



No. 166

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 7 OF 2012

MARCELLA NYABONYI OTIENO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence by the Senior Resident Magistrate's Court at Keroka, Hon. J. Were in Criminal Case No. 2 of 2011 dated 26th June, 2012)

JUDGMENT

1. The appellant with three other persons were charged at the Senior Resident Magistrate's Court at Keroka with the offence of robbery with violence contrary to **section 295** as read with **section 296 (2)** of the Penal Code. The appellant was convicted of the charge and sentenced to serve life imprisonment on 26th June, 2012. The appellant has now preferred this appeal against her conviction and sentence by the trial court. The appellant's appeal has been brought on the following grounds:
 - i. That the learned trial magistrate erred in law and fact by not thoroughly considering that the appellant had entered a plea of not guilty and that the prosecution had failed to prove its case beyond any reasonable doubt as required by the law against the appellant.
 - ii. That the trial magistrate erred in law and fact by not taking into consideration the fact that there were no exhibits recovered in the appellant's possession that could link the appellant with the offence with which she was charged.
 - iii. That the prosecution failed to produce exhibits that could give clear proof of the commission of the said offence and that the appellant was linked to the same.
 - iv. That the learned trial magistrate erred in law and fact by not considering that the appellant was only 2 days old in the deceased house as a house help hence was not conversant with the area so as to be able to plan the commission of such offence.
 - v. That the appellant is an old woman aged 49 years old, an IDP having been displaced from Kericho in 2007 and had worked in several places since then as a house help in which she had left a clean record.
 - vi. That the appellant is a poor woman with 8 children and 2 grandchildren all under her care and that she is the bread-winner in the family.
 - vii. That life sentence imposed against the appellant is overly harsh in the circumstances.

2. This appeal came up for hearing before us on 15th October, 2013. The appellant appeared in person while the state was represented by Mr. Shabola. The appellant informed the court that her appeal was against both conviction and sentence and that she wished to rely entirely on the grounds of appeal set out in her Petition of Appeal. The appellant in conclusion urged the court to allow the appeal as she is sickly and has grandchildren to take care of. Mr. Shabola opposed the appeal. Mr. Shabola responded to the appellant's grounds 1 to 4 of appeal which concerned the issue as to whether the prosecution had proved its case against the appellant beyond reasonable doubt together. Mr. Shabola submitted that the evidence adduced by the prosecution witnesses proved beyond reasonable doubt that the appellant had committed the offence with which she was charged. Mr. Shabola highlighted the evidence of the prosecution witnesses as follows; PW1 in his testimony positively identified the appellant as the woman who had come to their home with the deceased. PW1 testified that the appellant used to sleep together with him in the deceased's house in the sitting room but on the material night, he woke up and was surprised to find that the appellant was not in the house. PW1 testified that he went to sleep on the material night and left the deceased and the appellant taking tea. PW2 who is the mother of PW1 confirmed that the appellant stayed with the deceased who was her mother-in-law for 2 days. PW2 narrated how the appellant had come to assist the deceased with household chores and that on the material day; they broke the door and found the deceased blood soaked body lying on the floor, the deceased's 2 radios and clothes were missing. PW2 testified further that the appellant was arrested 3 months later as she had disappeared after the incident and went to the deceased's sister's home to look for a job. PW4 a neighbor to the appellant testified on how at some point she intervened in a fight between the appellant and one, Evans and on asking why they were fighting, the appellant said Evans had sent her to a place to do some work and that Evans had caused her to commit an offence. The appellant told PW4 that she had been taken to Manga to work and that a lady had been killed and that the quarrel between the appellant and the said Evans came about because Evans had sold what they had got following the incident but had not shared the proceeds with her. PW6, Dr. Muthoni Aidu who produced the P3 form on behalf of Dr. Raute confirmed that the deceased had; blood stained clothes and cuts on the neck with multiple wounds on the ears. He concluded that the death of the deceased was caused by strangulation and injuries to the head arising from assault. PW 8, **Corporal Chirchir** who was the investigating officer noted on arrival at the scene of crime that, 2 sofas were disarranged and there were two blankets which showed that two people had slept in the room. Mr. Shabola submitted that, when the appellant was put on her defence, she denied having been to the deceased's home. She claimed to have been alone on the day of the robbery. She denied knowing PW1 and PW2 the people who testified to have interacted with her for the 2 days that she is said to have stayed at the deceased's home. Mr. Shabola submitted that the evidence produced by the prosecution although circumstantial, did place the appellant at the scene of crime. Mr. Shabola submitted that the appellant failed to explain her disappearance from the deceased's house on the fateful night. Mr. Shabola submitted that the prosecution had established a case to warrant the appellant's conviction.
3. Mr. Shabola did not respond to the appellant's grounds 5, 6 and 7 of appeal which in actual sense were not grounds of appeal but personal statements. With regard to ground 8 of appeal (ground 7 above), Mr. Shabola submitted that the sentence provided for on conviction for the offence with which the appellant was charged and convicted is death and for that reason, life sentence that was imposed upon the appellant by the trial court was far from harsh as alleged by the appellant. Mr. Shabola urged us to dismiss the appellant's appeal and to proceed to uphold her conviction and sentence. In her reply to Mr. Shabola's submission, the appellant submitted that she disagreed with the testimony of PW1. She submitted that the clothes her co-accused wore were blood stained when they were arrested and that she had testified before the trial court that she did not know her co-accused. The appellant reiterated that she was not staying in the

