REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 29 of 2005

WINNY CHEPNGENO KORIR …………………………………… APPELLANT

AND

REPUBLIC ………………………………………..………………… RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kericho (Muga Apondi, J.) dated 9th February, 2004

in

H.C.CR.C. NO. 34 OF 2002)

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JUDGMENT OF THE COURT

In an information dated 3rd day of September, 2002, the Court was informed by the Attorney General that the appellant **Winny Chepngeno Korir** was charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the Penal Code in that on the 30th day of January, 2002 at Yaganiek sub-location in Buret District of the Rift Valley Province, she murdered **Fancy Chepkurui**. She pleaded not guilty to the charge but after full trial with the aide of three assessors, the superior court found her guilty as charged, convicted her and sentenced her to suffer death as by law established. This was, despite the opinion of two assessors that she was guilty of manslaughter. One assessor had an opinion that she was guilty of the charge of murder. The appellant was not satisfied with that conviction and sentence and hence this appeal before us based on four grounds of appeal filed by the appellant herself all of which are mainly that she acted as a result of circumstances beyond her control as she was chased away by her husband because of the deceased who was born out of wedlock and none of her other immediate relatives gave her accommodation. Her lawyers, while, in effect adopting her original appeal filed a supplementary Memorandum of Appeal citing six grounds which are that:

"1. The learned Superior Court Judge erred in law and fact in convicting the appellant of the offence of murder.

2. The learned Superior Court Judge was in error of law and fact in failing to adequately consider the extenuating circumstances under the offences was (sic) allegedly committed.

3. The learned Superior Court Judge erred in law and fact in failing to satisfy himself that the plea was unequivocal.

4. The learned Superior Court Judge erred in law and fact in failing to take into consideration particular circumstances material to the appellant's diminished responsibility.

5. The learned Superior Court Judge was in error of law and fact in disregarding the appellants unsworn statement.

6. The learned trial Court was in error of law and fact in finding that the prosecution had proved the offence of murder to the required standard".

The facts of the case in brief summary are that the appellant was the daughter of **Grace Chepngetich Too** (PW1) (Grace), and a neighbour to **Geoffrey Kipkoech Rono**, (PW2) (Geoffrey), **Linah Chepkurui Buses** (PW4) (Linah) and **Joyce Cherotich Ngetich** (PW6) (Joyce). She was married to one **Sammy Korir** who was living at Ole Nguruoni and they had a total of three children including the deceased Fancy Chepkurui, who the appellant says was born before she was married and when she was aged sixteen years. At the relevant time, she was expecting the fourth child. On 24th January, 2002, Grace stated in her evidence that the appellant visited her at her home. The appellant was accompanied by the deceased who was seven (7) years old and another child called Kimutai. She told Grace that she wanted to take the deceased to somebody who could assist her with school fees and who was at Mara in Bomet. The appellant had a green paper bag and sack. The appellant left but next time Grace saw her, the deceased was not there with the appellant. In the intervening period, on 30th January, 2002, Geoffrey was by the side of a road waiting for some people. The appellant passed nearby and she was having only one child. The deceased was not there. Linah had seen the appellant near the river when she (Linah) went to fetch water. At that time the appellant had two children near the river. After sometime, Linah got some information that a child had been killed. She went to Grace. Joyce also saw a woman near the same river. On hearing Grace, Linah and Joyce talking about the appellant and the deceased, Geoffrey dashed to the river where he met **William Kipkorir Ng'eno** (PW3) (Wiliam) and other elders who were already searching for the body of the deceased in the river. Later William told those carrying out the search that she had stepped on a body. He was assisted by one Richard Koech and the body was retrieved from the river. It was inside a sack. The body had injury on top of her ear and had a rope tied around her neck. There were three stones inside the sack. The Assistant Chief of the area reported the matter to Sotik Police Station on 31st January, 2002. On receipt of the report, **Inspector Shadrack Marua** (PW8) (IP. Shadrack) and other police officers visited the scene where they found the body of the deceased. After finding the body, they carried other investigations and then took the body to Kapkatet District Hospital where on 4th February, 2002, **Dr. Joyce Chebase** (PW7) carried out a postmortem examination on it. She found bruises on the face, on the forehead, ears and neck together with puncture wounds on the chest. Limbs were intact but trachea was fractured. She formed the opinion that the cause of death was cardio-respiratory arrest due to respiratory failure. The appellant was thereafter arraigned in the court as stated above.

In her defence, she stated that she committed the offence without the intention of doing so. She gave birth to the deceased before she was married. Thereafter she married one Sammy Korir with whom she had two other children. When she was expecting the fourth child, her husband "*chased*" her away. She went to stay with her mother-in-law but her husband prevailed upon her mother-in-law who also chased her away. Her husband demanded that the deceased be returned to whoever sired her. She took the child to her mother but her mother also refused to take the child and insisted on her returning the deceased to her husband. She then went to her uncle's home, but her mother protested and her uncle's wife (aunt) sent her away. She went to her sister with the child and explained to her sister the situation, but her brother-in-law i.e. her sister's husband complained saying he was already having a burden of taking care of his own children and could not take the deceased. Eventually, she went to her grandmother's house where she slept but the following day her mother went there and forced her to go to her matrimonial home. On seeing the above, she just took a rope and went to strangle the child. Immediately after killing her child she realized she had done a bad thing and she fell sick the same night. She was taken to hospital by Korir's parents as she was shivering and felt pains in her heart. She was admitted for three days and on the fourth day she was arrested.

At the close of her defence case, Mr. Matwere, her learned counsel at the time, submitted that the

appellant killed her child but without any malice aforethought and sought that the appellant to be found guilty of the lesser offence of manslaughter. The prosecution through Mr. Oriri submitted, that as all the ingredients of murder had been proved, the appellant was indeed guilty of murder maintaining that if there was any provocation, the same should have been directed to the husband and not to the deceased. He contended that the appellant was not suffering from any mental illness and so he sought a verdict of guilty against the appellant.

The learned Judge of the superior court after considering the evidence that was before him, a summary of which we have given above, stated:

"**This court has carefully perused the evidence on record. It is obvious to all and sundry that it was actually the accused who had strangled her child while using a rope. The accused openly admitted that, she was the person who did the above. It is apparent that the accused had the intention of killing her own child. There is no doubt that the accused being an adult of sound mind knew very well the implication of strangling a child and throwing her in water. This court is satisfied that the prosecution had proved its case beyond any reasonable doubt. On the other hand the defence of the accused amounts to a confession. The upshot is that the prosecution has proved its case beyond any reasonable doubt".**

He then proceeded to find the appellant guilty of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. We make haste to add here that what we have reproduced above is, apart from reproducing the evidence that was tendered before him, the entire substantive part of the judgment i.e. analysis, evaluation and conclusion of the entire case by the learned Judge.

Mr. Matiri, the learned counsel for the appellant, submitted that the learned Judge erred in failing to consider the entire case particularly the senario as stated in the defence and in failing to appreciate that the circumstances prevailing as narrated in the defence clearly showed that the appellant, at the time she killed the deceased was suffering from diminished responsibility and was thus incapable of making any informed intention; and that being so ,the correct conclusion should have been to reduce the offence to that of manslaughter. Mr. Gumo, the learned Assistant Director of Public Prosecutions, on the other hand, submitted that the conviction for the offence of murder was safe.

We have considered the submissions by the learned counsel, the record, the judgment of the superior court and the law. This is a first appeal. Our duty when considering a matter as a first appellate court is well documented in the celebrated decisions of the predecessor to this Court and of this Court in the cases of **Pandya vs. R.** [1957] EA 338 at page 337 and **Okeno vs. R.** [1972] EA 32 respectively. Put in a nutshell, we are duty bound to analyse and evaluate the evidence a fresh and to come to our own independent conclusion on the same but always putting in mind that we had no advantage of seeing the witnesses and their demeanor and giving allowance for the same.

In the appeal before us, three matters cause us serious anxiety. First, the learned Judge of the superior court treated the entire defence as a mere confession and having done so, he did not with respect analyse it for its full meaning and impact. In our view, the appellant was not merely confessing to the offence. She was raising weighty matters that went towards her ability at the time of the offence, to form intention to kill. She was saying, in our view, that she was at that relevant time suffering diminished responsibility and acted without any intention to cause the death of her child. She was saying that indeed immediately after the act, she realized what she had done and fell sick. We do not say that if all these were considered in their proper perspective, the court could have acquitted the appellant nor that the court could have reduced the charge to that of manslaughter. What we are saying is that the court was bound to consider that defence fully for what it was worth before dismissing it as a mere confession. In our view, if the court had done that, it might have possibly reached a different conclusion altogether.

The second point that has caused us concern is that the learned Judge did not in his summary to the assessors consider the effect of the defence and its impact on the entire case and did not direct the assessors on the legal implications of the same. It is noted that two assessors returned opinions of guilty to Manslaughter but this did not proceed from the summary given to them by the learned Judge who had

summed up the defence as follows:

“**Surprisingly in her defence, the accused asked for forgiveness on the ground that she had committed the offence without the intention of doing so. The accused explained in detail the problems that she had with her husband due to the deceased who had been born out of the wedlock. She also explained several measures that she had put in place to have the deceased have a home to stay. Somehow, she was frustrated in all her efforts. In her own words, she admitted taking a rope and strangling the child”.**

In our view, the learned Judge had a duty to tell the assessors the legal effect on the case of that defence, whether they should have put no legal weight upon it or not so as to enable the assessors make an informed opinion. If he had done so, the assessors including the first assessor who returned an opinion of guilty to the offence of murder might have come to a different opinion on the matter.

The third aspect is that two assessors had the opinion that the appellant was guilty of manslaughter whereas the learned Judge in his judgment came to the conclusion that the appellant was guilty of murder. Thus, the learned Judge’s decision differed from those of the two assessors. Under the circumstances, the learned Judge was bound to give a reason or reasons why he came to a different conclusion from the opinion of the assessors. The record and the judgment show that he never did so. That, in our view was not proper.

We have carefully considered the evidence on record. That the appellant killed her daughter aged seven years is not in doubt. The appellant admitted it freely. The circumstances that gave rise to her action were detailed in her defence. The deceased was born out of wedlock and her husband rejected her and sent the appellant away because of her. The appellant went back to her mother-in-law’s home which is the natural next place for her but she was rejected as well. She went to her mother but she was rejected again. She went to her brother-in-law, but she was unwanted there as well. She went to several places and back to her mother but got no accommodation for her daughter, the deceased. We agree that in law as it stands, those acts in their own could not reduce the offence of murder to manslaughter, but that is not all. A court of law is for justice. That being so, the Court is bound to ask, as we do, whether all those frustrations could have left the appellant with a balanced mind capable of making a rational decision? We think not. We are of the opinion that all these aspects when considered together as a Court must do, would make it impossible for the appellant to act as a reasonable person would have done in the circumstances.

For the above reasons, we think, the decision which would address the justice of the matter is to reduce the offence to that of manslaughter. The appeal is allowed. The conviction for the offence of murder is quashed and sentence of death set aside. In its place, there shall be conviction for the offence of manslaughter under **Section 205** of the Penal Code. The appellant is sentenced to serve a sentence of **ten (10) years imprisonment** with effect from **9th February, 2004** the date of her first conviction. Orders accordingly.

Dated and delivered at Nakuru this 6th day of March, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR