



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: O’KUBASU, GITHINJI & WAKI J.J.A
CRIMINAL APPEAL 208 OF 2005**

BETWEEN

MARIAM GATI CHARLES.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from conviction and sentence of the High Court of Kenya at
Kisii (Mr Justice Bauni) dated 27th May, 2005*

in

H.C.CR. C. NO. 22 OF 2003)

JUDGMENT OF THE COURT

The appellant **MIRIAM GATI CHARLES** (the appellant) was convicted by the superior court, (Kaburu Bauni J) of the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code** and sentenced to death. She appeals against both conviction and sentence.

The particulars of the offence alleged that the appellant murdered one **RONALD OTIENO** on 25/11/2002. The deceased was an eight- days old infant. The parents of the infant are **Lydia Akinyi Onyango (PW1)** (Lydia) and **Fredrick Onyango Ochieng (PW2)** (Fredrick). The appellant was the second wife of Fredrick Onyango Ochieng. Fredrick was living with his two wives in one house which comprised of a sitting room, a bedroom used by first wife Lydia and a store where the appellant used to sleep. **Fredrick** and **Lydia** had lived as man and wife since 1996 and they had three young children including the deceased infant. He married the appellant about 2½ months before the alleged murder of the infant. The appellant and Fredrick had no child although she had one child who had died. On the evidence the appellant and Lydia had a cordial relationship. On the material day (i.e. 25/11/2002), Fredrick left his two wives at home at 5.45a.m. and went to the offices of Sony Sugar Company. At about 7.30a.m Lydia washed the appellant’s clothes and her childrens’ clothes and hung them on a drying line. At 8.00a.m. Lydia left the deceased infant sleeping on her bed and went to tether cattle a distance from the house . She left the appellant in the kitchen preparing porridge. Lydia returned to the house shortly thereafter but did not find the appellant. The appellant’s clothes which Lydia had washed in the morning had been removed from the drying line. The infant was missing. He was not on the bed where Lydia had left him. She searched the house and found the infant in the store/bedroom. The infant was lying dead inside a big sufuria full of water in the store/bedroom where the appellant used to sleep. Lydia screamed and neighbours, **Elias Ochieng Nanga (PW3)** **Dorica Odero Okombo (PW4)**, (**Dorica**); **Japhet Kayange Kamasi (PW5)** **Florence Minayo Ochieng (PW6)** and **Kenneth Olwal Ochieng (PW7)**, (**Kenneth**) went to the house of Lydia while **Dorica** removed the deceased infant from the sufuria and placed him on a seat. Lydia told the neighbours that she suspected that it was the appellant who had drowned the child. Several

groups of people went out in search of the appellant. The appellant was found on a foot path walking towards the Kisii/Migori main road. She was carrying her clothes including the wet clothes in a nylon paper bag. She was taken back to her house. Fredrick found her at home when he returned at 11a.m.

The appellant made an unsworn statement at the trial. She stated that after washing utensils and clothes she took cattle to the grazing field and tethered them. While there, she heard screams at home. She went back home and was told that the child was dead. Her husband was not at home and she decided to go and look for him. She stated further that Lydia had been threatening to take serious action against her and that she was framed by Lydia.

The assessors returned a verdict of not guilty. However the trial Judge in an exhaustive judgment found the appellant guilty of the offence of murder. In the course of his judgment, the trial Judge said in part:

“The evidence is such that the only logical conclusion one can reach is that the accused is the one who murdered the deceased person. Pw1 on evidence told the court that when she went to tether the cattle she left accused alone and the baby in the house. As is stated, the baby was left sleeping in the mother’s bed but found drowned in a sufuria full of water in another room in the same house. The baby could not have moved itself to that other room; climbed into the sufuria and drowned. Somebody moved it from the bed to that other room and drowned it in the water in the sufuria. That person could only have been the accused who Pw1 had left at home. When Pw1 returned the accused had varnished. Those who came to answer the alarm raised by Pw1 did not find accused there”

The learned trial Judge considered the defence of the appellant and said in the last part of the judgment,-

“ I have considered what the accused said in her unsworn defence and that the mother of the child used to threaten her. Accused’s counsel in his submissions implied that Pw1 the mother might have killed the child so as to implicate the accused. I find this far fetched and not supported by any evidence. I don’t think a mother would kill her own child so as to implicate her co-wife no matter how much she hates her. The evidence points to no other conclusion other than that the accused did murder the deceased.”

There are eight grounds of appeal but two (grounds 4 and 7) were abandoned. There are three main grounds of appeal thus:

“5. THAT the learned Judge did not treat the appellant’s unsworn statement with the seriousness it deserved more particularly as part of the prosecution evidence supported her.

6. THAT the learned Trial Judge misdirected himself in the principles applicable when evaluating circumstantial evidence; had he drawn the correct conclusions he may have arrived well at a different conclusion

8. THAT the learned trial Judge erred in law in sentencing the appellant to death when she had been under the age of 18 years at the time of the perpetration of the alleged offence”

We are aware of our duty as a first appellate Court to reconsider the evidence; reevaluate it and reach our own independent conclusion.

We will consider grounds No. 5 and 6 together. In support of those grounds Mr Menezes for the appellant submitted, among other things, that the explanation by the appellant that her co-wife framed her was a possible explanation as the co-wife could have committed the offence of infanticide and framed the appellant. Mr Menezes further submitted that the defence of the appellant that she went to tether the cattle and was away when the co-wife returned home are co-existing circumstances which weakened the inference of guilt of the appellant.

The learned Judge recognized that the case against the appellant was dependent on circumstantial evidence. Relying on the case of **James Mwangi v Republic [1983] KLR 327** the learned Judge

correctly appreciated the conditions which circumstantial evidence must satisfy before an inference of guilt can be drawn from such evidence and concluded that circumstantial evidence satisfied the conditions.

The main circumstantial evidence relied on by the trial Judge was that Lydia left the appellant and the infant at home; that the infant had been moved from the bedroom of Lydia to the store/bedroom where the appellant used to sleep and was immersed in water contained in a big sufuria in the store; that the appellant had escaped carrying with her her wet clothes in a nylon paper bag; and that the appellant's behaviour after the child was born was strange. The evidence of the strange behaviour of the appellant was given by her husband Fredrick. According to Fredrick he used to sleep in Lydia's bed after the child was born while the appellant slept alone in her store (bedroom). The appellant would leave the lamp on until late at night and when told to put off the lamp she would get angry. The appellant did not deny that she was left at home alone with the infant. The trial Judge concluded from the conduct of the appellant that when she was arrested, she must have been running away after committing the heinous crime.

We have reconsidered the evidence. We are satisfied, like the trial Judge, that the possibility that Lydia may have killed the child with the intention of implicating the appellant was too remote and was correctly rejected. Further, the fact that Lydia and the neighbours who answered the screams did not find the appellant at home is not a co-existing circumstances which weakened an inference of guilt because the trial Judge found in fact that the appellant had escaped from the home. The appellant's explanation for such sudden departure from home was not consistent. She stated in the defence that she went to look for her husband yet she told Kenneth (PW7), who is among the people who arrested her, that, she escaped because the child died while she was at home and she became afraid and feared to be beaten. From the evidence, the trial Judge reached the correct conclusion that the appellant had escaped from home. The conduct of the appellant escaping from home is a circumstance which is indicative of the appellant's guilt. (See **Terikabi v Uganda** [1975] E A 60 and **Malova v The Republic** [1980] KLR 110). On our part, we are satisfied that there was strong circumstantial evidence against the appellant and that there were no co-existing circumstances which weakened such evidence and that the appellant was properly convicted.

We now turn to ground 8 of the appeal. The offence was committed on 25/11/2002. The appellant was examined by Dr Aggrey Indagiza Akidira (PW9) – a Medical Doctor on 17/12/2002 who testified that, at the time of examination “ **she was then about 17 years old**”. The Medical Examination Report (P3) which the police filled indicates that the age of appellant was 17 years. Mr Menezes contended that it was probable that the appellant was below 18 years old at the time the offence was committed. Mr Musau, learned Senior Principal State Counsel conceded that the evidence shows that the appellant was about 17 years old at the time of the commission of the offence. There was no medical evidence to prove otherwise. We agree that from the medical evidence, it appears that the appellant was under the age of 18 years when she committed the offence. In such an event **section 25(2)** of the Penal Code provides that a sentence of death shall not be pronounced but in lieu thereof the court shall sentence such a person to be detained during the President's pleasure. There is no doubt that the learned Judge erred in law in pronouncing a sentence of death, on the appellant.

For the foregoing reasons, we dismiss the appeal against conviction but allow the appeal against sentence. We set aside the sentence of death and substitute thereof an order under **Section 25(2)** of the Penal Code to the effect that the appellant shall be detained during the President's pleasure. We direct that the trial Judge shall comply with **Section 25(3)** of the Penal Code.

DATED and delivered at KISUMU this 25th day of November, 2005

E. O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR