



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 38 OF 2019

REPUBLIC..... ODPP

VERSUS

GCK.....ACCUSED

R U L I N G

1. On 15th August 2019 the accused person Gladys Cherop Koskei was charged with offence of **Murder Contrary to Section 203 are read with Section 204 of the Penal Code.**

2. It was alleged that on 5th August 2019 at Kipsigis Tugen Farm in Subukia Sub-County within Nakuru County, she murdered Ivyne Cheron Korir.

3. She took plea on 3rd October 2019 and pleaded not guilty. Her counsel was Mr. Orege, Ms. Murunga appeared for the state.

4. The case for the prosecution was that the accused was the mother of nine (9) children, and the deceased was the last born. She slept on the bed with her youngest child while the other children slept in the same room on the floor.

5. On the night of 4th August 2019, she was sleeping with the baby. PW1 - DC a daughter to the accused was putting her other sister to bed in the same bed with the mother and I. It is then that she saw that I was bleeding from the nose. DC then woke up the accused who was asleep in the same bed. When the accused saw the child was bleeding from the nose, she appeared shocked and left the room and went outside.

6. DC's brothers, B, C and K came in, and they too saw that the baby was bleeding from the mouth. They began to wipe the child. Later on, their father one WK arrived. It is DC who told him that the child was dead. The father asked where the accused was, DC told him that she did not know where their mother had gone to. She did not return, but the police came and took away their father and I. On cross examination she said that they were nine (9) siblings and DC was the 10th born. She said that her mother usually went to sleep at 7.00 p.m. That her mother had been sleeping on one side of the bed, while I slept on the other side. She said when she noticed the bleeding and woke up her mother, the accused was very shocked, she said that after her mother left she touched the baby's chest and she knew that the baby was dead. She said her mother had been breastfeeding the child earlier that evening while they ate supper. That sometimes she would notice that when the baby breastfed, sometimes milk would come through the baby's nose.

7. PW2 was the accused's husband WK. On 4th August, 2019, he was out drinking and came home at 9.00 p.m. He found DC who told him that the baby was dead. His wife GC was not at home. He went and informed the village elder, Samuel Ng'eno. He came back with Ng'eno. Ng'eno rang the chief, who rang the police. When the police came, they picked him up, and the baby who was placed in the mortuary while he was locked up. However his wife showed up at the police station. He was released and she was locked up. He said his baby had a breathing problem that resulted in nose bleeding and some kind of severe hiccups that would make it difficult for the baby to breath, the result of which would be a nose bleed (He said – *alikuwa ananyongwanyongwa anashindwa kupumua mpaka anableed kwa mapua*).

8. On cross examination he said that between them they had 10 children, and the deceased was the 10th child. He said G brought herself to the police station two days after the incident. He confirmed that the child would have hiccups and bleed from the nose.

9. PW3 No. 222099 Corporal(Cpl) Robert Ng'etich from Kanyotu Police Post in Subukia told the court that he received the report of murder from the chief on 4th August 2019 2300 hours. He visited the scene with a colleague, found the house where the accused lay dead closed. It was opened and he saw the baby who had dried blood on the nose and mouth. The PW2 was present and he told them that he did not know where his wife was. He rang the Sargent at Subukia Police Station who came to the scene, photos were taken and they left with the

father of the child and the child. The following day in the evening the accused went to the police post and reported that her life was in danger. She feared that since her child had died, people might attack her.

10. On cross examination he said that for people from the accused's community (where he too came from) it was normal to express fear of a dead person and therefore he did not find it strange that the accused person had taken off and realizing that her child was dead. He said the accused brought herself to the police station.

11. **PW4 Sammy Kipkemoi Ng'eno**, testified that on the night of 4th August 2019 WK woke him up at about 9.00 p.m. He simply told him that a bad issue had happened in his home and it could not wait till the next day. He thought it had something to do with Wilson's father who had been unwell. He accompanied Wilson to his house, and using his own torch light, he was led to the room where the baby lay dead, next to two (2) other children who were asleep. He asked W who has killed the child. W told him that it was G his wife who knew. He asked where G was and W told him that G had run away. Wilson uncovered the child. Ng'eno touched the child's stomach. She was still warm, but she was dead. He noticed blood in the nostrils. He rang the chief who sent some police officers, who on arrival rang Subukia Police Station. By the time the police from Subukia Police Station arrived he had left. He told the court that he knew Gladys well. That she had raised nine (9) children, and they had never heard anything wrong about her. He said she took herself to the police station. On cross examination he said the house he was taken to was one roomed round house. It had no bed and the baby was sleeping with other two (2) babies on the floor. He said there was very little blood on the nostrils.

12. **PW5 Patrick Kipchirchir Koske** testified that he and W were neighbours and had spent most of the day on 4th August 2019 together. Later that night he heard noise at Wilson's house, people were talking. He went there. He heard people saying that Gladys had killed her baby. G was not home. The police came and took W and the baby away. On cross examination he said he heard screams at W's home about 10.30 p.m. He went to the home. He saw where the child was sleeping with three (3) other children on the floor. He too saw blood and mucus on the child's nostril. He said G disappeared for three (3) days.

13. **PW6 David Miru Kabuga** was the Assistant Chief Marana Sub Location. He was rang by the Assistant Chief Gakingi Sub Location about the incident at Wilsons, and it is he who rang Cpl Ng'etich. He did not go to the scene.

14. **PW7 No. 116530 Police Constable (PC) Eric Tanui** attached to Subukia Police Station at the material time. While on patrol duties on 6th August 2019 with the in charge Sgt. Odiba they were rang by the Officer Commanding Station (OCS) that there was a suspect held at Pole Pole Police Post. They went there and took over the suspect, Gladys Cherop and took her to Subukia Police Station.

15. **PW8 was No. 82967 PC Aliyo Roba Jillo**. On 7th August 2019, he was called by his in charge to take over the investigations of the case where GC was charged with killing her one (1) month old baby by the name ICK. He said together with a female officer by name of Rachel Kanini. He said they found the father of the child, Wilson in the cells. He told them that the child's mother was missing and the body was at Nyahururu Referral Hospital Mortuary. They recorded statements. Later they learnt that the suspect had surrendered at Kanyotu Patrol Base. She was brought to the police station and the father of the child was released to become state witness. The police then went to court to seek extended time to detain the suspect. They were given seven (7) days when they sought to carry out the post mortem. The family could not raise money for the post mortem. A request was made for the post mortem to be conducted at the cost of government. He attended the post mortem together with the father of the deceased and a neighbour. The pathologist told them that the baby had been strangled, and the private parts had injuries. The accused told them that the child was healthy, but had developed hiccups. He said relying on the post mortem report, he was of the view that the accused needed to give answers about the child's death. The DPP recommended charge of murder. He said there was no eye witness, and he relied on circumstantial evidence. He was of the view that if the accused had not killed the child, she knew who had done it.

16. On cross examination he said there was no direct evidence that G had killed the child. That the only evidence he relied on to charge Gladys with the murder of the child was the postmortem. He testified that the police believed that the witnesses knew something which they hid from them and the court. He testified that the Doctor hold them that the child had injuries, marks on the neck, missing hymen, blood clot on the brain. Referred to the post mortem report he confirmed that there was no record of injuries on the neck of the child. He insisted that he had seen fingermarks on the neck. He also said that the doctor said the child had been defiled and sodomised, but not by any adult. He said he took the swabs from the deceased and samples from the siblings but there was no match, hence the alleged defilement was not linked to the siblings. He said he did not draw any conclusions from his investigations that the accused had killed the child.

17. The Pathologist **Dr. Boniface Miring'u** testified as PW9. At the material time he was a Senior Medical Officer attached to Nyahururu County Referral Hospital. He conducted the post mortem examination on 9th August 2015 at 3.46 p.m. He observed:-

- i. Blood clots from the nostrils
- ii. Multiple bruises on both thighs
- iii. Anal orifice was dilated with lacerations
- iv. Hymen was perforated introitus was open and lacerated
- v. Scapular hematoma on back of head, and upon opening the head there was blood covering the brain.

Cause of death: Bleeding in brain, diffuse subdural hematoma. That the child was defiled and sodomised.

18. On cross examination he told the court that the injuries on the thighs were about a week old. That the head injury and defilement most probably happened at the same time. That the defilement and sodomy was by a blunt object, most probably a male organ, he said he was not

the one who took specimens from the body, and the siblings of the deceased. Cross examined further on how he came to draw the conclusion that the child was defiled and sodomised, he said that the terms sodomy and defilement could be misleading because what he meant was that something penetrated the child's anus and vagina. He said the head injury was blunt force trauma like banging on the ground/table. There was no cranial fracture. Asked about the age of the child he said he could not tell with specificity, but could only say she was less than one (1) year old. On re-exam he said that the injury on the head could have been a consequence of the defilement.

19. The prosecution closed its case.

20. Counsel for the accused person submitted that on the evidence placed before the court, as set here above the prosecution had failed to establish a prima facie case to warrant the accused being put on the defence. The defence cited **Republic vs Danson Mgunya [2016] eKLR** where the Court of Appeal held;

“Turning now to the merits of the appeal, we must reiterate that the burden was on the prosecution to adduce evidence, which would prove its case beyond a reasonable doubt. In the absence of credible evidence proving the guilt of the accused, the prosecution cannot invite the trial court to convict on the basis of inferences and conjecture.”

21. The defence argued that even the investigating officer did not find anything to connect the accused with the death of her child. No witness saw her harm her child, and those who knew her told the court that she had raised nine (9) other children, and not even once had they heard that she had harmed any of them. That it was the doctor's evidence that the head injury would have been sustained at the time of defilement. There was no evidence to connect the accused with the said defilement. That the state was relying on the circumstantial evidence that did not at all link the accused with the death of her child. They referred the court to **Julius Suvi Ndabu vs Republic [2016] eKLR** where the Court of Appeal cited its own decision in **Musili Tulo vs Republic [2014] eKLR** on the criteria for circumstantial evidence.

22. The prosecution through Ms. Murunga submitted that the action of the accused upon seeing blood on the child's nostril, of running away were evidence of guilt. That she ought to have taken the child to hospital or called the child's father or a neighbour to help, instead she left the child in that state in the hands of her 10 year old daughter, the prosecution posed the question, why would she run away from the dying child? She submitted further that the child was killed. The pathologist report showed that she suffered multiple injuries that she was defiled, suffered head injury that led to death. That the doctor was not conclusive that it was a male organ. That she ran away from the scene, that child was either dead or dying and she did not report to the police. Ms. Murunga urged the court to find that a prima facie case had been established to warrant the accused to be placed on her defence.

23. Ms. Mungai in a rejoinder submitted that the cause of death was head injury, sodomy and defilement. Out of the nine (9) witnesses only PW1 was an eye witness at the time of the death. There was no time that she stated that she saw the accused harm the child. She saw her mother breastfeed the child and there were no time gaps between the time they went to sleep, there was no time lapse between the time of breast feeding, and the time of sleeping, when the accused and the child were out of sight of the PW1. The accused's only mistake was to react with shock and leave the house. That the prosecution was now prosecuting her for her reaction, yet the question was whether the reaction had caused the death. That investigations did not in any way link the accused to the death of her child. That when the samples from siblings did not match what was taken from the deceased, the investigating officer did not follow up. He told the court that it was up to the mother to tell the court who had committed the crime, and their position was that in default of doing this, she would pay for the culprits. The prosecution never led any evidence about the defilement and sodomy. That even though the accused took off, she surrendered herself to the police. Referring to the case of **Julius Suvi Ndambu** counsel submitted that the circumstantial evidence relied on by the prosecution did not consist of a chain of events that could link the accused to the murder.

24. Clearly therefore the issue is, from the foregoing, has the prosecution established a prima facie case to warrant the accused being put on the defence as required by Section 306 (1) of the Criminal Procedure Code?

25. I have carefully considered the evidence, and the submissions by counsel, there is no doubt that the child herein I (I) C died. According to the post mortem report, the police indicated that the victim was a new born one month two (2) week old baby, who was;

“choked by breast milk while they were asleep. Eye witness reported of bleeding from the mouth and nose.”

So from the word go, the police came up with a set of circumstance, that the child had died from choking on breast milk. No such evidence was given by any witness, not PW1, not the father to the child, no one, not even the pathologist. It is not clear where the police drew these circumstances. The pathologist did not get the age of the child, but indicated it as “infant”. He wrote in the post mortem. He signed that the cause of death was diffuse subdural hematoma, sodomy and defilement. There was no evidence to connect the accused to these injuries, as the pathologist actually disproved the set of circumstances set out by the police, and which would have connected the accused to the death. It is possible that the accused feared she may have done something to cause the death of her child, but the prosecution presented evidence, that shows clearly that she could not have caused the death of her child. Her running away, from the scene was explained by the investigating officer, the fear of death even the investigating officer, who was at the scene excused her behavior at the time. That if the child was dead, then the fear of death was enough to make her take off, the prosecution did not provide any other evidence to show that that was not the case. The investigating officer was of the view that the accused must have known who had defiled and sodomised her child but was refusing to tell! The investigating officer had no basis for that conclusion, especially when he had already concluded that the accused had nothing to do with the death. It was up to the investigating officer to present the evidence, and prosecution to present the evidence before court. It is unfortunate that the investigating officer did not have the evidence, but the prosecution expected to prove the case against the accused beyond reasonable doubt. The accused has a constitutional right to remain silent, and not to incriminate herself. It was a tall order for the investigation to expect that the accused would be the one to solve the crime on their behalf.

Clearly, even from the facts, the accused slept in the same room with all her daughters. They slept on the floor. The witness testified that there was no actual bed, making the bed here, and sleeping on the bed meant, the separate spaces on the floor, as PW1 was making the bed, her mother was asleep on the next “bed” just there, they had all had supper together in the same room. There was not a single opportunity for

the accused to do what is being alleged.

The pathologist did not establish the approximate time of death, neither has it been ruled out, that the head injury could have been caused after the accused left.

26. The investigating officer said he took swabs from the deceased and the siblings, it is not the pathologist who took the same, so who took the DNA samples and how were the specimens obtained? There was no report placed before the court to demonstrate this evidence.

27. The prosecution rushed to prosecute the accused herein when even their investigations were not complete, the pathologists report opened up a completely different scenario of how the child died. That was not investigated, and no evidence was led on that. Even the alleged obtaining of samples from the deceased and her male siblings was not supported by any report from the government analyst.

28. The upshot of this is that other than establishing that the child died, and that her mother ran away in shock, there is nothing placed before this court to link the accused to what caused the death of her child.

29. I proceed under Section 306(1) of the Criminal Procedure to make a finding of not guilty, dismiss the charge of murder against the accused person and to acquit her accordingly. She is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2022

MUMBUA T MATHEKA

JUDGE

In the presence of:-

Edna Court Assistant

Ms. Mungai for accused

Accused

Ms. Murunga for state