IN THE COURT OF APPEAL OF KENYA

PEAL AT NYERI

Criminal Appeal 22 of 2005

CECILIA WANGECHI KANYUIRA …….....…….…. APPELLANT

AND

REPUBLIC …… RESPONDENT

(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. 40 of 2003)

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JUDGMENT OF THE COURT

The appellant in this appeal, **Cecilia Wangechi Kanyuira**, is the mother of the deceased, William Kanyuira Wangechi. In an information dated 20th May, 2003, the superior court was informed by the Attorney General that she was charged 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 the 30th day of October, 2002, at Giagachucha Village in Nyeri District within Central Province she murdered William Kanyuira Wangechi. On 20th August, 2003, she was arraigned in High Court at Nyeri and she pleaded not guilty to that charge. After full hearing in which five prosecution witnesses testified, and she also gave her evidence in defence, she was convicted as charged and sentenced to suffer death in accordance with the law. In convicting her, the learned Judge of the superior court (Khamoni, J) stated, *inter alia*, as follows:

"**The accused was the last adult person to be seen with the child. In fact the evidence is to the effect that she was the last human being to be seen with the deceased alive. Her defence before this court does not cast any doubt on that evidence. Her statement that she does not know how the child died does not convince anybody to believe her denial. The evidence on record irresistibly points at the guilt of the accused and I find no other explanation in the alternative.**

Accordingly, I am in agreement with the unanimous verdict of the assessors who said that the accused is guilty of murder. I am satisfied the prosecution has proved their case against the accused beyond reasonable doubt and convict her."

The appellant felt dissatisfied with the conviction and sentence and hence this appeal which was

originally based on ten grounds filed by the appellant in person. Later the appellant was represented by a firm of advocates which firm filed what is termed "Memorandum of Appeal", but which we feel should in law be a supplementary memorandum of appeal. Mr. Kariuki, the learned counsel for the appellant, who appeared for her before us, relied on those "supplementary grounds" and we reproduce the grounds here below:

"**1. The learned Honourable Judge erred in failing to address himself to the apparent contradiction in the testimonies of PW 2 and PW 3 as to the body which they identified and therefore failing to arrive at the finding that the body of the alleged victim of murder was not properly identified.**

2. The learned Honourable Judge erred in failing to consider that no evidence was tendered by the prosecution as to the time of death of the alleged victim of crime.

3. The learned Honourable Judge misdirected himself in concluding that the appellant did not show concern at the disappearance of her child or that such apparent lack of concern pointed at the appellant's guilt.

4. The learned Honourable Judge misdirected himself at the finding that the deceased could only have met his death at the hands of the appellant."

The appellant and her son (the deceased), who was at the time of his demise about four years old, lived with her mother, Naomi Mumbi Kanyuira (PW 1) at her mother's home at Giagachucha Village. Her father, William Kanyuira (PW 2) was at that relevant time working at Nanyuki. The record shows that the appellant was the one taking care of her son. On 30th October, 2002, at 2.00 p.m., Naomi left home and went to Kiamariga Market leaving the appellant with her son at home. She returned home at 8.00 p.m. but did not find the child although the appellant was there. She enquired from the appellant where the child was. The appellant told her that she had taken the child to his father. She gave the name of the child's father as Peter Mwangi. Naomi did not believe her because she had not heard of that name before. Her suspicion was strengthened when the appellant told her she (the appellant) did not know where the alleged father of the deceased lived. Next morning at about 5.00 a.m., she called the appellant and asked her whether she could go and trace the child at Kerugoya where she alleged the child was. The appellant replied that she did not know where the father of the child lived. Both mother and daughter went to Nanyuki to William Kanyuira (PW 2). She gave the same answers to her father on being asked about the whereabouts of her child. They returned home and Naomi and her son took the appellant to Kiamariga Police Post the same day as her father (PW 2) had directed. But before going to the police post, Naomi opened the sewage manhole in the compound, looked into it but saw nothing. Perhaps this was in furtherance of the search of the deceased. That was on 31st October, 2002. At Kiamariga Police Post, Pc. James Lailatia (PW 4) was on duty when Naomi and the appellant reported the disappearance of the deceased. He received a report that the appellant had given her son to someone at Kerugoya. The report was from Naomi. Pc James referred the matter to Inspector Obel who was his boss. After making her report, Naomi went away together with her son who had accompanied her there. The appellant was left at the police post. On 4th November, 2002, Naomi decided to go and open the sewage manhole in the compound at about 9.00 a.m. She was with her sons, Gachau and Muriuki. This time she saw something. They tried to take out that thing but failed. She went and reported to the police. They found Pc Lailatia who booked the report and referred the matter to Inspector Obel again. The police proceeded to the scene. They too saw something in the cesspit. With the help of members of the public, the police removed it and discovered that it was the body of the deceased. They took it to the mortuary. On 11th November, 2002, Pc Lailatia, William Kanyuira and John Ngatia (PW 3) went to Karatina District Hospital Mortuary where they identified the body of the deceased to Dr. Robert Gichare who performed a post mortem examination on the body. After the post mortem examination, Dr. Gichare formed the opinion that the cause of death was strangulation. He filled the post mortem form, signed it and later produced the same in court as Exh. 1. Dr. Gichare also produced the P3 form prepared by Dr. Kariuki, a psychiatrist at the Provincial General Hospital, Nyeri in which the same Dr. Kariuki had certified, after examination of the appellant, that the appellant was found to be mentally and physically normal and fit to stand trial. That P3 form was produced after the then learned counsel for the appellant raised no objection

to its production by a witness who did not make it.

The appellant was charged with the offence of murder as we have stated. At her trial, she gave a short defence as follows:

"**On that day I had been left at home. I left the child sleeping. The home is fenced with barbed wires and people have access from outside. When I returned home and did not get the child, I got surprised. I therefore do not know how that child died. I have no witness to call."**

The above is what was before the trial court. Before us, Mr. Kariuki, the learned counsel for the appellant, submitted that the body of the deceased was not properly identified as the evidence of the two identifying witnesses, the grandfather of the deceased (PW 2) and John Ngatia contradicted each other as to the identity of the deceased, with William Kanyuira saying the body they identified to the doctor was that of Cecilia Wangechi while John Ngatia's evidence was that the body was that of William Kanyuira Wangechi. He however agreed in the same submissions that there is no dispute that William Kanyuira Wangechi died. He further submitted that time of death was not given and that was important as the body was discovered in the sewage manhole at a time when the appellant was in police custody; that the appellant's allegation that she took the child to his father in Kerugoya was not properly investigated by the police; and lastly, that the learned Judge of the superior court introduced extraneous matters in his consideration of the case when he held that the appellant did not show concern for the loss of her child and interpreted that to mean the appellant committed the offence. Mr. Orinda, the learned Senior State Counsel, supported the conviction and sentence.

We have perused the record before us and considered the submissions and the law anxiously. It is clear from the record that there was no direct evidence adduced by the prosecution as to how the deceased met his death. From the evidence of Dr. Gichare and the post mortem report, it is certain that the deceased died through strangulation. We, like the superior court, are satisfied as to that aspect. The deceased was a young boy aged four years only. All the evidence that was adduced was circumstantial. The main evidence was that Naomi left the appellant with the deceased at 2.00 p.m. on 30th October, 2002. There is no evidence that the deceased was unwell when Naomi left him with the appellant. He was well. At 8.00 p.m. when Naomi returned home, the appellant was there but the deceased was not there. Naomi became suspicious and enquired as to the whereabouts of the deceased but the appellant said that she had taken the child to his father whom she named as Peter Mwangi. Naomi's evidence was that she had seen the decease's father called Kingeri who hailed from Kerugoya. However, as the appellant was not staying together with that man and as the name the appellant gave differed from the name Naomi knew which was Kingeri, and further, as earlier on the appellant had said she did not know where the father of the deceased lived, Naomi did not believe the appellant's story. This was the main evidence that resulted into the appellant being taken to her father at Nanyuki in an attempt to unearth the truth as to the whereabouts of the deceased. Before her father, William Kanyuira, the appellant gave the same answers and hence her being taken to the police post. The body of the deceased was discovered in the cesspit in her absence as she was at the police post.

At her trial, the appellant's defence was that she left the child sleeping and did not know how the child died. The main evidence in the entire case is that she was the last person seen with the deceased before his death. She was seen with him at 2.00 p.m. and by 8.00 p.m., about six hours later, the deceased was not there and no other witness could shed any light as to his whereabouts, till 4th November, 2002 when the deceased's body was recovered from a cesspit within the home where the appellant lived with him. The only person in the circumstances of this case who could tell what happened to the deceased was the appellant as she was the last person seen with the deceased when the deceased was still alive. The facts as to when and with whom the appellant left the deceased was a matter especially within the knowledge of the appellant. **Section 111** of the evidence act states as follows:

"**111 (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any act especially within the knowledge of such person is upon him.**

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

In this appeal, as we have said, the only person who could give a reasonable explanation as to where the appellant left the deceased and with whom is herself. What she says in that respect however, does not need to prove her innocence beyond reasonable doubt. All she needed was to make a statement such as would create a doubt in the mind of the court as to her guilt, and that doubt would be resolved to her benefit. When confronted by her mother as to where the deceased was, the appellant said she had taken him to his father but gave a different name of the alleged father from the name Naomi had earlier known. She also stated that she did not know where the alleged father lived. That made it impossible to verify her story. We must express our surprise at this juncture that the appellant who alleged she had just taken the deceased to his father was at the same time saying she did not know where the father lived. Later in her defence, her story was that she left the deceased sleeping and returned to find he was not there. She did not state where she had gone to and how long she had been away. It is clearly a departure from the original story that she had taken the deceased to his father. It is not surprising that the superior court did not accept her story. We too find it impossible to accept it. The totality of all this is that the appellant failed to explain the whereabouts of the deceased who was left with her by Naomi only six hours previously, and her stories failed to raise any reasonable doubt in the mind of the court and in our mind.

As we have stated, the evidence by Dr. Gichare is that the deceased died as a result of strangulation. There is no evidence as to when that could have taken place but equally, there is no evidence as to who could have strangled him except the appellant who was last seen with the deceased. The deceased, a boy of four years only could not have strangled himself and then thrown himself into the cesspit. We have seen the original memorandum of appeal which was filed by the appellant and which is part of the record. In it, the appellant owns to the offence and states why she did this heinous act. We have also considered whether the circumstances she relates in that memorandum of appeal would negate malice aforethought in respect of the offence, but we answer the question in the negative. We have fully considered the evidence of William Kanyuira and that of John Ngatia, as regards the identity of the deceased. Both stated clearly that the body they identified was that of the appellant's child. The appellant had only one child who was the deceased. That being the case we see no merit in that ground of appeal. We also find no merit in the ground of appeal that contends that further investigations should have been carried out to trace the father of the deceased as the appellant had told her parents that she did not know where the same alleged father lived. On the comments made by the learned Judge of the superior court on lack of concern shown by the appellant as regards the disappearance and death of the deceased, all we read in it is that the learned Judge was considering the conduct of the appellant on the entire episode. The evidence on record warranted the same consideration and we do not think, with respect, that in doing so, he imported into the judgment extraneous matters.

We have analyzed the evidence that was adduced in the superior court and evaluated it independently as we must do, this being a first appeal – see the case of **Okeno v. R. (1972) EA 32**. We do find, like the superior court, that the offence of murder under **section 203** as read with **section 204** of the Penal Code was proved beyond reasonable doubt. That being our view of the matter, we decline to interfere with the conviction and sentence awarded by the superior court. The appeal is dismissed.

Dated and delivered at Nyeri this 3rd day of November, 2006.

S.E.O BOSIRE

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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