



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 29 OF 2016

REPUBLIC.....PROSECUTOR

=VERSUS=

EMW.....ACCUSED

JUDGMENT

The accused **EMW** was charged with two counts of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence:

COUNT I

EMW: On the night of 30th September, 2016 at Napara Location, Bumula Sub County within Bungoma County murdered: **DM**.

COUNT II

EMW: On the night of 30th September, 2016 at Napara Location, Bumula Sub-County within Bungoma County murdered: **MM**.

The Prosecution case is that the deceased **DM** aged 1½ years old and **MM** aged 1½ months old were the children of the accused. The accused who had been married in Ukambani came to stay with her mother **PW2 CK**. On 30/9/2016 **CK** the mother of accused left the accused with her two children and went to attend a funeral. When she came back at mid-night she did not find the accused or the children at home. She slept. The next day at 9am she received information that there were children put in a sack drowned at the fish pond. She and other people went there and confirmed that they were the 2 children of the accused. She retrieved the bodies which were in a sack and matter was reported to police. The bodies were taken to the mortuary and later post-mortem performed on the bodies by **PW1 Dr. Harrun Ombongi**. The Post-mortem showed no injuries on the deceased but each had a spinal fluid in the lungs. He formed opinion that cause of death was due to pulmonary arrest due to wet drowning. The accused who ran to Narok after the incident was arrested in Narok and brought to Bungoma where she was charged with the present offence.

Upon being called upon to give her defence, the accused gave unsworn evidence. She testified that she is the mother of the 2 deceased children, **DM** aged 1½ years old and **MM** 1½ months old. She stated that on a date she would not remember she threw them into a dam (pond). On realizing that she had killed them she went to Narok at a prayer Centre from where she was later arrested; brought and charged with present offence.

Mr. Kweyu for accused filed written submissions. He submitted that the accused at the time of the alleged offence may have been sick and was shocked of what she had done. He submitted that accused may have been insane at time of murder and therefore not criminally responsible for the killing. He submitted that a medical report dated 24/10/2017 showed accused to be mentally unstable and needed psychiatric follow up. He therefore urged the Court to make a special finding of guilty but insane.

From the evidence of **PW2** the **Dr. Harrun Ombongi**, the 2 deceased minors died from drowning. **PW3 Fred Kupalia** testified how he found the two bodies on a pond tied in a sack. He screamed and people came including **PW2 CK** who identified the children as those of the accused. She confirmed that she had left the children with accused. The accused in her defence admits to having killed the children by throwing them in the pond. Upon seeing what she had done she ran away to Narok where she was arrested.

The fact and cause of death was established by the evidence of the doctor. **Pw1 Dr. Ombongi** as due to drowning. That it is accused who was last seen with deceased is not in dispute. She readily admits in her evidence that she indeed killed them by drowning. The only issue raised by Counsel is whether the accused was legally insane when she committed the offence to avail herself to the provision of Section 12 of the Penal Code. Section 12 Penal Code provides:

“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but his mind is affected by disease, if such disease does not in fact produce upon his mind one of other of the affects above mentioned in reference to that act or omission.”

Was the accused insane at the time of commission of the offence? PW2 the mother of the accused when cross-examined by Kweyu for accused stated:

I took care of her and the children. I saw her come home. She came only with 1 cloth. She was dirty so were the kids and she would talk to herself and go away without informing me. This happened in 2016. She would say she is going to pray for people. When she left home she was okay but when she came back she was not well. I was alone. I wanted to take her to hospital and she would refuse and say she prayed to who knew her more than I. She would be harsh. She would disappear and go to relatives and I would be called. She stayed home for a month as she was pregnant otherwise she would keep leaving.

Upon being charged, a mental assessment report was made by Dr. Mbiti on 18/10/2016 where he found that the accused was mentally stable and fit to plead. Subsequent reports dated 17/8/2017 and 24/10/2017 Dr. Mbiti found that the accused was mentally unstable and needed psychiatric follow-up.

From these 3 mental assessment reports, it is clear that to this Court that the accused while on occasion would appear mentally stable, she would relapse with time. At the time of hearing of this matter, she appeared to have been in her lucid moments as can be seen from her defence where she was coherent in speech, oriented in time and recollection of events good.

From the evidence, I am satisfied that the accused did commit the offence but was labouring under a mental illness.

In circumstances such as in this case Section 166 Criminal Procedure Code provides:

1. Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

2. When a special finding is so made, the court shall report the case for order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.

The Court of appeal in Nyawa Mwajowa versus Republic 2018 eKLR stated:

“In our view, the trial court should have invoked Section 166 of the Criminal Procedure Code under which, if the accused person was insane at the time of commission of the act charged so as not to be responsible for his acts, and it appears to the court that he did the act charged but was insane at the time, the court is to make a special finding to the effect that the accused was guilty of the act charged but was insane when he committed it. Upon making a special finding, the court is required to make an order that the accused be kept in custody or other safe place of custody and to report the case for the order of the President, who may order the accused to be detained in a mental hospital or other safe place of custody. Thereafter, the procedure prescribed by Section 166 (4), (5) and (7) of the criminal Procedure Code takes effect.”

Having carefully considered all the evidence I under Section 166 (1) of the Criminal Procedure Code make a special finding that the accused is guilty of murder but was insane when she committed the offence. I direct that pursuant to Section 166 (2) of the Criminal Procedure Code this special finding be forwarded to the President. The accused to be kept in custody in Mathari Mental Hospital to continue treatment.

Dated at Bungoma this 29th day of January, 2020.

S. N. RIECHI

JUDGE