IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 5 of 2007

MIRIAM MUTHONI KARIUKI…….....……..APPELLANT

AND

REPUBLIC…….....RESPONDENT

(*Appeal from Judgment of the High Court of Kenya at Nyeri (Okwengu, J) dated 13th February 2007*

in

H.C.CR. Case No. 36 of 2005)

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JUDGMENT OF THE COURT

The appellant herein, **Miriam Muthoni Kariuki**, was arraigned in the superior court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence in the information were that on 17th day of September 2005 at Githunguri sub-location in Muranga District within Central Province she murdered **Michael Muchiri Muthoni,** herein "*the deceased*." The deceased was the appellant's son and they both lived with the appellant's father Kariuki Muchiri Kagucia (PW1) in his house. It was the evidence of PW1 that the three slept in that house on the night of 16th September 2005 and that when PW1 woke up at around 5.00 a.m. on 17th September 2005 he heard the appellant go out of the house and thought she had gone to the toilet, but when he got out of bed an hour later and went to the toilet, he never saw the appellant there and could not tell where she was.

The appellant came back at around 7.00 a.m. and prepared breakfast which PW1 took but he never heard the sound of the deceased. When he asked the appellant how the deceased was doing she said he was still sleeping. Meanwhile on the morning of 17th September 2005 Judy Wangare Mwangi (PW4) was going to Iyego Secondary School with two other students and when she reached Mathioya bridge she saw something which looked like clothing in the river and when she moved closer, she saw a child's head. They went to school and reported what they had seen to the principal, one Joseph Kamau Muturi (PW5) who took them in his car to Kiamara police post where the matter was reported. PW4 and the two other girls took police officers to the river bridge where the deceased body was retrieved and taken to Murang'a District hospital mortuary.

Meanwhile a report of the missing of and recovery of the deceased at Mathioya bridge had been made to Githunguri sublocation assistant chief by Florence Wangui Muchiri (PW3) and the appellant's name given as a suspect. He carried out investigations and found that the appellant was working for one Mrs. Gathumbi. This witness went to the home of Gathumbi on 18th September 2005 and arrested the appellant, took her to the chief's camp and then to Kangema police station where she was charged with this offence.

The appellant's defence was that on the material date she left the child asleep in her father's house and went to tell her sister in law about it as she was going to look for employment. However, when she returned home after work she found neither the deceased nor her sister in law. According to her evidence PW1 told her that her sister in law (PW3) had taken the deceased but that when PW3 came home she denied having taken the deceased. The two appeared to have exchanged bitter words before they heard some screams coming from the river side. The appellant asked PW3 to go and find out if it was her lost child. PW3 went towards the direction of the screams but did not return and soon thereafter a headman called Mero came to the home and talked to PW1 after which he arrested the appellant and took her to Kangema police station where she was interrogated and locked up. Later she was charged with this offence.

The trial Judge (H. M. Okwengu, J) heard and recorded the evidence of the witnesses. She summed it up to the assessors who returned a verdict of not guilty. Their reason was that there was no eyewitness who saw the appellant throw the deceased in the river. However in her reserved judgment the learned Judge stated:-

"**I find that although no one saw the accused throw the child in the river, the evidence regarding the deceased leaving her home at 5.00 a.m. and coming back at 7.00 a.m. shortly before the body of the child was discovered. The fact that the accused lied that the child was asleep in the house, the fact that the accused disappeared from home and went to work 20 kilometers away all lead me to the inescapable conclusion that the drowning of the deceased child was no accident but a deliberate act of the accused who wanted to free herself of the child so that she could go to work.**

I reject the defence of the accused person and find that she threw the child in the river when she left the house early in the morning. Although the 3 assessors returned a unanimous opinion of not guilty on the grounds that no one saw the accused person throw the child in the river, the assessors apparently ignored this court's discretion on the law regarding circumstantial evidence and therefore did not consider the other circumstances leading to the inference of guilt on the part of the accused. I do therefore reject the opinion of the assessors and find that the deceased child died as a result of accused's action. I am satisfied that the accused had malice aforethought as she wanted the child out of the way so that she could go to work. Accordingly, I find the accused person guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code."

