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

Criminal Appeal 41 of 2005

Z K M ……...…… APPELLANT

AND

REPUBLIC …… RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Machakos, (Nambuye, J) dated 17th January, 2003

In

H.C. Cr. Case No. 14 of 2001)

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JUDGMENT OF THE COURT

E A C (PW 4) and S N (PW 2) were friends sometimes before 1991. In January, 1991 out of their friendship, the deceased, M N, was born out of wedlock. Later either in 1992 or 1993, the two were married but that marriage ended after only three years of cohabitation. During that period of cohabitation, the two lived at Dandora neighbouring the house of C A O (PW 1) (to whom we shall hereinafter refer as "Catherine"). There developed family friendship between the family of Smirnoff and that of Catherine. On the separation of Eddy and Smirnoff, the child (deceased) was taken by the mother who had her custody for sometime but that was only for the time the father of Smirnoff still lived. After the death of her father, Eddy took the deceased and lived with her while Smirnoff continued with her life at Zimmerman in Nairobi. In 1999, Eddy married the appellant, Z K M (to whom we shall hereinafter refer as "Zipporah"). They lived at Dandora still as neighbours of Catherine. Zipporah had her own son, S, who was not sired by Eddy. Eddy had, in addition to the deceased, his brother. Thus, the two, Eddy and Zipporah, lived in their house with the deceased, Zipporah's son and Eddy's brother. Smirnoff used to visit the deceased on and off and her relatives such as R M N (PW 6) (referred to hereinafter as "Remi") would visit the deceased at the house of the appellant and Eddy. Sometimes Smirnoff would want to take the deceased with her and sometimes she would arrange to see her at different venues away from the house of the appellant. At one time, Remi went to take away the deceased temporarily. Apparently, these visits and arrangements did not go well with the appellant who raised objections with Eddy and there were exchanges of words at times arising from these visits. Catherine was a witness to one of these exchanges and W M N (PW 7) (Wilfred) was also informed about these misunderstandings. From the evidence on record, both Eddy and the appellant agreed that the two of them discussed these misunderstandings between them allegedly brought about by the desire of Smirnoff and her relatives to have the deceased under their care from time to time and resistance by Eddy and the appellant. At times the appellant and Eddy would quarrel about the deceased and on one of these quarrels, the appellant was reported to have said in the hearing of one Winnie words to the effect "*Halali Bilai ni Mimi a Muna*"

