



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, GITHINJI & VISRAM, J.J.A.

CRIMINAL APPEAL NO. 22 OF 2010

BETWEEN

SUSAN KAHINDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit, J) dated 5th February, 2010

in

H.C.CR.C. NO. 54 OF 2009)

JUDGMENT OF THE COURT

SUSAN KAHINDI, the appellant, was after trial convicted by the superior court (Lesiit, J) of the offence of murder contrary to **Section 203 as read with Section 204** and sentenced to death.

According to the information filed by the Attorney General, the appellant on 1st June, 2009 at Kawangware 56 in Nairobi West District within Nairobi Province murdered **Isaiah Mutwiri**, the deceased.

The case for prosecution as presented before the trial court established the following facts. The deceased and the appellant had lived as husband and wife since 2002 and had a seven year old child. On the material day at about 8 p.m., appellant left the house of a woman whom they fellowshipped with at the Catholic Church for home. She knocked at the door several times but the door was not opened for a considerably long time. She thought that her husband was deeply asleep. However, after some time a woman known as Mwendu (not called as a witness), opened the door. She had a towel wrapped around her waist. A fracas ensued between the two women. The deceased who was in bed naked with another woman woke up and pushed the appellant outside the one roomed house. Mwendu and the other woman then locked themselves inside. The deceased and the appellant who had dragged themselves out engaged in a quarrel, the appellant demanding to know why the deceased had brought prostitutes into their house. After a while the deceased was heard by neighbours shouting that he had been stabbed by the appellant. He was rushed to hospital by neighbours but died on arrival.

A post mortem was carried out on the body of the deceased some three days later and Dr Mungai who

performed it gave the cause of death as massive haemorrhage due to severed neck vessels.

In her defence, the appellant contended that the deceased was her lawful husband and that during the material night she went home at 10 pm only to find him in bed with two women. She stated that when the door was finally opened for her, a quarrel and later, a fracas ensued during which time the two women roughed her up. She claimed that when the deceased intervened to prevent one of the women who had been in bed with him from beating her, the deceased and the woman left the house arguing with one another. She did not know who stabbed the deceased.

In convicting the appellant, the learned trial judge held:

“Having carefully considered the evidence adduced in this case by both sides, I find that the circumstantial evidence adduced in this case points irresistibly at the guilt of the accused and that there are no other co-existing circumstances which weakens or destroys the inference of the accused guilt. I reject the accused defence in total and find the accused guilty of the offence of murder contrary to S. 203 of the Penal Code and convict her accordingly.”

Mr Obok, learned counsel for the appellant, submits that in the particular circumstances of the case it was not possible to establish with any degree of certainty who actually stabbed the deceased.

On our part, we have anxiously considered all the evidence adduced before the trial court. In our view, it is difficult to understand how the learned judge could find that the plea of provocation was not available to the appellant. Moreover, there is no justification for invoking circumstantial evidence.

There is no doubt on the evidence that the appellant stabbed the deceased. It could not have been done by the two women who were with him. This was done as a result of the appellant finding her husband in bed with two women in *flagrante delicto* in their matrimonial bed. This insulting conduct on the part of the deceased, culminated in the final provocation which immediately preceded the attack. Malice aforethought was indeed absent and the conviction for murder could not stand in the particular circumstances of this case.

In the result, we allow this appeal, quash the conviction for murder and set aside the sentence of death passed on the appellant.

We find the appellant guilty of manslaughter contrary to **Section 205 of the Penal Code** and convict her accordingly. Taking into account all the circumstances of the case, we sentence the appellant to ten (10) years imprisonment.

The sentence shall run from 5th February, 2010, the date she was convicted of murder by the High Court of Kenya at Nairobi.

It is so ordered.

Dated and delivered at Nairobi this 1st day of July, 2011.

P. K. TUNOI
.....
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