



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 16 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

CHRISTINE CHARO TSUI.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Mr. Gekanana for the accused

JUDGMENT

The accused was charged and tried before this court with the offence of murder contrary to Section 203 of the Penal Code as punishable under Section 204 of the code.

The charge read as follows that on 28.9.2016 at Jimba village, Watamu Location, Kilifi County, murdered **Baraka Yaa**.

At the initial indictment, the accused pleaded not guilty. The prosecution case to prove the charge is based on the evidence of seven witnesses.

The evidence in brief

On 28.9.2016, at Jimba, **(PW1) Moses Baraka** stated in court that while looking after goats in the field, he saw deceased accompany the accused to her house. Before that **(PW1)** testified that the accused had asked him to inform the deceased and her sister to go to the house so that they can pick a pair of shoes. While at a distance he only saw the deceased with the accused walking home but the sister **Charity Riziki** was left behind – taking a different route to their home.

Further, when **(PW1)** went back to the house of the accused to lock up the goats, he found her giving porridge to the deceased. This time round she warned **(PW1)** not to divulge any information to the parents of the deceased that he saw him taking porridge. He was to learn that the deceased died.

PW2 – Charity Riziki, a sister to the deceased informed the court that on 28.9.2016 while walking home with the deceased they were called aside by the accused to go and pick a pair of shoes from her house. The deceased agreed to go but she declined. The deceased returned later in the night complaining of stomachache. That is how their mother **(PW5)** decided to take him to Timboni Hospital on examination and treatment. They were allowed to go back home but the deceased condition never seemed to improve.

According to **PW5** she asked her sister **Margret** to assist in taking the deceased to the hospital for review but he passed on before he could be attended at the facility.

PW3 Katana Yaa Baya – the father to the deceased and husband to the accused testified that initially he was married to **PW5** with whom they were blessed with two children, **PW2** and the deceased **PW3**. Further, he gave evidence that during the treatment of the deceased, the condition worsened and he did succumb to death. On the other hand **PW3** told the court, that as a carpenter he had bought gladiator preservative for wood stored in the house of the accused. When all this was going on he noticed that the tin was wide open without his knowledge. That is when he suspected that the deceased may have taken the chemical.

It was the testimony of **PW3** and **PW5** that following the death of the deceased they lodged a report with the police for further investigations.

PW4 – Janet Katana gave evidence as the grandmother to the deceased confirmed that on 28.9.2016 when he came home from school

having passed through accused house he complained of headaches and being taken ill. That is how PW5 made a decision to take him to the hospital.

PW6 – Robert Kalama a neighbour to PW5 told the court that on 28.9.2016 he received a telephone call from PW5 with regard to ill health of the deceased. PW6 abandoned what he was doing in order to go to the home of PW5 to find out more on the illness being complained of by PW5. According to PW6, at the time of arrival, PW5 was already on her way to the hospital. From the short conversations PW6 explained that the deceased stated that the accused had given her some medicine with a caution that he should not tell anybody. It did not take long, before PW6 was to be informed that the deceased had died.

CPL Barizini Logosho, (PW7) conducted further investigations by visiting the scene. On examination of the scene he collected exhibits for chemical analysis. Among the exhibits identified by PW7 was a container suspected to be the pesticides dispensed by the accused upon the deceased. The deceased body was also taken to Malindi Sub-County hospital for post mortem examination. The post mortem examination report admitted in evidence by consent revealed the injuries suffered by the deceased.

On the opinion, **Dr. Angore** the cause of death was alleged poison of gladiator pesticides. The forensic analysis undertaken by **George Ogotu** from the extracted exhibits of the stomach, liver and spleen with the residues of gladiator poison showed the following results: ***“The gladiator in the container marked B was detected in the stomach contents. It is poisonous substance that contains chlorpyrifos an insecticide.”*** The forensic examination report was produced as exhibits.

At the close of the prosecution case, the accused was placed on his defence. She elected to give unsworn statement. In her evidence the accused stated that on the material day, the deceased arrived home from school complaining of headaches and stomachache. That is the time she made a decision to take out some medicine left at home by the husband PW3 and gave it to the deceased to relieve the pain. Thereafter, the deceased went back to the house of his mother (PW5). As alluded to earlier, she also received information that the deceased condition worsened and PW5 had escorted him to the hospital. She denied any knowledge that the substance dispensed to the deceased was pesticides.

Analysis and determination

The prosecution case is based partially on direct and entirely on the circumstantial evidence of the seven witnesses summoned by the prosecution.

As regards Section 203 of the Penal Code, the nature of the offence to be proved beyond reasonable doubt comprises of the following elements:

- ***The death of the deceased.***
- ***That the death was unlawfully caused.***
- ***That in causing death the accused had malice aforethought.***
- ***Finally, it was the accused in exclusion of somebody else committed the offence of murder.***

The burden of proof lies with the prosecution to produce at least enough evidence to persuade this court that allegations for the offence of murder have been proved beyond reasonable doubt. Under Section 107 (1) of the Evidence Act, the necessity of proof of the charge against the accused lies at all material times with the prosecution.

Before discussing the nature of the evidence, the threshold must be crossed for liability to attack. The appropriate ratio to draw an analogy between the scales of evidence and the standard of proof is as stated in the principles set out in **Woolmington v DPP {1935} AC 462 at pp – 481 Viscount Shirkly stated:**

“It is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. While the prosecution must prove the guilt for the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury of his innocence.”

Throughout the web of English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoners' guilt. The principle is part of Common Law of England and no attempt to whittle it down can be entertained.

It is imperative that a trial court bears in mind the doctrine of the presumption of innocence under Article 50 2(a) of the Constitution. Its constitutionally guaranteed as a right of an accused person in a criminal trial for the prosecution to establish any such guilt of the accused for every issue raised in the indictment.

The ultimate question which must be decided is **whether Christine Charo was the one who murdered the deceased?** Put it bluntly beyond reasonable doubt. As earlier reiterated cogency of the evidence is to prove accusation and malice aforethought. In determining the issue of causation the provisions of Section 213 of the Penal Code gets the part on which is denied to be the cause of the death of a human being. The general legal provisions provides that:

“a person is presumed to have caused the death of another person, although his act is not the immediate or not the sole cause of death.”

In any of the following circumstances, nevertheless the accused would be held responsible:

- (i). If he inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death.**
- (ii). If he inflicts injury on another which would not have caused death if he injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of injury.**
- (iii). If he by actual or threatened violence causes such person to perform an act which causes the death of such person. Such an act being a means of avoiding such violence which in the circumstances appear natural to the person when death is so caused.**
- (iv). If by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death and**
- (v). His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other person.**

It is clear from these provisions that the *actus reus* for the offence of murder is an act by an accused person which endangers the life of another person (See **Rex v Garu Ayub {1924 – 1928} 10 KLR, R v Mutoko s/o Lango {1936} 3 EACA**).

“The Law on this question therefore applies to the lawful act or dangerous act associated with the accused which no reasonable man would foresee as likely to cause death or grievous harm.”

With regard to the *actus reus* element three recurrent situations need mention. First, the evidence of (PW1) who saw the deceased walk to the accused house under the pretext that he was going to pick a pair of shoes. Secondly, at the time (PW1) drove the goats home he saw the accused serve some porridge but incidentally warned him not to tell anyone about it. Thirdly, ultimately, soon thereafter, PW2, PW3, PW4 and PW5 alluded to the fact that much of what the deceased had taken as porridge in the house of the accused was poison. For on the part of the deceased varying only in circumstances of time and place, in the voluntary course of things the probable consequences of the porridge he had taken under the influence and instigation of the accused triggered the headaches and stomachache.

There is evidence by the prosecution that the accused used poison in furtherance of a felony which resulted in death, whether or not he intended to cause death or serious harm. Fifth, the government analyst report produced as exhibit 3 affirmed that the said gladiator was a toxic substance harmful to humans if ingested. Its findings on toxicology, showed presence *chlorpyrifos* in the stomach contents of the deceased.

I am satisfied that the act that caused the death of the deceased was unlawful act or omission by the accused who gave him poison in the form of porridge. The statement of defence by the accused that her acts were primarily done in good faith to dispense medicine to the deceased expressly or impliedly did not controvert the unlawful enterprise.

I can see no reason how the accused could confuse pesticides with cough or headache medicine. The fact that (PW3) never told her that gladiator was wood preservative and not human medicine is plainly unacceptable for reason that it lacks justification and probable basis.

Secondly, together with the above element, it is incumbent upon the prosecution to prove malice aforethought. The broad test and circumstances that manifest this ingredient are defined under Section 206 of the Penal Code to comprise the following:

- (a). An intention to cause the death or to do grievous harm to any person whether such person is the person actually killed or not.**
- (b). Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused.**
- (c). An intent to commit a felony.**
- (d). An intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.**

There are strong lines of authorities that are clear for any unlawful act carried out by another to cause the death of another human being tacitly with malice aforethought. In **Wesley Smith {1963} 1 WLR** the court held that:

“Only he who intended that unlawful and grievous bodily harm should be done is guilty of murder.”

According to the principle in **Ahmed Mohamed v R {1956} 23 EACA** the court took the position that:

“it is the duty of the trial court to examine the evidence to determine whether on the facts adduced, it would reasonably infer

either that the accused intended to kill or that he at least knew that what he was doing was eminently dangerous that he must in all probability cause death or such bodily injury as was likely to cause death.” (See R v Ayodi {1924 – 1926} 10 KLR.

The imperative provisions under Section 206 of the Penal Code on malice aforethought is synonymous with purpose under our code. therefore, the offence of murder is committed when accused purposely or knowingly recognizes that death or serious harm would be virtually certain to result from his or her act.

In **H. M. A v Ruther Ford {1947} S. L. T Cooper L. J held:**

“The essence of murder is that the accused should have acted deliberately with intent to kill or at least with reckless indifference as to the consequences of his violence upon his victim.”

The criteria used in the case of **Tubere s/o Ochen {1945} 12 EACA** in determining culpability of an accused capacity to kill with malice aforethought states as follows:

“That in determining whether malice aforethought has been established the court ought to consider the weapon used, the manner in which it is used and the part of the body injured. It would also be relevant to take into account the conduct of the accused before, during and after the unlawful act.”

In the case of **Ernest Asami Bwire Abanga Onyango v R CR Appeal No. 32 of 1990** ***“malice aforethought can also inferred from the manner of the killing of the deceased.”***

In the instant case, the prosecution addressed the issue on malice aforethought from the analyzed evidence adduced as follows: **(PW1)** saw the deceased pass through the accused house on his way from school. Central to this piece of evidence was the direct testimony by **(PW1)** in reference on what he saw in the house of the accused when she gave the deceased alleged ‘porridge’ whilst at the same time warning him not to divulge the information to anybody. It was immediately confirmed by **PW2, PW3, PW4 and PW5** that the deceased soon after arrival at home he was taken ill with major complaint of stomachache.

The most authoritative evidence in support of malice aforethought came from **PW7, police detective** who received pesticides substances from the house of the accused. It was acknowledged by the Government analyst in his report that the whitish plastic container containing gladiator recovered by **PW7** was forensically analyzed to detect its presence in the stomach contents of the deceased. The analyst report determined the poisonous substance was detected and its ingestion brought about the death of the deceased. The pathologist in his post mortem report made a finding that the death was due poisoning as confirmed from zoology examinations.

The prosecution evidence establishes the legal requirements of criminal liability against the accused that she was at all material times capable of distinguishing between right and wrong. In combination with such other factors as motive it was obvious that the accused had planned and design to use poison to inflict harm against the deceased with full knowledge it would occasion to death.

Moreover, the accused admitted dispensing the ‘pesticide’ though from her knowledge and understanding what the deceased consumed was not poison but headache or flu syrup to deal with complaints of headaches raised by the deceased.

The question is whether the accused in her defence managed to convince this court that her action was a human error or mistake because the husband **(PW3)** never brought it to her attention that gladiator is poison and not human medicine.

