



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

Criminal Appeal 11 of 2003

VERONICA ANYANGO OKUMU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi, (Mutitu, J) dated 11th December, 2002,

in

H.C.Cr.C. No. 21 of 2000)

JUDGMENT OF THE COURT

The Appellant, *Veronica Onyango Okumu* was charged with murder contrary to section 203 as read with section 204 of the Penal Code. She was on 11th December, 2002, convicted of that offence by the Superior Court (Mutitu, J) and sentenced to death.

The particulars of the charge are that on the 1st day of October, 1999 at Dandora Estate Phase Four Nairobi, the Appellant murdered *Dorcas Achieng*.

It is common ground that the appellant and the deceased the late *Dorcas Achieng* were co-wives of *Mr. William Omondi (PW3)* and they had lived together in Dandora.

The factual background as narrated by PW3, the husband of the two ladies, is that, he had married the appellant in 1992 and for seven years the appellant was barren and had no child. Apparently, for this reason, PW3 decided to marry the deceased as a second wife. The two wives co-existed for three weeks in one house at Dandora. The appellant is said to have differed with the deceased after the deceased disclosed to her that she was pregnant. PW3 offered to take the appellant to his rural home but she refused. Instead she went to live with her sister at Huruma estate in Nairobi but after a short stay she left the sister's place to an undisclosed place. Later on, PW3 met the appellant. She informed him that she had divorced him. PW3 husband thereafter decided to move the deceased from the house the two wives had shared earlier, to another homestead owned by PW2.

PW3 gave evidence to the effect that he did not show the appellant his new house. The appellant claims

to have been shown the couples new house by her husband. However, on this point the husband's evidence seems to us more credible in that the unchallenged evidence of Mr. Caleb Otango (PW5), a neighbour of the husband, indicates that he had two weeks earlier been asked by the appellant if the deceased lived in the same plot and he showed her the house.

When the appeal came up for hearing the learned counsel for the Appellant **A.J.T. Gulenywa** opted to argue ground 10 only as set out in the memorandum of appeal and the ground states:-

“That I plead for forgiveness from this Honourable Court and request that this case be reviewed and my crime be reduced to manslaughter and I be given a lighter sentence.”

This being a first appeal this court has a responsibility to re-evaluate and analyse the evidence and to reach its own conclusions and make its own findings based on the Court's independent evaluation and analysis of that evidence bearing in mind that unlike the trial court, we lack the benefit of seeing and hearing the witnesses testify as to assess their credibility.

With the above consideration in view, our evaluation and analysis of the evidence will principally focus on the existence or non existence of the intention to kill, taking into account that there was no eyewitness of the actual stabbing of the deceased in the neck by the appellant. However, the appellant had in her two statements to the police, admitted having stabbed the deceased on the left side of the neck using a knife.

We have examined the evidence touching on the intention to kill as follows:-

i. The Appellant according to the evidence of her husband (PW3) had left the matrimonial home after the deceased's disclosure to her that she was pregnant.

ii. She knew that her husband could not be at home around 9.00 a.m. when she visited her husband's house allegedly to collect her photographs and clothes because ordinarily he would be at his place of work at that time.

iii. According to the evidence of **Mr Otango** (PW5) the Appellant had visited the couple's house at least two weeks before the fateful day to try and ascertain where the deceased lived. The house was identified to her by PW5.

iv. PW1, who owned the premises where the deceased lived, saw the appellant holding the deceased's T-shirt from the back, and heard her state that she wanted to kill **Dorcas** with a knife and even when the deceased fell down the appellant wanted to stab her further but was restrained from doing so by PW1 and PW2. The appellant informed PW1 that she wanted to kill the deceased because she had snatched her husband from her. According to her statement under inquiry the appellant admitted that she had stabbed the deceased. She repeated this in her charge and caution statement and also in her account to PW1, PW2 and PW3, although in her sworn evidence she tried to retract the admission, by stating that it was the deceased who tried to stab her first but she fell on the knife which “*stabbed*” her.

v. In the charge and caution statement (exhibit 7) recorded by PW7, the appellant in addition states that she was married to PW3 for 7 years but PW3 married another wife in 1999 and this brought sharp differences between her and her husband and as a result, her husband had chased her from the matrimonial home.

vi. **Dr Alex Onzere Kirasi Olumbe** (PW10), who performed the postmortem of the deceased report, testified that the deceased body did not show any “defensive wounds” and that the deceased died of a stab wound to the neck caused by a sharp object. The foregoing notwithstanding, there are aspects of the case which raise a doubt as to whether indeed the appellant killed the deceased with the requisite malice aforethought.

a) In her statement under inquiry the appellant states:-

“I had not planned or intended to go and kill the late, I had only planned to go and collect my photographs but when I arrived a disagreement arose, and a fight broke out and in the process, I stabbed the deceased with the knife and she died.”

b) The appellant had not been seen with any weapon or knife when she entered the house and the murder weapon was identified by *Mr Omondi (PW3)*, the appellant’s husband, as his kitchen knife. The use of a kitchen knife suggests a spontaneous action, and is consistent with the appellant’s evidence in the cautionary statement. The mere fact that she went to the house in the absence of her husband cannot per se point to an intention to kill.

c) There was no direct evidence or evidence on who of the two ladies was the first to go for the murder weapon namely the kitchen knife. It is also not clear who was the actual aggressor inside the house. It is possible the deceased could have gone for the kitchen knife and the appellant grabbed it in self defence or the appellant could have gone for it on the spur of the moment and inflicted the fatal wound. Although the appellant in her two statements admitted that she stabbed the deceased, it is the deceased who was familiar with the set up in her house including the place where the knife was kept. For this reason the deceased could have been the first to take the knife in order to attack the appellant. As the actual circumstances both before the stabbing and after the stabbing are not known, this Court is of the view that a reasonable doubt exists concerning whether the Appellant possessed the intention to kill the deceased or any other person.

It is trite law that any reasonable doubts should be in favour of the appellant.

As the offence of murder consists of proof of death, and that the death was caused by the voluntary and unlawful act of the accused person, and that the accused had the intention to kill the deceased, our evaluation of the evidence does not reveal a predetermined intention to kill and as a result, proof of one of the ingredients of the offence of murder is conspicuously missing. There is no proof of malice aforethought and the burden of proof lay on the prosecution. In this regard, we have also taken into account the concession made by the learned Principal State Counsel, Mr Kaigai, to the effect that the State’s own analysis of the evidence is that, there was no proof of malice aforethought, and he as a result urged the Court to convict on the lesser offence of manslaughter.

It follows, then, that as the burden was on the prosecution to prove malice aforethought and that burden has not been discharged, the conviction of the appellant on the charge of murder cannot stand. We quash it. But we are not in doubt that the appellant caused the death of the deceased and that the killing was unlawful.

We therefore substitute a conviction for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code respectively. Considering the circumstances of this case, the appellant is sentenced to fifteen (15) years imprisonment, to run from the date she was convicted of murder by the High Court namely on 11th December, 2002.

It is so ordered.

Dated and delivered at Nairobi this 29th day of May 2009.

S. E. O BOSIRE

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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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