IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 35 of 2005

MARGARET WAMUYU WAIRIOKO …… APPELLANT

AND

REPUBLIC …… RESPONDENT

(*An Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J.) dated 20th December, 2004*

In

H.C. Cr. Case No. 34 of 2003)

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JUDGMENT OF THE COURT

Margaret Wamuyu Wairiuko, the appellant herein, was charged with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code, the particulars of the charge being that on the 10th day of October, 2002 in Kamburaini village, in Nyeri District of the Central Province, the appellant murdered Joseph Wairiuko Kimani.

The trial of the appellant commenced on 23rd June, 2004 before Khamoni, J. The prosecution called eight witnesses. The appellant was the wife of the deceased and the two lived with their three children – two teenage boys and a young daughter. In that homestead there was the main house in which the appellant and the deceased slept in one room while the small girl slept in a separate room. There was then a separate house in which the two sons slept. There was a kitchen which was separate from the main house. Evidence was led to the effect that during the night of 9th and 10th October, 2002 the appellant, the deceased and their three children, as was normal, took their supper in the kitchen and the two sons retired to their house leaving their younger sister with their parents in the main house. On the morning of 10th October, 2002 at about 5.00 a.m. the elder son Julius Muchira Wairiuko (PW2) went outside their house to help himself and to check on the charcoal he was burning. While the young Julius was outside he heard strange screaming or wailing of a person in great pain emanating from his parents' house. Julius was apprehensive as he returned to the house to inform his younger brother Michael Kimani Wairiuko (PW8). The two boys (PW2 and PW8) went out to check what might have happened at their parents' house. According to Julius there was no further noise but according to Michael (PW8) he heard something being hit. From where the two boys were, behind the house they saw their mother come out of the main house, go to the kitchen and light a fire. It would appear that the mother (appellant) did not see her two sons. The appellant then walked back to the main house. The boys then decided to go and call their grandmother Cecilia Nduta Kimani (PW3) who lived in a house some distance from the appellant's homestead. The boys told their grandmother that they had heard some noise from their

parents' house and that they thought that there was something wrong. It was then about 6.00 a.m. The grandmother on being told this decided to go and check. She reached the appellant's homestead and found the appellant standing outside the main house. Cecilia (PW3) inquired from the appellant what might have happened and the appellant told Cecilia that there had been "*something very small and all was normal now without any problem.*" On being told this the old lady Cecilia went back to her house after the appellant had assured her that the deceased was alright but asleep . As the two boys were still curious their mother (the appellant) assured them that their father was fine and asleep.

The appellant prepared breakfast for the family which they took in the kitchen as usual but the deceased was not present. The younger son Julius took out cattle to graze while the elder son Michael accompanied the appellant to the garden. At about 10.00 a.m. the appellant returned home to prepare tea which she took to the garden. At lunch time the appellant and Michael returned home and Michael noticed that the door of the main house was locked with a padlock. When Michael inquired the appellant told him that the deceased had woken up, taken breakfast, locked the house and left for work.

During supper time the deceased had not been seen and the door of the main house was still locked. The young boys started wondering as to where their father had gone since he had not joined them for supper. While in this state of anxiety the appellant informed her sons (PW2 and PW8) that she did not know why the deceased had not returned. She told the boys that she was going to sleep in the kitchen claiming that the deceased had gone with the key. The two boys then went to their house to study and thereafter slept. They had left their mother and sister in the kitchen.

On the morning of 11th October, 2002 at about 5.00 a.m. the young Julius (PW.2) was awake when he heard the door of his parents' house being opened, and on peeping through an opening in the wooden shutter of his window he saw some light in his parents' house. He woke up his brother Michael (PW8) to inform him that someone had entered their parents' house. The two boys heard noise as if something was being dragged in the compound from the main house towards the gate. The two boys remained where they were as they were frightened. They heard more noise as if someone was digging in the garden outside the gate. Wondering as to what was happening the two brothers returned to their house and stayed there until they heard their mother (appellant) calling them to light the fire and prepare breakfast. According to the evidence of Julius (PW2) he did not see what was being dragged and who was dragging it. But according to Michael (PW8) he saw the appellant pulling or dragging the body of the deceased. He went on to tell the trial court that he saw her mother (appellant) return to the house where she started washing some clothes.

The family, as usual, had breakfast in the kitchen but the deceased was not present. Later Julius asked the appellant whether the deceased had returned the previous night and the appellant replied that the deceased had returned at night taken all his belongings and deserted. When Julius asked about the dragging incident the appellant replied that she was the one involved and that she was covering the dam which was no longer required.

Despite various explanations being given by the appellant, the two boys did not believe her. They decided to report the matter to their grandmother Cecilia (PW3) who in turn reported to the Assistant Chief Edward Waweru Mutitu (PW4). The Assistant Chief went to the appellant's home and took her to the police station where she was placed in cells. Later the police exhumed the body of the deceased from where it had been buried – the same place where the boys said they heard as if somebody was digging . The body was taken to the Provincial General Hospital mortuary where post-mortem was conducted by Dr. Wachira (PW1) . Dr. Wachira found several cut wounds on the body and it was his view that cause of death was severe head injury.