In my humble view from the totality of the evidence, the conclusion to which I come to is that the defence of mistake cannot be availed to the accused such that it rebuts the requisite intention under Section 206 of the Penal Code to cause death or grievous harm to the deceased.

I also hasten to add that the surrounding circumstances of the case include the aspect that accused sent words in advance to **(PW1)** that she was in need of having the deceased and her sister Charity go to her house to pick some pair of shoes.

It also happened that the deceased and his sister are born of a different mother but the same father who gave evidence as **PW3**. In many ways as stated in evidence by **PW3** the deceased and her co-wife **PW5** did not enjoy a cordial relationship. There was therefore clearly every reason for the accused to form the necessary intention to kill or to do grievous harm to the children of **PW5**.

With regard to the evidence called in support of the charge and the defence by the accused I make reference to the principles in the persuasive case of **S v Ayala {2008} (1) NR 223** where the court held:

“The evaluation of evidence requires from the court to consider the evidence as a whole, instead of focusing too intently upon the separate and individual parts of the evidence. Doubt may indeed arise when one or more aspects of the evidence are viewed in isolation, but when evaluated with the rest of the evidence, such doubt may be set to rest.”

The weight of circumstantial evidence as stated in **R v Taylor {1928} 21 CR Appeal R 20, Teper v R {1952} AC 480, Kipkereng Arap Koske v R {1949} 16 EACA, Simon Musoke v R {1958} EA 715** on motive, knowledge, capacity, opportunity, behavior before and during the unlawful act, being in possession of poison (pesticides), the analyst report and the post mortem form point irresistibly to the accused and the facts are incompatible with her innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt.

The rule on constitution evidence as obtained in the case of **DPP v Kilborne {1973} AC 729** in determining the two narratives worked in favour of the prosecution cumulatively, in geometrical progression, eliminating other possibilities as regards the unlawful acts and by reason

of malice aforethought that the accused killed the deceased.

I am satisfied that there is no evidence left to discredit the prosecution case on the charge against the accused.

This court therefore, finds the burden of proof for the offence of murder contrary to Section 203 of the Penal Code discharged beyond reasonable doubt.

That being so, the accused is found guilty of the charge and consequently convicted, save for sentence to be considered in terms of the provisions of Section 204 and the principles emanated in **Francis Muruatetu v R {2017} eKLR**.

Sentence

In assessing an appropriate sentence, the court has to take into consideration the totality of mitigatory factors and sought to weigh them vis-à-vis the aggravatory factors at the same time seeking to strike a balance on the nature of the offence, murder with malice aforethought and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done.

While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purpose of meting out the sentence, it is not proper for the court to set out to analyze the evidence as if it is meant to arrive at a decision on the guilt of the accused.

According to **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**:

“[71] To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;***
- (b) being a first offender;***
- (c) whether the offender pleaded guilty;***
- (d) character and record of the offender;***
- (e) commission of the offence in response to gender-based violence;***
- (f) remorsefulness of the offender;***
- (g) the possibility of reform and social re-adaptation of the offender;***
- (h) any other factor that the Court considers relevant.***

In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in **Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR**, where the High Court held that the objectives include:

“deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

There are more aggravating features in this case than mitigating ones. In aggravation, despite the fact that she was at all times, capable of distinguishing between right and wrong, it was obvious that the accused had planned and design to use poison to inflict harm against the deceased with full knowledge it would occasion to death.

I have taken in to account the callousness of the murder in light of the fact that it was brutality committed on an innocent child. I have considered the sanctity of human life and the need to protect it at all costs. The murder was senseless and heartless. There is no doubt that it requires a stiff sentence.

In passing sentence then, the pre-sentence time of incarceration will be taken as part of punishment already served and suffered.

In foregoing, the only mitigating circumstance in this matter is that she is a family woman and that she is a first offender. In the premises, as demonstrated above, the aggravating circumstances in this case far outweigh the mitigating circumstances. The appropriate sentence befitting the callousness of the murder is ten (10) years.

It is so ordered.

14 days right of appeal

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF FEBRUARY 2020

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R. NYAKUNDI

JUDGE