



..REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA.

CRIMINAL CASE NO. 32 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS.

AC.....ACCUSED

JUDGMENT

The accused **AC** is charged with offence Murder Contrary to Section 203 as read with Section 204 of the Penal Code. **The particulars of the offence were;** On the 11th day of November, 2017 at Kipsikrok market, Kaimugul Sub-location Chepyuk location in Cheptais Sub-County within Bungoma County murdered SC.

The Prosecution evidence is that on 11.11.2017 Pw4 TC who was staying at Kipsegon was in her house. The accused came and gave her KShs.50/= to go and buy her *mahamri*. She went and bought and took it to the accused in her house. She entered the house and found accused seated on her bed. T asked accused where the child was and accused told her the child was asleep. She removed the blanket and saw the child. She touched the child and felt it was cold. She informed neighbours and also reported to Kapsigori Police Station.

Pw6 CPL. Wesley Ngeno was at Kapsigori Police market Police Station when Pw4 Teresa reported that they suspected something was wrong with the child of the accused. He together with colleagues went to the scene. They went to the home of the accused. They found her seated on her bed. They found a child on bed covered with a blanket. They observed the child and found it had bruises and was dead. They took the body to Bungoma Hospital. They tried to talk to accused who refused to talk. He testified that he knew accused who was staying alone with the child.

Pw3 Dr. Haron Ombongi produced the Post Mortem Form prepared by Dr. Hezbourn Wabwire who found that the deceased had a depressed skull fracture on right side of head and there was bleeding to the brain as a result of blunt head injury.

The accused gave unsworn evidence. She testified that deceased was her daughter who was 8 years old. She testified that when she was 5 months pregnant of the child, a woman stepped on her abdomen. When the child was born she had chest problems and difficulty in breathing. On material day she developed difficulty in breathing, and folded her hands and the deceased body became cold at night. She stayed till next day when Teresa (Pw4) came and later police came to the scene. She denied that the child was hit as alleged.

M/s Wakoli for the accused submitted that the evidence against the accused is circumstantial evidence as none of the witnesses who testified saw accused inflict injury on deceased.

The accused is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The ingredients of the offence the prosecution must provide are as;

In **Republic Vs. Joseph Ekai Lomongin [2018] eKLR** this court stated that in an offence of murder the prosecution must establish the three ingredients of the offence;

1. The killing or fact of death of the deceased;
2. existence of malice aforethought or *mens rea* and
3. the unlawful act or omission on the part of the accused the *actus reus*.
4. That it is the accused who inflicted the injury.

Pw3 Dr. Haron Ombongi provided a Post Mortem report prepared by his colleague which showed that the deceased who was aged 1½. There was no external visible injuries on body of deceased. Upon opening he found there was a depressed skull fracture on right side of the head; leading to bleeding to the brain. The doctor as a result of the examination, formed opinion that cause of death was due to bleeding due to trauma on the head. The fact cause of death was therefore established.

The accused admits in her evidence that she was with the deceased in the house. She explains that the deceased suffered breathing difficulty and was sickly. She explained that while in the house the deceased started having breathing difficulty and she folded her hands and later discovered she was cold. There Post Mortem examination found the Respiratory system, Cardio-vascular system, Digestive, genito – urinary, Spinal column all normal. The head had depressed skull on the right side measuring 20cm. This was caused by blunt force trauma. It is not therefore true that deceased died due to breathing difficulty as the accused stated. The death was caused by blunt force trauma on the head. Blunt force wound have been inflicted by a person or child also be as a result of a fall. The accused did not state that the deceased fell down. She actually was found having kept the child on the bed while dead. If the deceased died as result of blunt trauma on the head, and the accused was the only person who was with her, and she does not allege that she fell, it leads to irresistible conclusion that it is the accused who inflicted the injuries on the deceased.

When the accused was arrested and taken for Medical assessment, Mr. Amunga who examined her and filed report dated 30.11.2017 indicated that the accused had poor ruling and judgment and therefore not fit to stand trial. On the basis of this report plea taking was deferred.

The accused was examined on 20.2.2018 by Mr. Mbiti. Dr. Mbiti upon examination found that the accused was fit to plead. The accused was again examined on 15.11.2018 by Dr. Mbiti who as a result of his examination found the accused Mentally unstable and in need of Psychiatric follow up.

All these reports and the observation by court indicate that accused is a person whose mental status keeps changing from being mentally unstable. This was confirmed during the proceedings when accused would refuse to speak to her Counsel. It is therefore my finding that at the time of commission of an offence her mental status would not be ascertained. The issue for determination by court 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.”

Upon being charged, a mental assessment report was made by Dr. Amunga on 30.11.2017 where he found that the accused was not fit to plead. Subsequent reports dated 20.2.2018 and was fit to plead. Subsequent examination by Dr. Mbiti on 15.11.2018 found she 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 10th day of March, 2020.

S. N. RIECHI

JUDGE