which translated into English meant "It was me or Muna". These words were allegedly uttered on a date prior to but close to 11th November, 1999. On 11th November 1999, the appellant left her house together with the deceased, her son and her sister's son. The last two namely her son Stanley and her sister's son Tom were left at Dandora Phase III with a relative, while the appellant and the deceased proceeded to Athi River. The next that was heard of them was at Athi River where the record shows that the appellant called C M G (PW 3) (Charles) to go to her assistance as the deceased was very sick and urgent help was needed. At that time, the appellant together with the deceased were behind Indere building in Athi River. When Charles responded to the appellant's call and went to the scene, he found the deceased lying down and looking sick. The appellant wanted Charles to help her take the child to hospital. On the advice of Charles, the deceased was first taken to where Charles worked. She carried the child to that place and placed her in the house. In the meantime, she gave Charles Eddy's phone number and Charles went to contact Eddy on phone. He did not find Eddy. By that time some women who had come to that house to plait their hair also gave some help and the deceased was taken to Makadara Clinic. Charles went back to his place of work but after 10 minutes, he rang Eddy and explained to him the position and as well guided him as to where the appellant and the deceased were. After that, Charles went back to Makadara Clinic. He found the appellant who told her that the deceased had passed on. Charles returned to his place of work. Eddy went there and Charles directed him to the hospital. At the clinic, Eddy found that the deceased had died. The appellant told him she had given two malaraquine tablets to the deceased who was sick. He asked Charles to take him, together with the appellant, to the police station as the doctor at the clinic had told him to report the matter to the police. They were taken to Athi River Police Station. Both Eddy and the appellant recorded statements at the police station and they were permitted to take the body of the deceased to the City Mortuary. It does appear however, that apart from permitting Eddy and the appellant to move the body to the City Mortuary, the police at Athi River did nothing more on that day and on the next day, because, on 13th November 1999, Smirnoff reported to Pc Weldon Towett (PW 8) of Athi River Police Station that she had received a report on 12th November, 1999 that her daughter had died within Athi River on 11th November, 1999. Weldon booked the report in the occurrence book. He then started investigations and although the record is rather confusing, Weldon appears to have gone, during his investigations, to where the appellant alleged she had bought the malaraquine tablets and the appellant took him to various places in Athi River in an attempt to trace her movements on the fateful day till the deceased died. He drew a sketch plan of the same. After some investigations, he arrested the appellant and put her in the cells while he proceeded on with the investigations. On 17th November, 1999, a postmortem was performed on the deceased by Dr. Kirasi Olumbe. That report was produced under **section 77(1)** of the Evidence Act as the maker of the report, Dr. Olumbe, was not available to give evidence. The postmortem report showed that the cause of death was increased Intracranial Pressure and Pending Toxicology. Some parts of the deceased's body were removed and taken for Government Analyst Department. These were intestines, liver, kidney and blood. The report showed that Choloroquine, an anti-malarial drug was detected in the postmortem specimens in those parts of the body in various levels with a remark by the Government Analyst (which was also produced under **section 77(1)**) that the drug levels indicated a lethal overdose. Although the appellant was put into custody by Towett on 13th November, 1999, she was later on 21st November, 1999 released and was given Form P22 and directed to report to the police station on monthly basis. She was re-arrested on 2nd April, 2001, over one year and four months later. She was taken to court on 9th April, 2001 and charged with the offence of murder, particulars of which were that:

"**On the 11th day of November, 1999 at Lower Athi River Township in Machakos District within Eastern Province murdered M N."**

She pleaded not guilty and the case came up for hearing before the superior court (Nambuye, J). The appellant's defence was that she had treated the deceased with love and never mistreated her when the deceased was living with them as their child. This was despite several persistent interferences from the deceased's mother and other maternal relatives who wanted to take away the deceased. She discussed these interferences with Eddy and settled whatever differences the same could have generated including her disagreement with Remi, the deceased's uncle, who had gone to take away the deceased by force when she resisted the same. On 10th November, 1999, the deceased had fallen on the stair and the appellant brought drugs and gave her. There was a fax machine in the house which she had been directed

by her husband to sell. She found a buyer at Athi River. On 11th November, 1999, she took her son and her sister's son to Dandora Phase III and asked the deceased to go to her uncle's place so as to enable her go to Athi River to sell the said machine but at Dandora Phase III, the deceased refused to go to her uncle's place. So the two, i.e. herself and the deceased, went to the bus stage to take a vehicle to Athi River. They waited at the stage for sometime but eventually they went to Athi River. The deceased started complaining that she was feeling bad. She said she was hungry and the appellant bought for her a soda and two (2) malaraquine tables and gave her the same. Her condition grew worse and she took her behind a building in Athi River and sought assistance from a boy who was passing by. Later she was assisted by two women and she took her to a hospital called 24 hours. The ladies took her and they were told she was dead.

After the full hearing, the superior court found her guilty, convicted her and sentenced her to death. In so convicting her, the superior court stated *inter alia* as follows:

"**In the absence of the truthfulness of the reason for going to Athi River and that reason having been disbelieved by this court and the same ousted then the only reasonable conclusion left to this court is to find that the reason for going to Athi River was to create an opportunity and to facilitate the poisoning of the child by drug overdose. There is no evidence that only 2 tablets were administered. Indeed PW 5 was unable to say how many were administered from the analysis but it is enough to say that the contents were high and lethal and could kill. The accused had an opportunity and the intention to kill and chose to carry out and or execute her intention away from those who could assist with a hope that the same will not be uncovered."**

In coming to the same conclusion, the learned Judge of the superior court differed with the assessors all of who returned an opinion of "Not Guilty". This was within her judicial powers to do so. In one of her reasons for differing with the assessors, the learned Judge stated *inter alia* as follows:

"**Once the issue of sell (sic) of the fax machine is removed then what is left is that the only reason for going to Athi River with the child was to create an opportunity for accused to poison the child and bring an end to PW 2's and his brothers among PW 6 (sic) interference with her marital life to PW 4. They also failed to note that although the evidence of how many tablets were purchased and administered was given (sic) there is corroboration by opportunity that the accused could have acquired them, mixed them with the soda and administered it to the child to end the child's life as she did."**

The appellant was dissatisfied with the conviction entered against her and the sentence of death pronounced against her. She filed this appeal, raising in the grounds of appeal filed by herself in person and adopted by her counsel during the hearing, mainly two grounds namely that she loved the deceased and cared for her such that the deceased felt comfortable in her custody and that being so, she could not form the intention to kill her and had no motive for killing her, and that the circumstantial evidence relied upon was not sufficient to warrant a conviction. She also raised the question of the burden of proof and submitted through her learned counsel that the same burden which was throughout on the prosecution was not sufficiently discharged by the prosecution.

This is a first appeal. In law, we are enjoined to analyze the evidence that was before the superior court afresh and draw our own inference always putting in mind that we did not see nor hear the witnesses and so had no advantage of gauging their demeanour and allowing room for the same.

We do agree and it was never in dispute that the entire case was based on circumstantial evidence. That the deceased died is not in dispute. The appellant also admits that much. It is also admitted that she died at Athi River where she went with the appellant. There is some grey area as to the actual cause of death. The Post Mortem report which unfortunately was not produced by the maker says the cause of death was due to two factors namely increased intracranial pressure and pending toxicology. Had the maker of this report, Dr. Kirasi Olumbe given evidence and produced it, perhaps he would have been able to satisfy the court as to whether the increased intracranial pressure resulted from a hit on the head by an external object or was directly attributed to the pending toxicology and would also have been able to clear

the air as to which of the two was the actual cause of death. This, in our view, would have been important in the facts and circumstances of this case. Further, some parts of the deceased's body we have mentioned hereinabove were removed and taken to the Government Chemist's Department for analysis as to the cause of death. These, as we have stated, showed that Chroloquine, an anti-malarial drug was detected in various concentrations in the various specimens taken for analysis leading to the drug levels in the body of the deceased indicating lethal overdose. Leonard Waweru Kariuki (PW 5), a government analyst who gave evidence said in cross-examination by the defence counsel that the specimen he received from Weldon was not sealed, and stated further that he could not tell when the drug had been ingested; he could not know at what stage it had been taken whether all at once or at different times and he could not tell how many tablets were involved. For some reasons unknown, he was not asked whether chemically the chroloquine he found in the body of the deceased was the same as Malaraquine. This was important, in our view, as the only evidence on record concerning what the deceased had taken prior to death was that she was given soda and two malaraquine tablets and not chroloquine. It was therefore necessary to have evidence as to whether chroloquine and malaraquine is chemically one and the same drug or not. We are however certain in our mind that those shortcomings notwithstanding, there was evidence that the deceased died and that is not in doubt.

What evidence is there connecting the appellant to the death of the deceased? Eddy, the husband of the deceased, said in evidence that he and Smirnoff separated. He later took the deceased and thereafter married the appellant who also had her son. Eddy's brother was also living with them. He stated that at first the two of them lived happily with their three children but in November 1999, he started getting complaints that Smirnoff used to go to his house and would abuse the appellant and at the same time neighbours also tried to portray a picture that the deceased was suffering at the hands of the appellant. On 10th November, 1999, the deceased's uncle, Remi, also visited his house in an attempt to take away the deceased. According to this witness, all these interferences in their life were not well received by the appellant who on 10th November, 1999 in the evening told Eddy that she did not want the interference and so did not want to see the deceased's mother and/or relatives. Catherine also said in evidence that she witnessed the appellant and Remi "hurling abuses" at each other on 10th November, 1999 as Remi wanted to take the deceased with him. The appellant, according to this witness, was so annoyed that she removed all the decease's clothes and threw them into the corridor at her (witness's) door. She (the witness) also stated that she was told by Winnie that Winnie heard the appellant and Eddy quarrelling and she heard the appellant say "*Halali Bilai ni Mimi a Muna*" meaning "It was me or Muna". Muna was the deceased. Smirnoff in her evidence stated that the deceased was not happy staying with the appellant and the deceased had told her that the appellant had told the deceased not to return to the appellant's house. Remi also gave evidence that on two occasions on 8th November, 1999 and on 10th November, 1999 when he went to collect the deceased, the appellant resisted and on 10th November, 1999, he had a quarrel with the appellant over the same issue but he took the child. He reported the matter to Eddy and Smirnoff but later at the insistence of Eddy, the deceased went back to Eddy's house. This evidence of the appellant feeling uneasy with the presence of the deceased in her house because of interference from the deceased's mother Smirnoff and uncle Remi was repeated by Winifred as well. Winifred added that she witnessed a quarrel between the appellant and Eddy on 10th November, 1999 when the appellant hit her "balm" swearing that she would not stay with the deceased and Eddy retorted saying the deceased was her daughter and there was no way she was going away. It would appear from the record before us that most of the witnesses remembered mainly exchanges between the appellant and Remi, and the appellant and Eddy on the evening of 10th November, 1999. The next day there was evidence from both the appellant and the prosecution that the appellant went with the deceased to Athi River leaving the other two children at Dandora Phase III. Her reason for going to Athi River was to get a person who could buy a fax machine they had in their house. Once in Athi River, the child fell sick and despite help from Charles, she died.

There was thus no direct evidence that the appellant was the person who murdered the deceased. However, the prosecution advanced the argument that the totality of all the above was a strong circumstantial evidence that pointed at none but the appellant as the person who must have knowingly administered the overdose drug to the deceased that caused her death. The superior court, in the passages we have reproduced above, found that once the reason advanced by the appellant for going to Athi River to sell a fax machine was not believed by the court, the only reasonable conclusion the court could come

to was that the journey to Athi River was undertaken merely to create an opportunity for the appellant to kill the deceased by poisoning.

The law on the principles to be applied by the courts of law when dealing with a case depending solely on circumstantial evidence is now well settled. In the case of **Rex vs. Kipkering Arap Koske and Kimure Arap Matahi**, the predecessor to this Court stated *inter alia* as follows:

"**As said in Wills on "Circumstantial Evidence" 6th edition page 311, "in order to justify 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." The burden of proving facts which justify the drawing of this inference from the facts to the exclusion by any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."**

The law, in effect, means that to prove a case such as was before the superior court by circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. Secondly, as is now settled, the chain must never be broken at any stage. The **Kipkering** case (**Supra**) was followed by this Court in the case of **Joan Chebichi Sawe vs. Republic – Criminal Appeal No. 2 of 2002 (unreported).**

In this case, it looks to us certain that the appellant, as we have stated above, did not appreciate the presence of the deceased in their house mainly because of interference from the deceased's maternal relatives. She, herself, says she loved the deceased and made her life with them as comfortable as possible. This however is contradicted by the quarrels that took place in the evening of 10th November, 1999 and her alleged utterances. We however have seen nothing in these quarrels to suggest that the appellant formed any intention of killing the deceased. The allegation by Catherine that Winnie told her that the appellant had uttered the words "*Halali Bilai ni Mimi a Muna"* (It is me or Muna) given their proper meaning could not necessarily only mean that Muna would die. All the words meant was that it was either herself or Muna which on reasonable hypothesis could mean that Muna had to return to her mother so that the appellant lived in Eddy's house or else the appellant would leave so that Muna would live there without her. In any event, Catherine said in her evidence that she was told of the words by Winnie. If by "Winnie" she meant "Winfred", then the same Winfred in her evidence did not say she heard words to that effect. What she said in her evidence was that the appellant was hitting her "balm" and swearing that she would not stay with the deceased. If on the other hand by "Winnie" she meant another person, then that part of the evidence reporting what Winnie told her was hearsay evidence as the said Winnie was not called to testify on the same. Either way, those alleged utterances can not be construed to be enough evidence for an inference of intention to kill the deceased or motive for killing the deceased.

