



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.9 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

EVERLYNE MARTHA OPICHO.....ACCUSED

JUDGEMENT

1. The accused herein **EVERLYNE MARTHA OPICHO** is 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 8th Day of December, 2016 in Athi River Sub- County within Machakos County, she murdered **JW**. The accused denied the charge.
2. The accused is represented by BM Kituku Advocate whilst the State is represented by Mr Machogu and later Mr Mwongera.
3. The Prosecution called a total of eight (8) witnesses in support of its case. **Pw1** was **John Karani** who testified that the accused is his girlfriend whom he sent bus fare on 7.2.2016 so that she could visit him at [Particulars Withheld] estate where he worked and resided. He told the court that she came and stayed with him and that on 8.12.2016, he received information that an infant had been burnt. It was his testimony that the accused went missing and later she sent him a text that she had committed a sin. He told the court that he learnt that the burnt infant turned out to be the deceased.
4. **Pw2** was **Innocent Otieno Ochieng** who testified that on 8.12.2016 his wife informed him that she had seen a burnt child at the rubbish dump. He stated that he rushed there and saw the body of an infant burnt beyond recognition.
5. **Pw3** was **Joseph Ekesa** who testified that on 7.12.2016 he saw a lady burning something at the dumping site and the lady turned out to be the accused. He stated that he later visited the rubbish dump site where he saw the body of the burnt infant which the police picked it up.
6. **Pw4** was **Ochanda Emily Atieno** who testified that on 8.12.2016 she saw something at the dumping site that looked like a burnt human being and alerted her husband who in turn alerted fellow staff.
7. **Pw5** was **Cpl Rayton Mbinji Omutere** who testified that on 8.12.2016 while on patrol duties within Sabaki area he received a report that residents of Kenchick area had discovered a body of an infant burnt beyond recognition. He rushed there and indeed saw the charred remains of an infant which was later collected by scenes of crime officers.
8. **Pw6** was **Dr Waithera Githendu** who testified of the post mortem examination carried out on the deceased on 23.5.2017. She stated that she found the body had been completely burnt beyond recognition and it had a missing leg hence identification was done via DNA analysis. She formed the opinion that the cause of death was 80% fourth degree thermal burns. She produced the post mortem report as exhibit 1.
9. **Pw7** was **Henry Kiptoo Sang** was the Government analyst who testified that he conducted DNA analysis on items that were presented to him that were collected from the body of the deceased and the accused and that he came up with the conclusion that there were 99.99% chances that the accused was the biological mother of the deceased.
10. **Pw8** was **Chepchirchir Rael** who testified that on 15.12.2016 she forwarded DNA samples that were collected from the accused and the deceased to the Government Chemist for analysis and that upon the report being prepared she recommended that the accused be charged for the murder of the deceased.
11. The court on 12.5.2020 found that a prima facie case had been made out against the accused who was placed on her defence. Due to the Covid-19 pandemic, directions were taken to the effect that the defence hearing be conducted through Skype which was duly done on 8.7.2020.

12. The accused testified that on 7.12.2016 she left for work and came back at around 4 pm and found her husband who was preparing to go to work. She told the court that her son went out to play and at 6.30pm her son had not turned up; she inquired from her neighbours and got no positive response. She stated that she was arrested on 10.12.2016 and that is when she learnt that a body of a burnt child had been recovered from a dumpsite. She exhibited awareness of the DNA test that was conducted on her. On cross examination, she denied being spotted with the child and also denied that she had been left alone with the child in the house. She denied the contents of the DNA analysis and denied disagreeing with her husband leading her to kill her son.

13. The parties filed submissions in respect of the matter. Learned counsel for the accused submitted that the prosecution failed to prove its case beyond reasonable doubt.

14. In response, counsel for the state submitted that the accused was the last person seen with the deceased and that Pw3 witnessed the accused burning litter where the body of the deceased was discovered. It was submitted that the evidence of Pw1 to Pw3 place the accused as the main suspect and the court was urged to convict the accused under section 322 of the Criminal Procedure Code.

15. Having considered the evidence on record and the submissions of the parties, the issue for determination is whether the prosecution proved its case to the required standard.

16. The burden to prove all ingredients of the offence of murder beyond reasonable doubt falls on the prosecution in all save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

17. The prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. As per the elements provided for under section 203 as read with section 204 of the Penal Code, prosecution must prove beyond reasonable doubt that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

18. As regards the aspect of death, the undisputed post mortem report (Pexh 1) indicate that there is no dispute that the deceased indeed died. Dr Waithera Githendu observed the body of the deceased and formed the opinion that the cause of death was 80% fourth degree thermal burns. She also noted that the body had been burnt beyond recognition and she collected some specimens for DNA analysis.

19. On the issue the unlawful nature of the death, and identity of the accused, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. The evidence of PW.3 was that he saw the accused burning things at the dumpsite and he as well as Pw2 told the court that in the morning the following day, a body of a burnt child was seen in the same dumpsite. I observed both PW2 and PW.3 when giving evidence in court and I was more persuaded by their truthfulness and consistency in stating what they saw. This evidence clearly placed the accused at the scene of crime. The accused denied killing the deceased but I am not convinced that her version is truthful. Her testimony did not shake that of the prosecution in that she was seen burning things at the rubbish dump site and that earlier on she had been with her baby before the child went missing only for its charred body to be found at the rubbish dump. The DNA analysis conducted by Pw7 confirmed that she was the biological mother of the deceased. The DNA samples had been collected from the body of the deceased and the accused and that the results revealed that there was a 99.99% chance that the accused is the biological mother of the deceased. Such a finding ruled out any other person as the mother of the deceased. She was the last person with the deceased a few hours prior to the incident as confirmed by the accused's boyfriend (Pw1). I find it safe to presume that the death was unlawful and I find the assault by the accused caused the death of the deceased who was her child. The accused had tried to disguise the killing by camouflaging it to appear like she was burning rubbish while in actual fact she was burning her own child. The accused upon being spurned by her boyfriend felt cheated and betrayed and thus resorted to eliminating the deceased so as to pursue her love life without any hindrance. I am satisfied that she had malice aforethought and was placed at the scene of crime.

20. I have considered the evidence adduced by the accused who testified that on the material day she returned home and her son left to play. She gave nothing that is of value that would absolve her from the dastardly act of burning her own child. She was seen by Pw3 in the act at the rubbish dump site; the circumstances that can be elicited are that there was a connection between what she was burning and what was recovered at the dumpsite that turned out to be the charred remains of the deceased. She projected a don't care attitude regarding the issue of her missing child by merely claiming that the child went missing and that she was not able to locate the child. She did not even show any surprise upon the discovery of the child. A person who is traumatized about her missing child would be much more uptight than what she exhibited when giving her version of what transpired. What can be read from her evidence is that her reaction to the missing child was one of aloofness as to the whereabouts of the child and she did not strike me as one who was genuinely concerned about the child. It had also transpired that the accused and her boyfriend had had some sort of misunderstanding prior to the incident as her boyfriend had instructed her to return back to the village a suggestion which she did not like. It seems this drove her to the point of getting rid of her own child.

21. On the issue of malice aforethought, courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack. As it transpired from the evidence the manner of the attack upon the deceased left no doubt that the accused intended to inflict upon the deceased grievous injuries which led to the death. It can safely be inferred that death was the desired outcome of whoever the assailant was. The act of snuffing out the life of the infant before burning it beyond recognition leaves no doubt that the accused had the requisite mens rea. She must have clearly made a lay out plan before executing it and hence it was not a spontaneous reaction following a disagreement with her boyfriend. Her defence evidence did not shake that of the prosecution which I find quite overwhelming against her.

22. In the result, I find that the evidence adduced by the prosecution as well as the circumstantial evidence surrounding the death of the deceased points to the guilt of the accused. I find the prosecution has proved the offence of murder against the accused beyond any reasonable doubt. I find her guilty of the offence of murder contrary to sections 203 as read with 204 of the Penal Code and I accordingly convict her.

It is so ordered.

Dated and delivered at Machakos this 28th day of October, 2020.

D. K. Kemei

Judge