



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 156 of 2006

AWM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J) dated 31.3.2006

in

H.C.CR.C. NO. 31 OF 2003)

JUDGMENT OF THE COURT

A *W M* was arraigned before the High Court at Nyeri on an information which charged her with murder contrary to *Section 203* as read with *Section 204* of the Penal Code. The particulars contained in the information were that on the 6th day of October, 2002 at [particulars withheld] in Kirinyaga District of the Central Province the appellant murdered *S N C*.

The trial of the appellant commenced before the *Hon. Mr. Justice Khamoni* sitting with three assessors (as the law then provided) on 28th February, 2006 when seven prosecution witnesses testified. The trial was then adjourned to 9th March, 2006 when prosecution called two more witnesses and closed its case. The learned Judge ruled that the appellant had a case to answer and the appellant elected to defend herself by making an unsworn statement.

The evidence adduced in the superior court was fairly straightforward. The appellant herein was a young lady living with her parents. The deceased infant was about nine months old and the appellant was the infant's mother. The appellant's parents had been educating her and she was in standard six when she got pregnant, left school and went to live with one *P K N (PW5)*. After staying with the said *N* for some months the relationship became sour and, as it happens in such cases, the appellant and her child returned to her parents.

On 6th October, 2002 the parents of the appellant *J M N (PW2)* (the father) and *N W M (PW3)* (the mother) went to church leaving the appellant and the child at home. While the two parents were in church they received information that the appellant's child was missing. They went back home and found the appellant who informed them that the child was indeed missing. The neighbours joined in the search of the missing child. This incident was reported to Kerugoya Police Station who started investigations. On 16th October, 2002 the appellant led the police and others to where the child had been buried. The

body of the child was taken to Kerugoya District Hospital Mortuary where a postmortem examination was conducted by Dr. Paul Mbalu (PW1). According to Dr. Mbalu this was a female child of 9 months old. In the course of his evidence in chief Dr. Mbalu stated inter alia:-

“Body in black polythene paper of a female child 9 months old partly decomposing. With the skin peeling off. There was a penetrating wound at the front abdomen piercing the liver. On the top of the head there was haematoma (blood collection on the top of the tissues). Another blood collection in the head.

The rest of the body organs normal. I formed the opinion the deceased died of head injury from a blunt object or force.”

According to Dr. Ibrahim Gatangi (PW9) who examined the appellant on 4th November, 2002 the appellant was mentally normal and aged about 17 years old.

When put on her defence the appellant’s defence was simple and straight forward. This is what she said in her unsworn statement:-

“On 6-10-2002 I was left at home by my parents when they went to church. I cleaning (sic) my clothes when I finished I started palying(sic) with the baby it fell down. I though (sic) my baby had died. I took step to go and burry the child since I was shocked. I was fearing my father could come and beat me up. I was afraid. Somebody went to call them and we went to report to the police. I went to show them where the child was and they uncovered the placed (sic) and found the child and took it as I was taken to the police where I was locked up.

It was not my intention to kill. That is all.”

Although the superior court’s record does not show that the learned Judge did any summing up to the assessors it shows that the three assessors returned a unanimous verdict of guilty.

The learned Judge considered the evidence, the submission by counsel appearing both for the State and the appellant and came to the conclusion that the appellant was guilty as charged. In concluding his judgment which he delivered on 31st March, 2006 the learned Judge expressed himself thus:-

“Accordingly, I am satisfied that the prosecution has proved this case against the accused person beyond reasonable doubt. I find the accused person guilty of the offence as charged and convict her.”

In mitigation, the appellant’s counsel Mr. Mahinda informed the learned Judge that the appellant was only 17 years old at the time she committed the offence. He asked the learned Judge to take that into account in sentencing the appellant.

Having considered the mitigating factors the learned Judge proceeded to sentence the appellant as follows:-

“The accused has been convicted. She is being treated as a first offender. I take into account what has been stated in mitigation. I particularly note that the age of the accused was assessed by the doctor who examined her as 17 years old at the time she committed the offence. Otherwise it had been claimed she was by then 13 years old. But the offence is serious.

Accordingly, the accused person is hereby ordered detained at the president’s pleasure.”

Being aggrieved by the foregoing the appellant now comes to this Court by way of first and final appeal. Being a first appeal it is in the nature of a retrial and we must deal with the appeal in accordance with the principles set out in *OKENO V. R (1972) E.A. 32*. It is for this reason that we set out in some detail what we considered the salient portions of the evidence tendered.

To challenge the findings of the learned Judge the appellant through her counsel, filed the following grounds as set out in the Supplementary Grounds of Appeal:-

- “1). *The trial herein was a nullity ab initio for blatant violation of the accused constitutional rights as enshrined under section 72(3) of the constitution that the accused was arrested on the 16th October, 2002 and was not taken to court until the 15th November, 2002.*
- 2). *The trial of the appellant violated the appellant’s constitutional rights to a speedy and expeditious trial as enshrined under section 77(1) of the constitution, the trial having lasted from the 5th November, 2002 until the 31st March, 2006.*
- 3). *The committal proceedings of 25th March, 2006 were conducted by an unqualified person.*
- 4). *The committal proceedings were unlawful and irregular in that the appellant was not informed of the purpose thereof until the 28th May, 2003 when she was informed of her (sic) committal to the High Court.*
- 5). *The trial judge failed in law in imputing mense rea for murder for the appellant conduct.*
- 6). *The trial judge erred in law and fact in ignoring the good and harmonious relationship which had existed between the appellant and the deceased.*
- 7). *The trial Judge erred in law and fact in failing to take note that (sic) the appellant was breast feeding mother of tender age and who had undergone (sic) a lot of frustrations including starvation and separation and was thus not seized (sic) of requisite mental capacity to murder the deceased.*
- 8). *The trial Judge erred in basing the entire conviction on the appellant’s conduct.”*

When this appeal came up for hearing before us on 12th May, 2009 Mr. Kinyua Kiama appeared for the appellant while Mr. J.M. Makura (Senior State Counsel) appeared for the State. Mr. Kiama addressed us at some length relying on his Supplementary Grounds of Appeal.

In view of our final conclusion in this appeal we do not think it will be necessary to deal with all issues raised in the submissions by both Mr. Kiama and Mr. Makura. We are of the view that the appeal can be disposed of on the issue of the appellant’s age when she is alleged to have committed the offence and the age of the child the subject of the charge.

From the evidence on record, it was undisputed that the appellant was below the age of 17 when she is alleged to have committed the offence. The child in question was aged 9 months.

Section 210 of the Penal Code (Cap. 63 Laws of Kenya) provides:-

“Where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide, and may for that offence be dealt with and punished as if she had been guilty of manslaughter of the child.”

And Section 181(1) of the Criminal Procedure Code (Cap. 75 Laws of Kenya) provides:-

“When a woman is charged with the murder of her child, being a child under the age of twelve months, and the court is of the opinion that she by a willful act or omission caused its death but at the time of the act or omission she had not fully recovered from the effect of giving birth to that child and that by reason

thereof or by reason of the effect of the lactation consequent upon the birth of the child the balance of her mind was then disturbed, she may, notwithstanding that the circumstances were such that but for the provisions of Section 210 of the Penal Code she might be convicted of murder, be convicted of the offence of infanticide although she was not charged with it.”

In view of the foregoing we are satisfied that the appellant was wrongly convicted before the superior court on a charge of murder contrary to *Section 203* as read with *Section 204* of the Penal Code. Accordingly the conviction is set aside and substituted with one of a finding of guilty of infanticide contrary to *Section 210* of the Penal Code. We also set aside the order of detention under President’s Pleasure apparently imposed pursuant to *Section 25(2)* of the Penal Code and in its place we substitute a discharge under *Section 191(1)(a)* of the Children Act taking into account the long period the appellant has been in custody. The appellant is to be set free forthwith unless otherwise lawfully held.

DATED and DELIVERED at NYERI this 15th day of MAY, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR