



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL CASE NO. 2 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MWK.....ACCUSED

JUDGMENT

1. The deceased, *SWW*, was a vulnerable child living with disability: She neither walked nor talked. Her body had healed scars on the arms and her back; jiggers had infested her soles and knees. According to the post mortem form, her cause of death was chest injuries due to assault.
2. Her mother is the accused. The Republic brought *Information* to the High Court charging her with the *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
3. The particulars are that on 24th December 2014 at [particulars withheld] village, Nguthuru Location within Murang'a County, she murdered the deceased.
4. She pleaded *not guilty*. The prosecution called *three* witnesses. The prosecution's case is built purely on *circumstantial* evidence.
5. PW1 was the deceased's grandmother, MK. She said the accused was under medication for a mental illness. On the material day, PW1 woke up early and fed the deceased. The accused was still asleep. PW1 went to her *shamba* and left the deceased with other children in the house.
6. At about 11:00 a.m., JM summoned PW1 back to her house where she found the lifeless body of the deceased lying on a seat. The accused denied killing her. The accused and the other children were all crying. The witness said the body of the deceased had no visible injuries. PW2 alerted her husband (PW2) who informed the police of the incident.
7. PW2 was PK. He is the father of the accused. When he left for work in the morning, the accused was still in bed. He returned in the evening to find the deceased dead. The police came to the scene, took some photographs and removed the body to the mortuary.
8. PW2 testified further that the accused had previously exposed the child to grave danger by depositing her in the middle of a road at night. But a vehicle avoided running over the deceased. However, his written statement to the police does not contain that detail.
9. PW3 was Police Constable Gideon Wambua. When he interrogated the accused she answered that the deceased was sick and died. The witness said the deceased had some broken bones. He claimed the victim had been left alone with the accused. The witness produced the post mortem form (exhibit 1). The learned defence counsel, *Mr. J. Mbuthia*, had no objection.
10. When the accused was placed on her defence, she elected to remain mum. Learned counsel for the defence filed final submissions on 20th February 2020.
11. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*.
12. There are three key ingredients of the offence: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*.

13. There is no doubt about the death or the cause of it. Like I stated, the pathologist concluded that the death resulted from *chest injuries due to assault*. From the totality of the evidence I find that the death resulted from an unlawful act.

14. The key question then is whether the accused, *of malice aforethought*, killed the deceased. In *R v Kipkering arap Koske & another* 16 EACA 135 (1949) the court held-

In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt

15. The burden of proof that the accused murdered the deceased lay squarely with the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

16. There is no evidence connecting the accused to the *actus reus*. The circumstantial evidence is tenuous. It is not true that the accused was left *alone* with the child that morning as alleged by PW3. The only incriminating piece of evidence is the allegation by PW2 that the accused had previously exposed the child to danger by depositing her in the middle of a road at night. PW3 was equally suspicious of the accused. But the suspicions and allegations were unadorned with concrete evidence.

17. I have reached the conclusion that the entire corpus of *circumstantial* evidence does not *irresistibly* and *exclusively* point to the guilt of the accused. I *cannot* say with confidence that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the accused, *of malice aforethought* killed the deceased.

18. I accordingly enter a finding of *not guilty*. The accused person is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 23rd day of April 2020.

KANYI KIMONDO

JUDGE

ORDER

In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the directions first issued by his Lordship, the Chief Justice on 15th March 2020 (as amended from time to time), this judgment has been delivered in the absence of the accused, his counsel and Prosecution Counsel. I accordingly make the following order and directions:

a. A certified copy of this judgment shall be served forthwith on the accused through the Officer in Charge, Murang'a Women's GK Prison Remand; to the accused's counsel of record; and, to the Prosecution Counsel.

b. The Deputy Registrar shall forthwith transmit a signal to the Officer in Charge Murang'a GK Women's Prison Remand to immediately release the accused unless otherwise lawfully held.

KANYI KIMONDO

JUDGE

Ruling read in chambers in the presence of:

Ms. Dorcas, Court Assistant.