosphorous pesticide was detected in the *githeri* (exhibit B) and the stomach of F.K.

There are at least three hypotheses suggested by the appellant at the trial as emerges from the totality of the evidence.

The first one is that the cause of food poisoning is the pesticide used to preserve the maize used in *githeri*. The appellant was represented by Mr. Mongeri at the trial who cross-examined James on this hypothesis. James on cross-examination said in part:

“I used to put pesticides on the maize when I preserved it. We kept maize for *githeri* and the maize for ugali separately. The accused removed maize from the store and prepared *githeri*. There is nothing to differentiate maize for *githeri* and maize and the maize flour.

I did not see her put the *githeri* on fire. I left the *githeri* when it was already put on fire”.

and further on:

“I am sure that the maize that *githeri* was cooked with was not removed from the bag which I had put pesticide to preserve it. It is not possible that a mistake could have arisen”.

On this aspect, the trial Judge made a finding that since Lucy Njoki and the appellant ate the *githeri* and were not affected and since the remaining *githeri* in the cooking pot was found to be safe, the poisoning was not accidental and further that the poison was administered when the food was served.

That finding is not, with respect, supported by the evidence. On the contrary, James (PW1) categorically stated that Lucy Njoki and the appellant had not eaten the *githeri*. This evidence was supported by **Chege** (DW1) who testified that the two did not eat the food and that their share was found poured in the compound.

Furthermore, there was no evidence that police took the sample of the *githeri* left in the cooking pot for forensic analysis.

Nor was there any evidence to show that the food was poisoned as it was being served on the children. The police did not find any pesticides at the scene. Moreover, the samples were interfered with by James before police arrived by collecting the food, putting it in polythene bags and hiding it.

In any case, there is no certainty as to which plates contained food served on the deceased children. There was evidence from James that he found four plates in the cupboard and sought the assistance of Lucy Njoki to sort out the food which had been served to the children. This is hearsay evidence for Lucy Njoki was not called as a witness.

The finding of eight dead chicken and the suspicion of both James and Cpl. Peter that their death could have been caused by the same *githeri* strengthens this hypothesis that maize preserved with pesticides could have been accidentally used.

The second hypothesis was that the children could have eaten a poisoned orange given to them by a stranger. There was no concrete evidence as to when the children may have been given the oranges. Apparently, the appellant did not witness this incident and it seems she was told so by Lucy Njoki or the children. Indeed, Chege claimed that is Lucy Njoki who disclosed that somebody had given oranges to the children. Nevertheless, three oranges were recovered in the pit latrine. One orange was taken to Government Analyst but no report was made. This hypothesis is probable.

The third hypothesis is that the children ate poisoned *Githeri* in the house of Maria. This was the evidence of the appellant. However, Maria strenuously denied giving the children any food. She denied having cooked *githeri*. The trial Judge believed Maria. Although Maria was helping appellant to cook *githeri* in her absence and had therefore access to *githeri* it seems improbable that she could have intentionally poisoned the children. It is probable, however, that she could have served the children with the same *githeri* not knowing that the maize had been preserved with pesticides.

Although James categorically said that he could not find any reason why the appellant could have poisoned the children the trial Judge came up with his own theory in effect that the appellant was unhappy when James married another woman while she was away; that when she returned to the matrimonial home, she harboured the resentment that she was being made to take care of the children of her rival in love; that the appellants child born out of wedlock being a boy was resented by James and thus the appellant hatched a plan to kill the three children.

The prosecution did not suggest the motive for poisoning the children. The finding of the trial Judge was contrary to both the evidence of James and the appellant. It was highly prejudicial to the appellant. This was a grave error by the trial Judge.

The appellant gave sworn evidence denying the charge and was cross-examined at length. She testified that when the children started vomiting she called Maria for help. She also sent Lucy Njoki immediately to call her husband. She did not deny the fact that she had served the children with *githeri*. She merely said that the children became sick before eating it. She did not destroy or hide the *githeri* she had served before calling Maria and James. Her conduct appeared beyond suspicion and the two assessors believed her. It is improbable that if she had poisoned the food she could have kept it for her husband and the police to recover.

The appellant's husband was in the neighbourhood on the material day. Both the appellant and her brother Chege testified that James is reputed to be a person of bad character. James testified that after the appellant returned to the matrimonial home he still kept contact with his second wife – Grace and that V.N was conceived when he was still living with the appellant. He also revealed that he is now living with his second wife whom he invited back three months after the burial of the children. However, according to Chege the appellant has married another woman.

The conduct of the appellant of interfering with the samples of food before calling the police and his failure to report the death to the police immediately is suspicious.

When all these circumstances are considered, it is probable, as the assessors believed that the James played a role in the death of the children and thereafter implicated the appellant with the intention of getting rid of her so that he can have his second wife back or marry another woman. The trial Judge failed to consider this possibility.

In the final analysis, we have come to the conclusion that the circumstantial evidence was so weak and incredible that the conviction is in our view unsafe.

Accordingly, the appeal is allowed, the conviction on each count quashed and the sentences set aside.

The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered at Nakuru this 10th day of June, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR