IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, O'KUBASU & NYAMU, JJA

CRIMINAL APPEAL NO. 221 OF 2007

BETWEEN

LYDIAH NJERI MBARA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction & sentence of the High Court of Kenya at Nairobi (Muga Apondi, J) dated 15th February, 2007

in

H.C.CR.C. NO 148 OF 2004)

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JUDGMENT OF THE COURT

The appellant herein, **LYDIA NJERI MBARA,** was arraigned before the superior court on an information in which she was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were as follows:

"on the 11th June, 2004 at Dandora Phase II Estate in Nairobi within the Nairobi area murdered John Mbugua Njoroge"

The record of appeal shows that the appellant appeared before Rawal J on 22nd November 2004 but was remanded in custody without her plea being taken. She eventually pleaded " Not Guilty" to the charge before Ombija, J on 6th December, 2004 and her trial commenced before Apondi, J on 30th January 2006. The trial proceeded before Apondi, J with the aid of three assessors as the law then provided. The prosecution called a total of nine witnesses.

Grace Wangare Githinji (PW1) testified that on 11th June 2004 at about 6.30 pm while outside the gate she heard the appellant shouting. When Grace entered the appellant's house she found her (appellant) seated while armed with a knife and her husband (the deceased) was standing holding the appellant's shoulders. Grace asked the appellant to put down the knife. The deceased then fell on the bed and when

Grace asked the appellant what had happened the appellant said that the deceased had stabbed himself. Grace then called other neighbours who included Moses Kibe Gakunju (PW3). It was the evidence of Gakunju (PW3) that when he was called he found the deceased sitting on the bed but leaning on the sofa set. Though Gakunju called the deceased there was no response from the deceased. This matter was reported to Dandora Police Post and as a result Sgt. Stephen Ngocho Karao (PW4)

proceeded to the scene where he found a blood stained kitchen knife and bed sheet. Sgt Karao was informed that the suspect (the appellant now) had gone to Mukunga Private Hospital for treatment. Sgt. Karao proceeded to the hospital where he found the appellant being treated. He arrested the appellant and took him to Dandora Police Post for interrogation.

Dr. Zephaniah Kamau (PW2) testified that on 25th June 2004 he was requested by C.I.D. Buruburu to assess the mental status of one Lydia Njeri Mbara (the appellant). Dr. Kamau examined the appellant and found that she had a healing wound on the lateral aspect of the middle third right thigh. It was Dr. Kamau's evidence that the appellant was 24 years old and of sound mind.

Pc Isack Muraya (PW5) testified that he was assigned the duties of attending a postmortem at the City Mortuary and that the doctor gave him the sample of deceased's blood. He also produced as evidence the blood stained knife and bed sheet.

Michael Kangethe Njoroge (PW1) was the brother of the deceased who identified the body of the deceased to the doctor who conducted post-mortem examination.

Stephen Matinde Joel Waribe (PW7) was the government Analyst who examined the blood stained knife and bed sheet. He formed the opinion that the blood on the knife and bed sheet or bed over could have come from the deceased.

Pc Patrick Mbuu (PW8) testified that he was attached to Buru Buru Division C.I.D. in the month of June 2004 when this incident took place and that he is the one who gathered all the evidence and prepared the relevant file which was forwarded to the Attorney General.

Lastly there was Dr. Moses Njue Gachoki (PW9) who produced postmortem examination report which had been filed by Dr. Maundu. Dr. Maundu who had conducted the postmortem examination formed the opinion that the cause of death was due to stab wound that perforated the chest wall and left lung.

When put to her defence the appellant gave unsworn statement in which she said, inter alia, that there was a quarrel between her and the deceased who was her husband. She said that the deceased who was drunk stabbed her on the leg and thigh. She stood and a struggle ensued and she fell on the seat. She raised alarm and neighbours came to the scene. Both the appellant and the deceased were taken to Mukunga Hospital from where she was arrested.

After the final submissions the learned Judge summed up the evidence and the law to the three assessors and each assessor returned a verdict of guilty.

The learned Judge reserved his judgment which he delivered on 15th February 2007 in which he convicted the appellant and sentenced her to death.

It is from the foregoing that the appellant comes to this Court by way of a first and final appeal. That being so, it is our duty to reconsider the evidence, re-evaluate it and draw our own conclusion. In **Ogeto V R [2004] 2 KLR 14 at p** 17 this Court said:

" This is a first appeal and the Court has a duty to reconsider the evidence which was before the superior court; evaluate the evidence and draw its own conclusions giving due allowance for the fact that it has neither seen nor heard the witnesses – see Okeno vs Republic [1972] EA 32, Ngui v Republic [1984] KLR 729 and Njoroge v Republic KLR 197. Nevertheless a Court of Appeal will

not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or misapprehension of the evidence, or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision. Chemagong v Republic [1984] KLR 611; Kiarie v Republic [1984] KLR 739"

The learned Judge evaluated the evidence before him and in concluding his judgment said:-

"Given the above analysis, the only logical conclusion that one can reach is that the alleged wound must have been sustained by the accused conveniently after she had stabbed her husband. One does not have to be a genious or rocket scientist to make that conclusion.

The upshot is that the prosecution has proved its case beyond any reasonable doubt. They have proved the death of the deceased and that the accused had mens rea. The motive for the accused was the domestic quarrel that they had on the material day. Thirdly, the medical evidence that was adduced by Dr. Njue clearly show that the deceased died due to a stab wound. He ruled out the possibility that the wound was self-inflicted. He also ruled out the possibility of a fall. Given the above overwhelming evidence, I hereby reject the evidence that does not ring true at all. Lastly I must admit that the accused was economical with the truth and never impressed me to be truthful. In view of the above, I hereby find that the accused is "guilty" of the offence of murder, contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya. That means that this Court concurs with the unanimous findings of the assessors. Given the above, I hereby sentence the accused to death as required by law"

When this appeal came up for hearing before us on 16th December 2009 Mr. D.G. Wachira appeared for the appellant while Mr. J. Kaigai (Principal State Counsel) appeared for the State.

The two main issues raised by Mr. Wachira were that the appellant's Constitutional rights were breached in that there was a long delay from the time the appellant was arrested to the time she was arraigned before the court; and secondly whether the evidence on record, indeed, proved the offence of murder and not manslaughter. On the issue of delay in bringing the appellant to court to plead to the charge Mr. Wachira relied on what appears in the record of appeal. The appellant was arrested on 11th June 2004 and produced in Court on 22nd November 2004 Mr. Wachira submitted that the explanation given by the police for the delay was not reasonable.

On the second issue Mr. Wachira invited us to consider the evidence to the effect that this was a young couple and the husband (deceased) had suspected his wife (appellant) of cheating on him; that there was a struggle between the two and that the deceased was the author of his own death. Mr. Wachira was of the view that the appellant was entitled to an acquittal or at worst a conviction for manslaughter should have been preferred.

To counter the foregoing submissions Mr. Kaigai submitted that the affidavit of Pc Patrick Mbuvi gives reasonable explanation for the delay in taking the appellant to court.

On the issue of evidence Mr Kaigai conceded that this disclosed a lesser offence of manslaughter as there was a fight between the appellant and her husband (the deceased).

As stated earlier in this judgment it is our duty to re-evaluate the evidence and come to our own conclusions but always remembering that we have neither seen nor heard the witnesses testify. The learned trial Judge had the advantage of seeing and hearing the witnesses. On the issue of the appellant's right to be produced before the court we can only go by the record of appeal. The record shows that the appellant was arrested on 11th June, 2004 and produced before Rawal J on 22nd November 2004. There can be no doubt that there was a long delay from 11th June to 22nd November, 2004 when the appellant was produced in court. Mr. Kaigai relied on the affidavit of Pc Mbuvi in a bid to explain the delay. In that affidavit Pc Mbuvi depones, inter alia:

" 4 That on 15th June 2004 I was instructed by the DCIO Buru Buru together with I.P. Francis Sembe to investigate a case from Dandora Police Post whereby on 11th June 2004 the appellant stabbed her husband to death.