The other matter that the learned Judge considered important was that the appellant said she went to Athi River to sell a fax machine yet she left Nairobi on 11th November, 1999 to Athi River but did not carry the fax machine and Eddy said in evidence that he had no such machine for sale in his house and on the material day, he was not aware that the appellant was going to Athi River. The appellant's story could not therefore be true and that being so, the appellant must have gone to Athi River only to get an opportunity to kill the deceased. On our reading of the evidence on record, all that the appellant said was that she had gone to Athi River to check and see if the customer she was to be introduced to would buy the machine. She did not say that she had carried the machine to Athi River. Further, she said that she had agreed to meet with the girl whose uncle wanted the fax machine but she and the deceased stayed at the stage for long upto the time the deceased started complaining of being sick and the deceased died before the appellant could see whoever was to buy the fax machine. On the question of going to Athi River to get a buyer for the fax machine, all that Eddy said was that they had one faulty machine in the house but he did not authorize the appellant to sell it as he never sold items in the house. The prosecution, which had the burden of proving by circumstantial evidence that there was no such a machine to be sold, and no person to be met at Athi River by the appellant, did no more than what they produced through the evidence of Eddy. That, in our mind, was not enough to prove that the appellant's story for going to Athi River was completely false and that she went there solely for purposes of killing

the deceased.

Further, and even more serious, there was no evidence adduced to throw some light as to how many tablets could have been given to the deceased or, put another way, what was the minimum number of tablets that could have been lethal. Added to that is the missing evidence of where the appellant bought the same tablets and, whether they were chroloquine or malaraquine tablets. In short, was there proof that it was the appellant who bought all the lethal malaraquine tablets and administered the same to the deceased? If so, when did she administer the tablets to the deceased? None was called from the shop where the alleged tablets were bought. On our part, we doubt that two malaraquine tablets admittedly administered could have resulted into what chemical analysts described in the report as lethal. Further, there was evidence from Charles that the deceased was taken to a clinic where she died. This was not denied by the appellant. What we fail to understand is why anybody in that clinic was not called as a witness to state whether they carried out any examination on the deceased and whether they administered any first aid treatment to her and with what results. In our mind, even if the deceased died on arrival at the clinic, (and the Court was not told so) still some evidence was necessary to complete the chain.

In our view of the matter, we are unable to come to a conclusion that the prosecution discharged the burden placed on it in the case as is required by law. There were, in our judgment, several lose ends such that the chain which is required to be completely unbroken in a case such as this which depended on circumstantial evidence was broken in several instances. The evidence did not lead to one and only conclusion that it was the appellant who caused the death of the deceased, neither did it prove beyond any reasonable doubt that if she did so, she did so with intent to cause the deceased's death for if it was true that she only administered to the deceased two malaraquine tables with a soda, then she may have done so innocently in an attempt to cure her sickness. It is only when the court is told that she administered the entire lethal doze that **section 206** of the Penal Code could have caught up with her. It was the prosecution to prove that she administered a quantity that was lethal and that onus never shifted. The prosecution failed to do so, and so what remains is no more than suspicion which, however strong, cannot sustain a conviction in a criminal case.

The totality of the above is that the appeal is allowed, conviction quashed and the sentence of death set aside. The appellant is set free forthwith unless otherwise legally held. Judgment accordingly.

Dated and delivered at Nairobi this 5th day of May, 2006.

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR