Republic v Muchiri & another (Criminal Case 22 of 2014)
[2023] KEHC 21904 (KLR) (17 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21904 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL CASE 22 OF 2014

FN MUCHEMI, J

AUGUST 17, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

AGNES WANGUI MUCHIRI ..... 1ST ACCUSED

GENERICA WANJIKU MUCHIRI ..... 2ND ACCUSED

JUDGMENT

1. The accused persons jointly face a charge of murder contrary to section 203 of the *Penal Code* as read with section 204. The particulars of the charge are that on the 4th day of December 2014 at Gathumbi village in Iriani location within Nyeri county jointly murdered LWW.

2. At inception, the case was heard by Ngaah J. who heard 13 prosecution witnesses. Directions under section 200(3) of the *Criminal Procedure Code* were taken and the accused persons opted to proceed from where the former trial judge reached. This court heard the defence case which was made of the sworn evidence of the accused persons. None of the two called any witness.

3. The evidence of the prosecution was that on December 7, 2014, the family members of the accused persons, in the company of the chief and police officers learnt that the infant daughter of the 1st accused aged (10) months. The 1st accused is the mother dauther of the 2nd accused. had passed on and had been buried secretly. PW1, a sister to the 1st accused and daughter of the 2nd accused, visited the two accused persons who lived together at Gathumbi and noticed strange behaviour of the two women. PW1 informed her brother of what she had seen. The prosecution led evidence to the effect that the strange mental behaviour of the two accused persons who are mother and daughter in particular on December 2, 2014. On that day, the 2nd accused asked PW1 to withdraw money from their joint bank account which she could not do herself because she believed that some people in the village wanted to kill her. On December 6, 2014, PW1 PW2 and one Philip Karikui went to the home of the accused

persons and the gate was not opened for him to enter the compound. Following these events, the witnesses went to the area chief where they reported the matter. A visit to the home of the accused persons was planned for the following day. A search of the body was mounted at the home. The body of the infant was spotted and exhumed. The police later removed the body to the mortuary for post mortem purposes.

4. The two accused persons were arrested and thereafter taken for mental assessment. Dr Richu Mwenda found that the 1st accused was of unsound mind and therefore, not fit to take plea. The 2nd accused was found to be mentally fit to plead. Following an order by the court, the 1st accused was admitted at Mathari Mental Hospital and commenced treatment until October 26, 2015 when she was found fit to stand trial and a certificate of capability issued.

5. Post mortem of the deceased's body was conducted by Dr Obioro Okoth and he formed the opinion that the deceased died as a result of asphyxia secondary to smothering and strangulation and of starvation.

6. Upon being put on their defence, the accused persons elected to give sworn testimony. The 1st accused person stated that the deceased is her third child and was aged ten (10) months when she died that she could not recall what happened on the material day as she was mentally sick having been diagnosed with the illness. The 2nd accused person testified that she recalls that on the material day, her sister and brother in law went to her home and took her for treatment to Nyeri Hospital. She further stated that she did not kill the deceased and neither did she know how the deceased was killed. Further, that she did not see the 1st accused kill the deceased.

7. The prosecution and the defence filed their submissions in this case which the court has perused and considered in this judgment.

8. The prosecution submitted that the evidence of doctor was that the deceased did not die of natural causes. The cause of death was asphyxia secondary to smothering and strangulation with a possibility of strangulation and starvation. The prosecution submitted that the accused persons were the only people living with the deceased in that compound at the time of her death. The deceased was a child of 9 months who still depended on her mother for provision of food and other basic necessities. However, the prosecution said that it must have been the 1st accused who starved her child and strangled her to death.

9. At the time the chief and the relatives gained access to the homestead on December 7, 2014, it was noticed that the child was missing from the home. Thus, the prosecution argues that it is untrue for the 2nd accused person to state that she did not know what happened to her granddaughter from December 4, 2014, when she was killed up until December 7, 2014 when the relatives gained access to her home.

10. The prosecution further submits that although no one witnessed the accused persons killing the deceased, the fact that the accused persons are the only ones who lived with the deceased and were her caregivers puts them squarely as the persons responsible for the murder of the infact. It was further argued that though the 2nd accused may not have killed the deceased, she was involved in the cover up of the offence as he never raised alarm or reported the death to the police. The 2nd accused was responsible of locking out people who went to the home.

11. The prosecution further states that the 1st accused raised the defence of insanity to which the prosecution concedes to. Relying on the case of *Leonard Mwangemi Munyasia v Republic* [2015] eKLR, the prosecution submits that from the evidence on record, the 1st accused was unstable at the time of the commission of the offence. The relatives had noticed the mental instability and were in

the process of taking her to hospital but the 1st accused person killed the deceased before she could be taken to hospital. The prosecution however submits that the 2nd accused being declared fit to stand trial by PW5 and her own testimony that she was okay in 2014, she ought to have reported the matter. However, the prosecution argues that she possessed a guilty mind and thus she did not report the matter but instead locked out her relatives in a bid to cover up what the 1st accused had done. Thus, the prosecution submits that the 2nd accused person is an accessory after the fact of murder contrary to section 222 of the *Penal Code* and urges the court to convict her accordingly.

12. The defence submitted that the prosecution had failed to prove its case beyond a reasonable doubt. The circumstances as brought out by the prosecution witnesses are such that nobody witnessed the deceased being murdered. The defence further submits that the two reports produced by Dr Mwenda and Dr Mary Karanja show that the 1st accused person was not fit to plead as she had an abnormal mental status and she required treatment until further notice. This was confirmed by the 1st accused person who testified that she did not know what happened as she was suffering from mental issues. Having such a mental condition, the defence argues that the 1st accused person was not in a position to form the necessary mens rea to kill her own child. The defence further argues that it is immaterial that she led the police to where she buried her own dead child.

13. The defence submits that from the age of the deceased and the mental status of the 1st accused person, the proper charge for the prosecution ought to have charged her with infanticide contrary to section 210 of the *Penal Code*.

14. The defence further submits that there is no direct or even circumstantial evidence connecting the 2nd accused person with the offence leading to the death of her grandchild.

15. The defence relies on the case of Nyeri High Court criminal case No 38 of 2010 *Obyteleen & 14 others v Republic* and submits that a normal person cannot act in concert with a person who is of an abnormal mental faculty. Thus, the defence urges the court to acquit the accused persons accordingly.

Analysis & Determination

16. The burden of proof in criminal cases lies on the prosecution to establish that the deceased's death was a result of the unlawful act of the accused person. The prosecution must prove the primary ingredients of the offence of murder namely:-

    a. That the deceased died as a result of the unlawful act of the accused;

    b. That the accused person has been positively identified and placed at the scene of the crime;

    c. That the unlawful act was actuated by malice, rather that malice aforethought existed on part of the accused person.

17. Upon the death of the deceased, PW9 Dr Obioro Okoth conducted an autopsy on the deceased. The post mortem report shows that the cause of death was asphyxia secondary to smothering and strangulation and possibility of starvation. The death and cause of death have been established by the prosecution herein.

Whether the accused persons caused the death of the deceased by either an unlawful act or omission.

18. The prosecution's entire evidence was based on circumstantial evidence. As such, it is important that this court examines the principles that guide courts in dealing with circumstantial evidence. As such, it is important that this court examines the principles that guide courts in dealing with circumstantial

evidence. Circumstantial evidence must be examined in light of the principles set out by the Court of Appeal in *Sawe v Republic* [2003] KLR 364 where the court held:-

> " In order to justify, on circumstantial evidence, 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 guilt. There must be other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

19. Similarly in the case of *Sylvester Mwacharo Mwakeduo & another v Republic* [2019] eKLR:-

> " Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this court in a myriad of cases for instance in the case of *Judith Achieng' Ochieng' v Republic*, criminal appeal 128 of 2006, this court stated the law as follows:-
>
> It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-
>
> a. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;
>
> b. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
>
> c. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;
>
> d. In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt."

20. From the testimonies of PW1, PW2, PW3, PW4, PW6, PW7, who were relatives and neighbours of the accused persons, it is noted that they learnt of the death of the deceased on December 7, 2014 when they went to the home of the 2nd accused. According to the witnesses, the 1st accused told PW4 that the deceased was taken by God which he interpreted to mean that she was not alive. PW4 further testified that the1st accused person led him to the grave of the 1st accused's father and told them that the deceased was alive. The witness testified that there was fresh soil visible on the relevant spot in the ground. He called the police to the scene and directed them to where the deceased was alleged to have been buried. PW6 testified that he guarded the scene from December 7, 2014 till December 10, 2014 ensuring that there was no interference. PW10 testified that he obtained an exhumation order and dug out the grave but did not find the deceased. He testified that they found a sack of assorted baby clothes in the farm at the search area. Search of deceased's body was mounted in the family's coffee plantation

until it was recovered in an area with fleshly planted bananas section of the land buried and covered with a metallic lid. The body was inside a cement bag.

21. The prosecution further led evidence to show that only the two accused persons lived in the said homestead. The deceased was 9 months old at the time of her demise and was under the sole care of her mother, the 1st accused. The 2nd accused denied killing the deceased and stated in her defence that she did not see the 1st accused person killing the deceased or burying her. Although the evidence does not point to the 2nd accused killing the deceased, she must have known the whereabouts of the child since it was only the 1st and 2nd accused living in the compound. Furthermore, when the chief and the relatives gained access to the homestead on December 7, 2014. It was noted that the child was missing. At the time of the search, the 2nd accused assisted in tracing the body of the deceased by pointing out where she had buried the deceased.

22. The evidence of the prosecution witnesses, the words of the 1st accused that her infant had been taken by god and her cooperation to assist in tracing the grave where the dead body was found, all point at the 1st accused as the one responsible for the death of her infant.

23. I have carefully analysed the evidence of the prosecution and find that the inculpatory facts are incompatible with the innocence of the 1st accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. From the evidence on record, I am of the considered view that the prosecution have proved that the unlawful act of the 1st accused caused the death of the deceased.

Whether the 1st accused had malice aforethought

24. Section 206 of the *Penal Code* stipulates that malice aforethought is deemed to be established by evidence when any of the following circumstances are proved:-

    a. An intention to cause the death of another.

    b. An intention to cause grievous harm to another.

    c. Knowledge that the act or omission causing death will probably cause death or grievous harm to someone, whether that is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

    d. An intent to commit a felony.

    e. An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.

25. The evidence of the prosecution witnesses was to the effect that the deceased was killed in the home of the 2nd accused where her daughter the 1st accused lived with her 10 months old baby. In her defence, the 1st accused did not deny being responsible for the death of her baby but pleaded the defence of insanity. The psychiatrist reports, from Othaya Sub-county Hospital and Nyeri Provincial Hospital declared the 1st accused not mentally fit to plead shortly after the commission of the offence. The 1st accused in her defence testified that she was undergoing treatment for mental illness. The said illness must have affected her mind to an extent that she did not know what she was doing as she committed the offence.

26. Section 12 of the *Penal Code* provides for the defence of insanity which is my view is available to the 1st accused in this case. It is noted that the prosecution acknowledged the fact that the accused was mentally unfit at the time she was charged in court and this state of affairs continued as she received treatment.

27. It is my considered view that the 1st accused was not mentally capable of forming the necessary intention to commit the offence of murder.

28. As for the 2nd accused, the evidence against her is that after the deceased was killed, she failed to report the incident to the relevant authorities. Further, when the neighbours suspected that the deceased was missing from the home of the 2nd accused, she locked her premises to bar them from entering. This was further concealment of the crime committed by the 1st accused that the 2nd accused was aware of and was determined to conceal.

29. Section 222 of the *Penal Code* provides:-

> " Any person who becomes an accessory after the fact to murder is guilty of a felony and is liable to imprisonment for life"
>
> In my considered view, the 2nd accused concealed the murder not because she took part in it, but most probably because she wanted to shield the 1st accused from responsibility and prevent arrest and prosecution. In my considered view, the prosecution have not proved the offence of murder against the 2nd accused. However, this court invokes section 179 of the *Criminal Procedure Code* and convicts the 2nd accused with a lesser offence which in my view has been proved based on the evidence on record.

30. Consequently, I find that the 1st accused is "guilty but insane" of the offence of murder and is hereby convicted accordingly.

31. The prosecution have proved the offence of accessory after the fact to the offence of murder against the 2nd accused. I find her guilty of the offence and convict her accordingly.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF AUGUST, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 17th day of August 2023