5. **That while in custody the appellant needed frequent medical attention at the AAR hospital as she had an injury. She was taken several times.**

6. **That the file was called for by the PCIO on 24th June 2004 for onward transmission to the Director of CID following representations made by the appellants relatives, who were interfering with the investigations.**

7. **That I received the file back on 4th October 2004 with instructions to cover some points and record additional statements from witnesses but they could not be traced.**

8. **That when exhibits were taken to the Government Chemist on 15th June 2004 by No. 61510 PC Isaac Muraya, the results were not available immediately due to lack of laboratory chemicals.**

9. **That the post mortem form was also misplaced by the doctor at the City mortuary and took some time to be traced.**

10. **That the appellant also had to be taken for mental assessment and age.**

11. **That the delay was not deliberate but was caused by the calling of the file by the Director of CID following representations above."**

Section 72(3) of the Constitution which the appellant contends was breached provides:-

" (3) A person who is arrested or detained

a. **for the purpose of bringing him before a court in execution of the order of a court; or**

b. **upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,**

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

It is to be observed that in the context of this appeal it is upon the state to show that the provisions of that section of the Constitution have been complied with. The law requires that an accused person has to be brought to court as soon as is reasonably practicable. The burden of proving that an accused was brought to court in accordance with the law is on the State in the circumstance of this appeal. It is for that reason that the state through Mr. Kaigai caused Mr. Mbuvi to swear an affidavit in a bid to explain the otherwise undue delay. The issue here is whether the explanation as contained in PC Mbuvi's affidavit is reasonable and acceptable. Dealing with more or less a similar situation in **Charles Chacha Sasi v Republic – Criminal Appeal No. 334 of 2008** (unreported) in its judgment delivered at Kisumu on 7th August, 2009 this Court said:-

" We would also wish to observe that some of the recent authorities concerning this Court's interpretation of the Constitution have not prescribed a rule of thumb concerning compliance with

section 72 (3). In this regard, the Court, in the case of Paul Mwangi Murunga v Republic 2008 (e KLR) stated:-

" These are no more than examples which would and can provide the prosecution authorities with an explanation to enable them discharge the order placed on them by section 72 (3) of the Constitution. So long as the explanation preferred is reasonable and acceptable, no problem would arise. Again the Court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that."

In view of the foregoing, we are satisfied that the explanation given for the delay in taking the appellant to court is reasonable and acceptable. The appellant has not denied that she was taken to AAR hospital for treatment while in custody. Neither did she deny that her relatives interfered with investigations. We therefore find no merit in the ground relating to breach of the Constitutional provisions.

As regards evidence we are of the view that this was straightforward since there was no dispute that there was a quarrel between the young couple. The appellant in her defence told the trial court that she was aged 26 years and that she was a mother of two young children aged 6 and 3 years as at 10th July 2006 when she defended herself before the superior court. As to what happened on the material evening we have only her unsworn statement and the evidence of Grace Wangare Githinji (PW1) and Moses Kibe Gakunju (PW3)- the two neighbours who rushed to the scene to answer the appellant's screams. In view of the foregoing we accept Mr. Wachira's submission that the evidence proved a charge of manslaughter rather than murder. Mr. Kaigai, on his part conceded that the offence disclosed was manslaughter and not murder.

Before we conclude this judgment we must say something about the conclusion of the judgment of the superior court. In his judgment the learned Judge convicted the appellant of murder and proceeded to sentence her to death without giving her opportunity to offer whatever mitigation she might have wished to state to the trial court. We have stated so in other judgments that in a situation as the current one the trial Judge ought to have given the appellant opportunity to mitigate. This is necessary in the event that the person convicted turns out to have been under the age of 18 (a minor) when he committed the offence or in a case of a woman she was pregnant when conviction is entered.

As already conceded by the State that the appellant should have been convicted of manslaughter rather than murder we respectfully agree in view of the evidence adduced by the prosecution witnesses. This appeal is therefore allowed to the extent that the conviction for murder is substituted with that of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code.

As regards the sentence we have agonized over the matter and in view of the circumstances of the case we sentence the appellant to ten years imprisonment. The sentence to commence from the date she was convicted by the superior court, i.e. from 15th February, 2007. It is so ordered.

Dated and delivered at Nairobi this 12th day of February 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR