



IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL 234 OF 2005

JANE MUTHONI MURIUKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J) dated 18th August, 2005

in

H.C.CR.C. NO. 22 OF 2004)

JUDGMENT OF THE COURT

Jane Muthoni Muriuki, the appellant herein, was charged before 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 were that on **4th day of June, 2004** at Ragati village of Karatina Division of Nyeri District within Central Province the appellant murdered **Mary Wanja Mureithi (the deceased)**.

During the trial in the superior court evidence was led to show that the appellant was the mother of the deceased, a female child, aged about 1½ years old. On **4th June, 2004** the deceased fell sick and the appellant was asked to take her to the hospital. The appellant was seen by various witnesses who she told that she was taking her child (the deceased) to the hospital. But when she was later seen without the child she said that she had taken the child to her husband’s home. Among those who saw the appellant with the child were **Margaret Wamuyu Wambugu (PW2)**, **Pauline Waithira Kabongi (PW4)**, **Shelmith Nyawira Maina (PW5)** and **Eunice Nyawira (PW6)**.

The following day (**5th June, 2004**) a body of a child was found floating in a cattle dip at Ragati village. The body was retrieved and identified by **Elizabeth Muthoni (PW1)** and **Eunice Nyawira (PW6)** as that of the appellant’s child (deceased). The body was taken to the mortuary where a postmortem examination was conducted by **Dr. Moses Njue (PW10)** who formed the opinion that the cause of death was lack of air due to strangulation.

When put to her defence, the appellant made an unsworn statement. Her defence was as follows:

“My baby was sick and I took her to hospital but did not reach the hospital as I decided to take her to her grandmother. I did not kill the child. I have nothing more to say.

That is all. I have no witness to call. I close my defence.”

The learned trial Judge (Khamoni J) summed up to the three assessors who returned a unanimous verdict of guilty.

The learned trial Judge considered all that was before him and came to the conclusion that the appellant was guilty of the offence as charged. In concluding his judgment, the learned Judge expressed himself thus:

“True, no witness testified in the court saying that he/she saw the Accused kill the deceased, but in my opinion the circumstantial evidence the court has, irresistibly points at the guilt of the Accused person to the exclusion of any other person. The poor child was violently and mercilessly strangled to death by her mother and the body thrown into the water in Ragati cattle deep (sic). I am satisfied there is sufficient evidence to sustain the conviction of the Accused. I therefore find the Accused guilty of the offence as charged and convict her”.

Having convicted the appellant, the learned Judge proceeded to sentence the appellant to death. In sentencing the appellant the learned Judge stated:

“The Accused person has been convicted. She is being treated as a first offender. I fully take into account what Mr. Kimani has said on behalf of the Accused particularly her age which was assessed by the doctor who examined her at the time the offence was committed to be 20 years.

This was her child but the fact is that the accused is not even remorseful for what happened.

There is no doubt that the offence she committed is a very serious offence. In the circumstances, the court should not condone such an offence.

That being the position, the Accused person is hereby sentenced to suffer death in accordance with the law under Section 204 of the Penal Code”.

Being aggrieved by the conviction and sentence the appellant filed this appeal which appeal was argued before us on 3rd August, 2006 by Mr. D. Mindo who appeared for the appellant while Mr. Kaigai the learned Senior State Counsel appeared for the State.

In his submission, Mr. Mindo stated that the question was whether it was the appellant who had killed her child or somebody else. Mr. Mindo submitted that **PW7 (Cecilia Wanja Mwangi)** had denied that the appellant had been married to her (PW7's) son, and that the child had been brought to her. It was further argued that there was doubt as to who was the last person to be seen with the deceased. Mr. Mindo emphasized that the evidence against his client was circumstantial and that PW7 was a suspect and hence her evidence had to be considered carefully.

At the commencement of his submission, Mr. Kaigai had supported the conviction of the appellant but in concluding his submission he said that there was a doubt, which could be resolved in favour of the appellant. Mr. Kaigai drew our attention to the manner the learned Judge analysed the evidence of PW7 vis-a-vis the appellant's defence.

Most of the facts of this case were simple and straightforward. But this being a first appeal it is our duty to re-evaluate the evidence, analyse it and come to our own conclusion but as we do so we must remember that we did not have the advantage of seeing or hearing the witnesses (see ***R V. OKENO [1972] E.A. 32***). The evidence before the trial court was that the appellant, a young girl aged about 20 years was the mother of the deceased child aged 1½ years. We are indeed talking of an appellant who gave birth before she was 20 years old. On the material day (4th June, 2004) the child became sick and

the appellant was asked to take her to the hospital. **Shelmith Nyawira Maina (PW5)** in her evidence in chief stated inter alia:

“I live at Karatina. On 4/6/04 I was at Sofia Estate in Karatina where I lived. Jane Muthoni came (pointing at the accused). Came carrying a baby saying she was taking the baby to hospital. The baby’s name was Mary Wanja. She came back in the evening without this child. I asked her where the child was. She told me she took the child to the child’s grandmother after coming from the hospital”.

Eunice Nyawira (PW6) in her evidence in chief stated inter alia:

“Staying at Sofia since 2004, about 4/6/2004 I was going to collect my child from school when I met with Jane Muthoni who when I asked her where she was coming from she told me she had taken her child Mary Wanja to her grandmother and left a letter inside the child’s coat telling the grandmother that she can kill the child or take care of the child”.

On being cross-examined this witness (PW6) said:

“She told me she had taken the child to paternal grand mother at Karumi. I knew she had been married and her husband died. That is when she told me she had left a letter in the child’s coat. She said she had taken the child there because the child was unwell and she was unable to take care of the child. That is what I told the police”.

In her evidence Cecilia Wanja Mwangi (PW7) stated:

“I live at Kiamwangi in Kathungu area. Johnson Muriithi Mwangi was my son. I do not know whether he was referred as Simon. I cannot recall the date when he died. Could have been something last year. He had not even mentioned at home that he had a child. I do not remember dates. I remember the police coming to my home in the evening saying were my visitors. (sic)

They asked me whether I had a son. They mentioned my son’s name. I said yes but he died. I told them that at the burial nobody claimed to be his wife. I did not see anybody. I do not know the accused in the dock. She came with the police on that day. They told me she was a wife to my late son Muriithi I did not see that child and I do not know the child. The first time I saw the accused person is when she came with the police”.

From the foregoing it would appear that the appellant’s child fell sick and on the material day (4th June, 2004) the appellant was asked to take the child to the hospital. The appellant heeded that advice and took the child to the hospital. She was seen taking the child to the hospital but later in the evening she was seen without the child. She told those she met that she had taken the child to her grandmother. Indeed, she told PW6 that she had even left a letter in the child’s coat when she took the child to her grandmother.

It was the prosecution case that the appellant had thrown the child into a cattle dip. The appellant’s defence, on the other hand was that she had taken the child to her grandmother.

The main issue here was who killed the child? The evidence against the appellant was circumstantial since nobody saw the appellant kill her own child. It is to be observed that it was the appellant who led the police to the home of **Cecilia Wanja Mwangi (PW7)**.

We must now consider circumstantial evidence upon which the appellant was convicted. She was seen with the child on the material day and she told those she met that she was taking the child to the hospital. Later in the evening she was seen without the child and she told those who had seen her earlier that she had taken the child to the hospital and then to the child’s grandmother (PW7), where she had left the child with a note in her coat. It can be seen that the appellant’s defence was consistently that she had taken the child to her grandmother. Circumstantial evidence against the appellant was that she was seen

with the child but later she did not have the child. The following day the child was found dead in a cattle dip. The conclusion, according to the prosecution, was that the appellant threw the child into the cattle dip. But there was no eyewitness to that incident. The appellant had given an explanation as to what had happened – she had taken the child to her grandmother (PW7). As already observed it was the appellant who led the police to the home of PW7. It is true as was said in **R V. TAYLOR WEAVER AND DONOVAN (1928) 21 Cr. App. R. 20**, circumstantial evidence is very often the best evidence which is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics, but we must always remember the warning by Lord Normand in **TEPER V. R [1952] AC** in which he said:

“Circumstantial evidence must always be narrowly examined if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.

In this case the appellant was convicted purely on circumstantial evidence in that she was seen with the child in the early hours of 4th June, 2004 but later in the evening she was not with the child. She however, gave an explanation that she had taken the child to her grandmother **Cecilia (PW7)**. The appellant maintained that explanation throughout her trial. In his judgment the learned Judge rejected the appellant’s defence by stating as follows:

“One could imagine that the taking of the deceased to her grandmother, in the circumstances of this case, was such a great event that one would have expected that the Accused could have enlisted the company of a friend or relative or even an assistant like Elizabeth P.W.1, to escort the Accused to the home of P.W.7, the grandmother. On the contrary, the Accused did not see it that way. On that issue there, the court has the word of the Accused against the word of P.W.7. But the evidence of P.W.7 was not shaken in this court when she was in the witness box. The defence the Accused Person has put up as quoted above, makes no impact upon the evidence of P.W.7 and I find no basis upon which I can disbelieve the evidence of P.W.7 in order to believe the defence of the Accused, even if I were to merely say that the Accused may have taken the deceased child to P.W.7. I have no basis to dare say so – when P.W.7’s evidence is so unshaken – by the defence”.

Mr. Kaigai took issue with the above analysis by the learned Judge. It was Mr. Kaigai’s submission that the analysis by the learned Judge might not have been correct. We agree. The appellant as we have observed was a young girl aged only 20 years who had the misfortune of being a mother at that early age. The father of the child had died leaving the appellant and the child without any source of assistance. It was the appellant’s defence that she decided to take the child to her grandmother. In view of the evidence on record we are unable to say that the appellant’s explanation was totally unacceptable. It was a very plausible explanation.

In **Sawe V. R [2003] KLR 364 at p. 375** this Court stated:

“In this state of the evidence, the two watchmen are not excluded from being persons who might have started the fire or for that matter any intruder might have done so. If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of R v Kipkering arap Koske & Another 16 EACA 135 where it held, inter alia, that:

‘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’.”

On our part we are of the view that taking the evidence tendered before the trial court in its totality, Cecilia (PW7) cannot be excluded from being the person who might have thrown the child into the cattle dip. That possibility was not completely ruled out. A case based mainly on circumstantial evidence must be watertight before basing a conviction on such evidence. In our judgment the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant. We

have evaluated the evidence and there is really nothing left to connect the appellant with the death of her child except mere suspicion. But suspicion, however strong is never sufficient in a criminal case.

That being our view of the matter, we allow this appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 27th day of October, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR