



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.40 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

OLIVIA MUNYIVA NZAU.....ACCUSED

RULING

1. The Accused person, **OLIVIA MUNYIVA NZAU** was charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It is alleged that on the 17th Day of April, 2016, at Sabaki Estate, Athi River Sub-location within Machakos County murdered **BM**.

2. The accused person was represented by Mr Mutinda Kimeu whilst the State is represented by Mr Mwongera.

3. The Prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. Under section 203 as read with Section 204 of the Penal Code, the prosecution must prove the following ingredients beyond reasonable doubt:-

i. That the deceased is dead;

ii. That the death was caused unlawfully;

iii. That there was malice aforethought; and

iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

4. The prosecution called a total of nine (9) witnesses in support of its case. **Pw1** was **Muthama Mbithi** who testified that on 20.9.2016 he was informed that a child's throat had been slit by his mother. He testified that he was led by one Stella to a bush where the body of the deceased was recovered. On cross examination, he stated that he did not witness the incident.

5. **Pw2** was **Florence Kiio**, the assistant chief of Mlolongo sub location who testified that on 20.9.2016 she received information that a lady had killed her child. She stated that she rushed to the scene where the headless body of a child was recovered stashed under some cactus trees. She added that a lady by the name Stella was claimed to have given the information regarding the alleged murder and who was promptly picked up by the police.

6. **Pw3** was **Joan Wayua** who testified that on 20.9.2016 she was informed that the accused had murdered her child. On cross examination, she stated that she did not witness the incident.

7. **Pw4** was **Josephine Nyambura Karuga** who told the court that 21.9.2016 she was informed that there had been a murder on her premises. She testified that she learnt that the accused had murdered the deceased. She added that she had rented one of her premises namely room number 7 to one Benson Ndunda who paid rent for the month of May and June 2016 but however the accused herein paid the rent for July that year. On cross examination, she stated that she had closed the premises for non-payment of rent and that she did not witness the murder.

8. **PW5** was **Anne Wangechi**, who worked at the Government Chemist. She testified that she received items being nail clippings from the deceased, nail clippings from the accused as well as a buccal swab from the accused so as to determine the maternity of the deceased. She told the court that the DNA analysis revealed that there are 99.99 chances that the accused was the biological mother of the deceased. The government analyst report was tendered in evidence and marked Exh2. On cross examination, she stated that she couldn't tell why DNA samples from one of the suspects named Stella Maris were not availed for analysis.

9. **Pw6, Pc Gisiri** testified that on 20.9.2016 he received a call to rush to Kyangombe slums as it had been alleged that a lady had killed her child. He told the court that he went to the scene and in the company of the village elder found the accused outside her house whereupon she was arrested and escorted to the CID Athi River.

10. **Pw7** was **Stella Maris Muthoki** who testified that the accused had been her neighbour. She told the court that on 17.9.2019 she and the accused went to watch movies and on return, it was noted that the deceased was unwell. She stated that she accompanied the accused and the deceased to Hospital but however while en route, the accused entered a thicket with the child and later emerged out of the thicket without the child. She testified that the accused admitted to killing the child and on the following day, Pw7 informed another neighbour about the incident and the information was relayed to a clan elder. She admitted leading the search party to the thicket where the deceased had been abandoned by the accused and she was able to identify the body as that of the deceased. On cross examination she admitted having been arrested as a suspect but was later released and made a prosecution witness as she knew the details of the incident. On re-examination, she stated that the accused used to complain that the child was a bother due to lack of food.

11. **Pw8 Dr Waithera Githendu** testified in respect of an autopsy that was carried out on the body of the deceased which revealed that the deceased had no head and she formed the opinion that the deceased died due to decapitation. She told the court that the body had no other injuries and that the weapon must have been a sharp object. She also stated that some nail samples were collected from the body for analysis. The report was produced as Exh 3.

12. **Pw9, Pc Joseph Chesario** who testified that on 20.9.2016, he was informed that there was a lady at Kyangombe who had killed her child. He told the court that he rushed to the scene and was led to the accused whom he arrested.

13. The prosecution closed its case. Learned counsels filed submissions on case to answer. Counsel for the defence submitted that there is no case to answer as the accused had not been identified. Reliance was placed on the case of **Anthony Njue Njeru v R (2006) eKLR**. It was submitted that there was no evidence that connected the accused with the death of the deceased. It was further pointed out that the knife that was used to commit the offence was not produced in court. The court was urged to find that Pw7 was an accomplice and that her evidence was accomplice evidence that was not safe to act upon hence there was no required corroboration. Learned counsel prayed that the court finds that the prosecution failed to establish a prima facie case against the accused and that she be found not guilty pursuant to section 306(1) of the Criminal Procedure Code.

14. The state in response submitted that as per the evidence of Pw7, the accused was the last person seen with the deceased. It was submitted that the accused person had malice aforethought and that the accused was identified by Pw7. It was submitted that the cause of death was proven vide the evidence of Pw9. In placing reliance on the case of **Ramanlal Trambaklal Bhatt v R (1957) EA 332**, it was submitted that the accused ought to be placed on her defence.

15. It is trite law that prior to placing an accused person to his/her defence, the prosecution is required to have established a *prima facie* case against such accused person. It is now a well-established law that a *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence would convict the accused person, if no evidence or explanation was set up by the defence to the contrary. See **Ramanlal .T. Bhatt v R [1957]E.A 332**, where the East African Court of Appeal held that a *prima facie* case could not be established by a mere *scintilla* of evidence or by any amount of worthless, discredited prosecution evidence.

16. Also, in the case of **State v Rajhnath Ramdhan, Amoy Chin Shue, Sunil Ramdhan and Rabindranath Dhanpaul. H.C.A No. S. 104/1997**, J.P. Moosali while quoting Lord Parker C.J. in **Sanjit Chaittal v The State (1985). 39. WLR. 925** stated that:

“A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence adduced by the Prosecution to prove an essential element in the alleged Offence; b) when the evidence adduced by the Prosecution has been so discredited that no reasonable tribunal could safely convict on it...”

17. I have carefully evaluated the prosecution evidence. I find that, in the absence of any explanation to the contrary from the defence, the prosecution evidence does establish the three (3) ingredients of the offence of murder. It is not in dispute that there was death as a result of decapitation caused by a sharp object. On the question of the accused's participation, this court finds that, in the absence of any evidence to the contrary, the evidence of Pw7 does point to participation of the accused person. In arriving at the above conclusions, I do recognize that at this stage, the standard of proof is not proof beyond reasonable doubt as required for a fully-fledged criminal trial. Rather, what is essential is such evidence which if taken literally or on the face of it would establish the essential ingredients of the offence of murder, as well as the accused's participation therein. It is instructive from the evidence of Pw7 that she was in the company of the accused who was then escorting the child to hospital for treatment only for the accused to move towards a thicket and return without the child whose headless body was discovered afterwards. The said Pw7 in her evidence confirmed that the accused had expressed her frustrations in taking care of the deceased due to lack of food and thus there is circumstantial evidence pointing to the accused getting rid of the deceased as a result of those frustrations. The accused was thus placed at the scene of crime and must offer an explanation as to how her child she was escorting to hospital for treatment ended up dead.

18. For those reasons, I find that there is some evidence adduced against the accused person to establish a *prima facie* case against her and sufficient to put her on her own defence for the offence of murder contrary. I find that she has a case to answer and is now called upon to elect to present her defence in line with the provisions of section 306(2) of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at Machakos this 20th day of January, 2021.

D. K. Kemei

Judge