When put to her defence the appellant in an unsworn statement stated that on the morning of 10th October, 2002 the deceased had left home early leaving her with her children and did not come back. That when the Assistant Chief went to her home inquiring about the whereabouts of the deceased she told him what had happened. That the Assistant Chief asked her to accompany him and she was taken to Naromoru Police Station. She concluded her defence by stating that she knew nothing about the offence.

The learned Judge summed up the evidence and the law to the assessors who returned a unanimous finding of guilty.

Leaving aside the irrelevant portions, the learned Judge carefully considered the evidence and the law and in the end convicted the appellant as charged. The appellant was consequently sentenced to death as mandatorily provided by the law. In convicting the appellant the learned Judge in his judgment stated inter alia:-

"***Those boys were teenagers but when they came to court to give evidence I found they were witnesses who understood the meaning of taking an oath although I had to conduct*** *voire dire* ***with respect to the younger son. They both gave evidence on oath and were not swayed during cross-examination. Despite some few inconsistencies between the two pieces of evidence, I find the totality of each piece of evidence reliable as the said inconsistencies were mainly minor and in any case not fatal to the Prosecution's case. I think they arose partly because of the fact that the witnesses who are children were giving evidence after two years from the event and may have been observing the event of the dragging from different angles and with different intensity of keenness. Moreover one of these two boys may be more forthright than the other. It be noted while one was crying on 11th October, 2002 after witnessing the dragging, the other boy was not crying. I found each boy to be truthful making me be satisfied that their evidence taken together with the evidence of other witnesses has enabled the Prosecution prove this case against the Accused beyond reasonable doubt despite the fact that there was no evidence of the Police Officer who may have investigated the case, Inspector Njoka.***

The three returned a unanimous verdict of guilty to murder.

That agrees with my findings above. Accordingly, I find the Accused person guilty of the offence as charged and convict her."

It is from that conviction and the subsequent death sentence that the appellant comes to this Court by way of first and final appeal.

When the appeal came up for hearing before us on 31st July, 2006 Mr. Mburu, the learned counsel for the appellant argued that the circumstances of the case pointed to a lesser offence of manslaughter rather than murder. Mr. Mburu submitted that the appellant and the deceased had quarrelled in the house which resulted in the death of the deceased.

Mr. Kaigai, the learned Senior State Counsel submitted that as the appellant appears to have admitted killing the deceased he was of the view that she should have been convicted on a lesser offence of manslaughter. Mr. Kaigai, however, asked us to impose an appropriate sentence of life imprisonment.

This being a first appeal, it is the duty of this Court to reconsider the evidence, evaluate it itself and draw its own conclusions but making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. Indeed in **Okeno v. R. [1972] E.A. 32** at p. 36 the predecessor of this Court said:-

"***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."***

Applying the foregoing to this appeal, we have considered the evidence and it is our view that the appellant's conviction was based on the evidence of the two young boys (PW2 and PW8) and

circumstantial evidence. For example, the appellant had explained to the boys that the deceased was still asleep in the house. That is the same story she repeated to the boys' grandmother Cecilia (PW3). The appellant later changed the story to her sons to the effect that the deceased had left home and disappeared. The conduct of the appellant was suspicious right from the morning the boys discovered that the main house had been locked with a padlock. Taking all these circumstances into account there can be no doubt that it was the appellant who killed her husband (the deceased). In **R v Taylor, Weaver and Donovan [1928] 21** Cr. App. R. 20 the principle as regards the application of circumstantial evidence was enunciated in these words:-

"***Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."***

In our judgment, the appellant was clearly involved in this heinous crime. We have, however, been asked to consider the fact that there was a quarrel between the appellant and her husband which led to the unfortunate death of the deceased. We have considered this fact and while we do not wish to appear to be stating that where death results from a domestic quarrel of husband and wife then the culprit will be convicted of manslaughter and not murder, we think that taking into account peculiar circumstances of this case the appellant ought to have been convicted on the lesser offence of manslaughter. We are strengthened in our view by the fact that there was animosity between the learned trial Judge and the learned State Counsel which resulted into a long narration by learned Judge in his judgment how, in his view, the learned Sate Counsel had mis-conducted himself in presentation of the prosecution case. We would say no more on that aspect of this appeal.

For the foregoing reasons we set aside the conviction of the appellant on a charge of murder and substitute it with a conviction of a lesser offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code, and sentence the appellant to fifteen (15) years imprisonment. This term of imprisonment to be served as from the date the appellant was convicted and sentenced by the superior court i.e. 20th December, 2004.Those shall be our orders.

Dated and delivered at Nyeri this 4th day of August, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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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.