house of the deceased as had been alleged but at a place called Riensune and that she was arrested at a place called Riomanoti. The appellant reiterated her innocence and urged the court to allow her appeal.

4. We have considered the appellant's grounds of appeal and the submissions by the appellant. We have also considered the submissions by the state in opposition to the appeal. As was held in the court of appeal case of, **Kiilu & Another vs. Republic [2005] 1 KLR 174**, we have a duty to re-evaluate and examine the evidence on record afresh and to arrive at our own conclusion on the charge that faced the appellant. As was correctly submitted by Mr. Shabola, grounds 1 to 4 of the appellant's grounds of appeal concerned the issue whether the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was charged with the offence of robbery with violence contrary to **section 295** as read with **section 296 (2)** of the Penal Code. The particulars of the charge were that, on the night of the 21st and 22nd day of December, 2010 at Gesabakwa Village in Borabu District within Nyamira County, the appellant jointly with her co-accused and others that were not before court while armed with dangerous weapons namely, rúngus and knives robbed Carren Kwamboka Ogato of a Panasonic radio cassette, a Sankel radio cassette, a National radio cassette and a Nokia mobile 1200 all valued at Ksh. 26,000.00 and immediately before or thereafter the time of such robbery killed the said Carren Kwamboka Ogato. The prosecution called ten (10) witnesses. PW1 was the deceased's grandson. He was staying with the deceased in the same homestead and used to sleep in the house of the deceased. He testified that on 17th December, 2010 at around 10.00pm, the deceased came home with the appellant. The deceased and the appellant came to their (PW1) house which is in the same compound with the deceased house, greeted him (PW1) and his mother before the deceased and the appellant left for the deceased's house. Later after taking supper, PW1 went to sleep at the deceased's house where he found the deceased and the appellant. PW1 used to sleep at the living room of the deceased house. On that day, he left the deceased and the appellant cooking and proceeded to sleep. On the following day, the deceased left for Manga where she used to sell clothes and left the appellant working on her farm. That was the first night and day of the appellant's arrival at the deceased's house. On the fateful night, PW1 took supper at their house as usual. While he was taking supper, the appellant came to ask his (PW1) mother for a torch to go to the toilet which she used and returned. PW1 then accompanied the appellant to the deceased house to sleep as usual. While on their way to the deceased's house, they saw someone squatting behind the deceased's house. They informed the deceased of this incident but the deceased told them not to worry over the same. The deceased and the appellant took tea after which they prayed and went to sleep. PW1, who was sleeping at the same place with the appellant, had some conversation with the appellant before they fell asleep. Next morning, PW1 was woken up by his mother who knocked at the window and asked him to go and check on the deceased in her room. When PW1 woke up that morning, he did not find the appellant where she had slept although all doors were still closed. PW1 found the deceased lying in the corridor and did not realize that she was dead. He reported this finding to her mother who screamed and alerted the neighbors who came and broke the front door that was locked from outside. When his mother and the neighbors got into the house, they confirmed that the deceased was dead. In cross examination, PW1 clarified that the deceased had come home with the appellant on 20th December, 2010. The appellant did not challenge PW1 on his testimony as to how and when the appellant came to live in the deceased's house. PW2 who is PW1's mother testified that she used to stay in the same homestead with the deceased but in different houses. Their houses were about 50 metres apart. The deceased used to stay alone but her son, PW1 used to sleep in the deceased's house. The deceased came home with the appellant on 19th December, 2010 at about 7.00pm and told her that she had brought the appellant to assist her. The deceased and the appellant thereafter left PW2's house for the deceased's house. On 20th December, 2010, the deceased went to her

business and left the appellant at home working on the farm. That evening, PW2 met the deceased and the appellant before they parted ways with the deceased and the appellant going to the deceased's house and PW2 going to her house. At around 9.00 p.m on the same day, the appellant came to PW2's house to ask for a torch which she took and brought back after a short while. PW2 then asked PW1 to accompany the appellant to the deceased house. The following day, PW2 noted that the deceased had not woken up early as was her usual habit. PW2 then proceeded to the deceased's house where she found the rear door locked from inside and the front door locked with a padlock from outside. PW2 tried to call the deceased but her phone was off. She then woke up PW1 who was asleep inside the deceased's house and asked him to go and check on the deceased whom he found on the ground. PW2 screamed and neighbors came and broke the deceased's front door which was locked with the deceased's padlock. PW2 testified that it was not usual for the deceased's doors to be closed from outside. When the door was broken, the appellant was not found in the house. The deceased was found blood soaked on the ground with a sharp cut on the forehead. The deceased's room and the living room were ransacked. Three radios and the deceased's clothes were missing. The police were called to the scene and she gave the police information about the people who were in the deceased house at the material time. The appellant was subsequently arrested at Matutu at the deceased's sister's home where she had gone to look for employment. PW2 had given the deceased's said sister the description of the appellant and when the appellant appeared there, they suspected her and called PW2 to go and identify her which she did in the company of the police after which the appellant was arrested. In cross examination, the appellant did not challenge PW2's testimony on how she came to live in the deceased's house and the fact that she was in the deceased house on the material night when the deceased was killed. PW4 was a neighbor of the appellant in January, 2011 at a place called St. Jimmy soon after the robbery and the killing of the deceased. PW4 told the court that one day, the appellant quarreled with the man she was staying with as her husband by the name Evans Onditi which quarrel led to a fight. Later on, PW4 asked the appellant the reason why they were fighting. It is at this point that the appellant narrated to PW4 how she(the appellant) had been sent by her said husband to work at the deceased's house and how her said husband later on killed the deceased. The appellant told her further that her fight with her said husband came about because he had sold all that they had taken from the deceased's house without sharing the same with her(the appellant). PW4 told the appellant that she would give this information to the village elder. On the following day after that conversation, PW4 woke up in the morning and found that the appellant and her said husband had shifted from her neighbourhood. PW4 nevertheless proceeded and informed the village elder of what she had been told by the appellant and the said village elder passed the same information to the area assistant chief. PW4 did not get the details from the appellant on how the robbery and the killing of the deceased were executed. She was however shocked with the information that she was given by the appellant. PW4 had previously heard about the death of the deceased on the radio and she found the information that was given to her by the appellant similar to what she heard on the radio concerning the death of the deceased. The appellant did not challenge PW4's testimony in any material respect in cross examination. PW5 was the deceased's son. He was not at home when the incident occurred. He told the court that when he came to the deceased's house following the incident, he noted that 3 radios were missing. The deceased's Nokia 1100 phone was also not recovered. He told the court of how he came to learn of the appellant's whereabouts and how he got her arrested. The prosecution's sixth witness was Dr. Muthoni Aidu(PW6). She produced a post mortem report on the deceased. She testified of the injuries that the deceased had sustained. Her conclusion was that the deceased death was as a result of strangulation and the injuries that she had sustained in the head. PW7 told the court how he got information that the appellant used to stay at Riensune and that she had ran away from the police who were looking for her for harboring criminals. PW7 told the

court how the appellant fitted the description of the lady who had stayed with the deceased prior to her demise and how he arranged for PW2 and PW5 to come and confirm if the appellant was the lady who was staying with the deceased a fact that was confirmed following which the appellant was arrested. PW8, PW9 and PW10 were police officers who investigated the incident. They told the court how they received the report on the death of the deceased, their visit to the scene and the investigations that led to the arrest of the appellant and her co-accused. The trial court after reviewing the prosecution's case found that the appellant had a case to answer. The appellant was accordingly put on her defence. In her sworn testimony, the appellant denied the charge. She told the court that on the night that she is said to have been in the deceased's house she was at Riensune where she was staying a lone. She testified that the evidence of PW1 and PW2 were lies as she did not know the deceased and never went to her home as the two had claimed. The appellant admitted that PW4 was known to her but said that, part of her evidence were lies. The portion of PW4's evidence that she said were lies was that bit that concerned the appellant and PW4 being beaten by Evans. She denied having been employed by the deceased and that she slept in the house of the deceased on the fateful night. She argued that if she had killed the deceased, she could not have gone to look for employment at the deceased's sister's home.

5. From our analysis and re-evaluation of the evidence on record, we are satisfied that the prosecution had proved the case against the appellant beyond any reasonable doubt. PW1 and PW2 were with the appellant for two days during the day and at night. In fact, PW1 slept with the appellant at the same place during those two days. PW1 and PW2 were therefore familiar with the appellant and could not mistake her for someone else. When the appellant was found, PW2 went and confirmed that she was the lady who worked for the deceased shortly and disappeared on the night she was robbed and killed. PW1 recognized the appellant in court. We find the evidence of PW1 and PW2 to the effect that the appellant was the lady who had been employed by the deceased as house help and who disappeared on the night of her murder truthful. This evidence was corroborated by the evidence of PW4. PW4 was the appellant's neighbor. She witnessed the appellant and one, Evans fighting. On inquiring as to the reason for the fight, the appellant informed her about her work at the deceased's house and the robbery and killing of the deceased in which the said Evans had involved the appellant. When PW4 told the appellant that she would report the matter to the village elder, the appellant moved out from the place where they stayed together with PW4 the following day. The appellant admitted that PW4 was known to her and that she used to be her neighbor. She did not challenge the evidence of PW4 save only for the bit about the appellant and PW4 being beaten by Evans. She did not deny that she moved out of the area where they stayed with PW4 the following day after telling PW4 of the robbery and killing of the deceased and after PW4 told her that she would report the matter. This evidence of PW4 ties up with that of PW7 who was told that the appellant used to stay at Riensune and that she had escaped because the police were looking for her for harbouring criminals. We are satisfied that the prosecution proved that the appellant was at the house of the deceased on the night when she was robbed at killed. We are also satisfied that the prosecution also proved that the deceased was robbed and that prior to or immediately after the said robbery, the appellant caused injury to the deceased that led to her death. PW2 and PW5 testified that on the day that the deceased was killed, three (3) radio cassettes and a Nokia mobile phone went missing from the deceased's house and the same were never recovered. Since the appellant was the only person who was at the deceased's house on the material night apart from PW1 when the said properties went missing and who left the premises in unclear circumstances, it was correct to presume which presumption was not rebutted by the appellant that the said properties were stolen by the appellant. On the death of the deceased, there was no dispute that the deceased was killed. All the prosecution witnesses testified to that fact. The deceased death arose as a result of strangulation and from the injuries that were inflicted on her on the night of

the robbery. PW6 produced in court a post mortem report that detailed the nature of the injuries that were inflicted upon the deceased and the cause of her death. The appellant was the only adult who was the last person to be seen with the deceased on the night she was killed. We have considered the appellant's defence before the trial court. We are unable to fault the trial court's finding that the same was unconvincing. The appellant's contention that on the material night she was alone at undisclosed place at Riesune is difficult to believe without more in the face of the overwhelming evidence by PW1 and PW2 that the appellant was at the deceased's house.

6. Due to the foregoing, it our finding that the appellant's conviction and sentence was proper. We are in agreement with the submission of the learned state counsel Mr. Shabola that the sentence that was imposed against the appellant was more than lenient. The offence with which the appellant was convicted carried a mandatory death sentence. The life imprisonment that was imposed upon the appellant cannot therefore be harsh as claimed by the appellant in her petition of appeal. The appellant's appeal therefore lacks merit. The same is accordingly dismissed in its entirety.

Delivered, Dated and Signed at KISII this 30th Day of December 2013

E.N. MAINA

S. OKONG'O

JUDGE

JUDGE

In the presence of:

..... for the Appellant

.....for the State

..... Court Clerk

E.N. MAINA

S. OKONG'O

JUDGE

JUDGE



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