The learned Judge then proceeded to pass the only lawful sentence provided by law for this offence, to wit death. The appellant was dissatisfied with both conviction and sentence and now comes to this court on appeal based on the appellant's own memorandum of appeal which listed 7 grounds of appeal; namely that she is a first offender and she pleaded not guilty, nobody saw her murdering the deceased and that all witnesses who testified relied on suspicion. She then reproduced the defence she made in the superior court about leaving the deceased under the care of her sister in law (PW3) and her strong belief that it is this witness who killed her child. She added that she could not kill the deceased since she had two other children whom she took care of and who are alive. She pleaded that her appeal be allowed, conviction quashed and sentence set aside. Though her counsel James Mwangi, attempted to introduce one more ground of appeal about contravention of the appellant's constitutional rights, he abandoned it when he was reminded that he had not sought the Court's leave to introduce it.

The learned counsel prayed that the appeal be allowed conviction quashed and sentence set aside. Mr. Orinda learned Principal State Counsel submitted that the evidence against the appellant was overwhelming and asked the court to dismiss the appeal.

Being a first appeal it is trite law that we reconsider and re-evaluate the evidence and come to our own conclusions in order to satisfy ourselves there was no failure of justice not forgetting of course that we had no advantage of seeing and hearing witnesses who testified before the superior court. It is not sufficient for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions: **OKENO vs REPUBLIC [1957] E.A. 336** and **NGUI vs REPUBLIC [1984] KLR 729.**

The appellant's grounds of appeal are basically against findings of fact. But as was stated by this Court in the case of **Chemasong vs. Republic [1984] KLR. 611:**

"**A court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings it did."**

The appellant insisted that she had left the deceased with her father (PW1) with instruction that her sister in law take care of it during that day. However, PW1 denied he had such instructions. Instead he told the superior court that the appellant lied to him that the deceased was asleep whenever he asked about his condition. But it was when he peeped through the window of the appellant's bedroom that he discovered the deceased was not on the bed. Even when the appellant came home, on the morning of 17th September 2005 and prepared breakfast, she told PW1 the deceased was still asleep. She did not wake him up to take the breakfast too since she was leaving the home to go to look for some casual work, as she put it. In fact PW1 suggested in his evidence that after the appellant left home on 17th September 2005 he never saw her for three days until he went to Kangema. In fact the evidence of PW1 was discounting the contention of the appellant that when he went out to look for a job on 17th September 2005 he came back home on the same day. The appellant did not answer some of those issues even during her cross-examination of PW 1. Even when she said in her testimony that she had left the deceased under the care of PW3, her cross-examination of this witness did not reflect this aspect of her defence. And if it is true when the deceased body was recovered from the river she was at home she did appear to be shocked as would have been expected.

We don't think this is conduct of a mother who had lost a child she loved. In the circumstances, it is our view that the superior court rightly rejected the appellant's defence.

The appellant was charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. PW1 gave the age of the deceased at about 9 months. Dr. Kanyi Gitau (PW2) who performed a postmortem examination on the deceased body at Murang'a District hospital assessed his age at approximately 1 year while the appellant gave the deceased's age as 1 year old. These pieces of evidence do not give an actual age of the deceased. Given this uncertainty on the age of the deceased and the evidence adduced it would have been more appropriate if the appellant was charged with an offence under **section 210** of the Penal Code. The section 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, them notwithstanding that the circumstances were such that but for the provision 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."**

The very fact that a mother strangles her own son and throws the body, in the river depicts very unusual behaviour giving rise to the view that the appellant had a disturbed mind at the time she committed this act. In the circumstances we set aside conviction and sentence for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, and substitute therefor a conviction for the offence of infanticide contrary to **section 210** of the Penal Code. Considering the fact that the appellant has been in custody for long we sentence her to 8 years imprisonment to run from the date of conviction.

Dated and delivered at Nyeri this 7th day of November, 2008.

S. E. O. BOSIRE

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR