IN THE COURT OF APPEAL AT NAKURU

Criminal Appeal 313 of 2006

SUSAN MUTONGORI MWITA …….APPELLANT
AND
REPUBLIC ……..RESPONDENT
(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Kimaru, J) dated 8th November, 2006

in
H.C.Cr.C. No. 42 of 2006)
****

JUDGMENT OF THE COURT

Susan Mutongori Mwita, (*Susan)* the appellant was arraigned in the High Court of Kenya at Nakuru on an Information which charged her with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence were that between 30th day of May, 2006 and 6th day of June 2006 at Naivasha town in Nakuru District within Rift Valley Province she murdered ***JS***, the deceased.

The appellant was the mother of the deceased. On 1st June, 2006 at 5.00 p.m. she went to the house of ***Gaudencia Magaiwa*** (PW3) and requested to be accommodated there that night alleging that her house had been locked up. She did not say by whom or why. She was with the deceased. However, on 6th June, 2006 ***Pc. Antony Mwangi*** (PW5) and ***Pc. Ongombe*** were instructed by their in-charge, ***IP. Lusunda*** to go to a scene near Naivasha G. K. Prison where the body of a dead child had been recovered. The two officers went to the gate of the G.K. Prison and were directed by guards at the gate of the Naivasha Prison to a scene where they found the dead body of a girl aged one year wrapped in many clothes and covered with a polythene paper. Pc. Mwangi and Pc. Ongombe collected the deceased body and took it to Naivasha District Hospital mortuary. Meanwhile members of the public who suspected the appellant of playing mischief with her child had apprehended her on the same day and taken her to Naivasha Highway Patrol Base where they handed her over to ***Cpl. Simon Mbogo*** (PW4). He in turn took her to Naivasha Police Station where, after investigations she was charged with the offence referred to herein before.

When the appellant was put to her defence, she testified on oath that on 5th June, 2006 she took the deceased to a baby care centre owned by one ***Lilian Wambui*** and went to work but when she returned home she found the deceased had been brought back to her house and left sleeping on the bed. Then during the night the deceased developed high temperature and by 3.00 a.m. she had died. The appellant called her neighbour George Kamau who came to her house with his wife but they told her to wait until the next morning in order to seek help. But nobody came to her help on 6th June, 2006 and she decided to dump the body of the deceased where it was recovered by police at 10.00 p.m. that day. She went to work on 7th June, 2006 but when she returned home in the evening, she was arrested by police.

Dr. David Kuria (PW1) performed a postmortem on the deceased's body and was of the opinion that the deceased had been strangled and that she had sustained a depressed frontal fracture of the skull. Further, it appeared to the doctor that the deceased had been subjected to sexual abuse before she died because her vagina and anus were torn. He gave evidence to this effect before the superior court.

In its judgment the superior court (*Kimaru, J.)* concluded as follows:

"I examined the demeanour of the accused when she testified before court. It is clear that she is a pathological liar. Her testimony before the court in her defence were pure and undiluted lies. The accused lied to her neighbours and the investigating officer of the cause of death of the deceased and her whereabouts before she was found dumped in the bush. It is clear to this court that the accused is the person who inflicted the fatal injuries on the deceased. Her motive appears to be extreme poverty that she was facing at the time. The accused could not pay the rent for the house she was living in. She was locked out of the house that she was forced to seek accommodation from (sic) one night to the other from sympathetic neighbours. In her convoluted thinking she thought that her problems would be resolved if she took away the life of the deceased. She did this by strangling the deceased. What is however not clear to this court is what role the accused played in the defilement of the deceased before she was killed. What is clear is that as a pathological liar, whatever story the accused would give would not be believed.
I considered the evidence adduced by the accused in her defence and I found it the same pure lies. The prosecution has established, on circumstantial evidence, that the accused killed the deceased with (sic) malice aforethought. I therefore find the accused guilty as charged on the charge of murder contrary to section 203 as read with section 204 of the Penal Code. The three assessors who assisted this court during the hearing, all arrived at a similar verdict finding the accused guilty of murder. The accused is therefore convicted as charged of murder."

The appellant was dissatisfied with this verdict and through the firm of ***Messrs Nyairo Nyagaka & Company Advocates*** filed and relied on a supplementary memorandum of appeal dated 27th January, 2010 which listed 6 grounds of appeal as hereunder:

"1. The trial Judge erred in law and fact in relying on circumstantial evidence which was not corroborated.

2. The trial Judge erred in law and fact by failing to take into consideration the evidence on record as to the cause of death more so

the evidence by the doctor (PW1) that the deceased had been raped.

3. The trial Judge erred in law and fact by failing to take account of the fact that reasonable doubt had been created in evidence in regard to the culprit who may have committed the offence and thereby the standard of proof required in criminal cases had not been met.

4. The trial Judge failed to take account of all the evidence relevant to this suit by failing to issue summons for the calling of the relevant and various defence witnesses.

5. The trial Judge erred in law and fact in failing to make a finding that doubt had been cast as to who committed the offence given medical evidence.

6. The trial Judge was impartial (sic) and biased in the conduct of the case and was influenced by extraneous circumstances in his judgment.

The appeal was heard by this Court on 20th February, 2010 when ***Mr. Nyagaka***, learned counsel for the appellant made submissions on her behalf. He abandoned ground 2 of the supplementary memorandum of appeal and apparently said nothing about ground 1. But on grounds 4 and 6 counsel submitted that the learned Judge was biased against the appellant by making adverse remarks against her in his judgment and also for failing to call the appellant's two witnesses namely ***George Kamau*** and ***Lilian Wamboi*** as she requested. Counsel complained about the finding in the medical report of sexual abuse and strangulation without facts to show when and who had committed these offences or that these acts had been committed by the appellant.

Mr. Njogu, Senior Principal State Counsel who appeared for the State supported the appellant's conviction and sentence and said she was given ample time to conduct her defence and that the court's attempt to assist her in availing her witnesses was not successful as they were not found at the estate mentioned. He stated that if it was true that the appellant sought assistance after the child died, she did not explain how the same child died or how she sustained the injuries on the head or on the neck from which she died. Counsel, defended the Judge over the appellant's allegation of bias.

This is a first appeal and as such this Court is duty bound to reconsider and re-evaluate the evidence afresh and subject it to an independent scrutiny in order to draw its own conclusions giving due allowance to the fact that it had no opportunity to see and hear the witnesses testify as the superior court had; see ***Okeno v Republic [1972] E.A. 32*** and ***Kinyua v R [2003] KLR 301***. In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond any reasonable doubt and generally the accused assumes no legal burden of establishing his innocence ***Mkendeshow v Republic [2002] 1 KLR 461***. However, in certain limited cases the law places a burden on the accused to explain on a balance of probabilities matters which are peculiarly within his/her own personal knowledge; see ***section 111*** of the Evidence Act (Cap. 80) Laws of Kenya. In this case there was no direct evidence to link the appellant with the death of the deceased.

WNN (PW2) who testified in the case stated that on 6th June, 2006 at 7.30 p.m. while passing near a foundation under construction in Naivasha town he saw someone sitting down covering her face. When the person saw PW2, she stood up and started walking ahead of him. PW2 realized he knew the person. She was the appellant. When PW2 went to his house the appellant also entered the house and asked PW2 to escort her to her house. A lady called *Makena* also came there and said she also wanted to accompany PW2 to the appellant's house. While at the appellant's house, many people came there and were asking the appellant about the whereabouts of her child. All the different answers she gave were not satisfactory and PW2 asked those present to restrain the appellant while he went to report the matter to Naivasha Highway Patrol Base. PW2 reported the matter and when police interrogated her, the appellant admitted the child died on 30th May, 2006. It is then that she took the police and members of the public to the place where she had dumped the deceased around the flyover on the Nakuru/Nairobi Highway road near the G.K. Prison. But the body of the deceased was not found there. As it emerged later the body had been collected by police and taken to Naivasha Hospital mortuary. PW2, other members of the public and the Patrol Base Police then took the appellant to Naivasha Police Station where they were informed about the recovery of the body of the deceased from the scene where the appellant had dumped it.

Gaudencia Magaiwa (PW3) who also testified in the case told the court that she was going to work on 6th June 2006 at 8.30 pm. when she saw many people gathered at the Naivasha flyover and when she went to check she found the body of a child whom she identified as the deceased, dead and dumped there. After work she went to the appellant's house and found her husband (PW2) there but when she questioned the appellant about the child she denied that she had killed it. However, when the matter was reported to Naivasha Highway Patrol Base and its personnel came to question the appellant she admitted killing the deceased and this is when she was arrested and taken to Naivasha Police Station where she was detained.

Cpl. Simon Mbogo (PW4) was the police officer to whom the appellant was taken by members of the public on allegation that she had killed and dumped the body of the deceased. He went to the scene with the appellant and members of the public but did not find the deceased's body there. While at the scene he learned from ***Pc. Antony Mwangi*** (PW5) that he and another police officer, ***Pc. Ongombe*** had recovered the deceased's body earlier in the day and taken it to Naivasha Hospital mortuary.

When placed on her defence the appellant testified on oath on how she went to the house of a neighbour, Mama Rusi on 30th May, 2006 and slept there. The next day she went to work leaving the decease at a baby care centre run by one Lilian Wamboi. She did the same on 1st, 2nd, 3rd and 4th June, 2006 and there was nothing wrong. However, when she took the child to the centre and went to work on 5th June, 2006, she found the child in the house sleeping on her return home. The deceased became sick that night and died of natural causes. She stated that she even called her neighbours George Kamau and his wife when she noticed the child had died but they told her to wait till the next morning when they would come to help but nobody came. This is why she decided to dump the deceased's body where it was found by police and members of the public on 6th June, 2006. She went to work on 7th June, 2006 but when she came back in the evening she was arrested at the house of Mama Makena.

What the appellant was really telling the Court was that she was not responsible for the death of the deceased but that the child died as a result of natural causes. This is why in the course of her testimony she requested that George Kamau, his wife Karumanzi and Lilian Wamboi, the owner of the baby care centre be summoned as defence witnesses. The appellant was represented by counsel at the trial but no formal application was made to summon those witnesses. Instead the court made an order on its own motion directing the investigating officer Anthony Mwangi (PW5) to trace and avail those witnesses. At the resumed hearing however Pc. Mwangi stated:-

"I went to the estate, where the accused mentioned, Site Estate. I looked for the plot mentioned but I could not find it. However, I received information that her husband was arrested in early May, 2006 on a charge of robbery with violence. It appears the accused was chased from where she used to live. Since then she has been staying temporarily with various persons".

No further effort was made to pursue the issue of those witnesses. The superior court was of the view that the evidence adduced by the prosecution witnesses upon which the conviction was founded was circumstantial. We agree. In ***R vs. Kipkering Arap Koske & Another [1949] 16 EACA 135*** which was quoted with approval in ***Msembe & Another vs. Republic [2003] KLR 521*** the Court of Appeal for Eastern

Africa stated:

"That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused".

The trial judge stated in his judgment:

"The evidence adduced by the prosecution clearly established that it is the accused who caused the death of the deceased. Although the accused claimed that the deceased died due to natural causes, the testimony of the doctor clearly established that the deceased was killed. She was defiled before she was strangled and her skull fractured. It is only the accused who can explain the circumstances under which the deceased sustained the said fatal injuries. These are matters which are within her own personal knowledge because of the fact that she was the sole custodian of the deceased".

But as was stated in ***Kipkering's case*** the burden of proving facts which justify the drawing of the inference of guilt from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused. The appellant testified that the deceased died of natural causes. Though she requested the court to call witnesses who saw the deceased on the night she died and who were not called, we are not persuaded that even if these witnesses were called they would have changed the case against the appellant. According to the appellant's sworn evidence the persons she intended to call came after the death of the deceased and were unlikely to shed any light on the cause of death. If the deceased died of natural cause, this would be understandable and there was no reason for the appellant to give different versions as to her whereabouts when asked about it by members of the public and even the police. She did not seek police assistance or even her employer on burial arrangements. Instead she dumped the deceased where the body was later recovered and went to work on 7th June, 2006 the day she was eventually arrested; as if everything was normal. This conduct on her part was intended to cover up what she had done. In this regard we agree with the learned Judge when he said:-

"These are matters which are within her own personal knowledge because of the fact that she was the sole custodian of the deceased."

It is true that no evidence was adduced to show how the deceased could have been sexually assaulted so as to cause her death. But the evidence on record shows that the appellant was the last person to be seen with the deceased and it was encumbent upon her under ***section 111*** of the Evidence Act to explain what happened to the child. Our overall review of the evidence adduced before the superior court and the appellant's conduct leaves no room for doubt that she was responsible for the deceased's death. In those circumstances, it is our view that the charge of murder against the appellant was proved beyond reasonable doubt and this appeal has no merit.
It is dismissed.

Dated and delivered at Nakuru this 16th day of April, 2010

E. O. O'KUBASU

……
JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR