



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 26 OF 2009

REPUBLIC

VERSUS

LUCY WANGARI MATHENGE.....ACCUSED

JUDGMENT

Soon after he arrived home from work on 7th April, 2009, at about 4 PM Joseph Mathenge Muthui sought to know from his wife, the accused, where his first-born son was. He was told that he was at the cow shed. Perhaps, curious why his son should be at the cow shed when the rest of the children were in the house, he sent one of the other children to call him. She reported back that he was lying still on the ground. Alarmed, Muthui went to the shed and found his son lying unconscious. He immediately rushed him to Ndaragwa district hospital; unfortunately, the boy was pronounced dead on arrival.

The accused in whose care the deceased together with the rest of their children had been was suspected to have fatally assaulted the deceased; she was thus charged with his murder in accordance with section 203 as read with section 204 of the Penal Code, cap. 63, particulars of the offence being that on the 7th day of April, 2009 at Wiyumiririe farm in Laikipia East District within the Rift Valley Province, she murdered JM. She pleaded not guilty to the charge.

Muthui (PW2) testified that the accused was his wife and the deceased, who was aged ten at the material time, was one of the six children they had been blessed with. On the material date, he left for work leaving behind the accused and their children as usual. The youngest child, said to have been three weeks old at the time was unwell and so he gave his wife Kshs. 100/= to take him to hospital. When he enquired from the accused what could have happened to the deceased, she told him that he had stolen this money. He, however, did not notice any injuries on the deceased's body.

The deceased's sister, BW (PW1), aged seven at the time, made unsworn statement after the court assessed her and found that she could not appreciate the nature and meaning of an oath. Her unsworn statement turned out to be of little significance because she stated that she had no idea of what happened to her late brother.

Her statement contradicted the evidence of Police constable Duncan Muli (PW4) who testified that the accused was arrested because her husband (PW2) told the police officer that he had been informed by W (PW1) that the deceased had been beaten by the accused for stealing money. Muli testified further that he also observed bruises on the deceased's hands.

Police constable James Ng'ang'a (PW3) who visited the scene together with corporal Duncan Muli (PW4) testified that the deceased body was about 25 metres from the main house; he observed bruises on the deceased's legs.

Dr Joseph Karimi (PW5) produced the postmortem report on behalf of his colleague, Dr Njenga who performed the post mortem. Upon examination of the body, he established the body had multiple bruises on the legs and hands. Internally, there was the swelling of the lungs on both sides. The gastric contents were found in the trachea. He opined that the death was caused by cardiopulmonary arrest secondary to aspiration which he explained to mean inflammation of the lungs making it impossible to breath.

The accused opted to given sworn evidence in her defence. She testified that she had been away at the hospital on the material day. She returned home at about 3 PM almost at the same that her husband came back. She found all the children at home except the deceased. She prepared a meal for them but for some unexplained reason, they declined to eat and kept off. As soon as their father arrived, she informed him of the children's refusal to eat. It is then that he went out and found the deceased lying outside. He took him to hospital oblivious of that fact that he was already dead. She closed her case on that note.

With this evidence, it is now upon this court to evaluate it and unravel the questions whether, in fact, an offence was committed as contemplated in **section 203** of the **Penal Code** and if so whether the accused is the culprit behind it. **Section 203** of the **Penal Code** reads as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

The fact of the deceased's death is not in dispute; his body was positively identified by his father in the presence of corporal Muli as that of JM referred to in the particulars of offence. A government doctor not only certified the deceased to have died and signed a certificate to that effect but he also established the cause of death in his post-mortem report which was admitted in evidence.

But the fact of death alone cannot constitute the offence of murder; the prosecution still has to prove that the death was an unlawful and a premeditated act by another person; in other words, it has to be shown that the death was not natural but was maliciously caused by an act of another person.

It is these three latter elements of the offence of murder that I am now concerned with and the first question to pose in this regard is whether the accused is the person who caused the deceased's death.

Of all the prosecution witnesses none saw, or testified as having seen what befell the deceased or, to be precise, having witnessed the accused assault the deceased. His sister W (PW1) who is supposed to have been at home with him at the material time had no idea what became of her brother. She was not the only one with the deceased though; if the evidence of the deceased's parents is anything to go by, there were at least three other children who remained at home with the deceased while their parents were away; however, except for BW (PW1) none of the rest of these children testified. If they had seen what caused the deceased's death, they would probably have shed some light on what may have transpired, assuming they were disposed to testify.

In absence of direct evidence of how the deceased came to die, all that is left is circumstantial evidence from which, so the state hopes, the court will infer the accused's guilt. I have no problem with the expectations of the state in this respect because it is legally acknowledged that circumstances observed and proved at or around the time when the fact in issue occurred, in this case the death of the deceased, are relevant if the trial court is satisfied those circumstances confirm the testimony of any particular witness. (See section 164 of the Evidence Act, cap.80.)

But circumstantial evidence must be narrowly examined before drawing any inference of guilt on the part of the appellant. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused person. The leading decisions on this issue are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715**.

Turning back to the prosecution case, I consider the inculpatory facts to be what the pathologist established to be "multiple bruises on the feet and hands" of the deceased. I would also consider the deceased's father's testimony that the accused told him that "she had differed with the deceased" because he had stolen the Kshs. 100/= he had left her with to be equally inculpatory.

The question, however, remains whether these inculpatory facts are so incompatible with the innocence of the accused that they are incapable of explanation upon any other reasonable hypothesis than the accused's guilt.

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting **Wills on Circumstantial Evidence**, held as follows:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

Where there are co-existing circumstances which would weaken or destroy the inference of guilt it would be unsafe to convict on circumstantial evidence alone. Citing with approval a passage from the Privy Council's decision in **Teper versus Republic (1952) AC 480** (at page 489) the Court of Appeal for East Africa said thus in **Simon Musoke versus Republic**: -

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

When I consider the evidence of what constitutes the inculpatory facts in the light of these propositions of the law, I am left with doubt whether the deceased died as a result of some form of bodily assault and if so whether such assault was occasioned by the accused. I am in doubt because as much as the pathologist established that the deceased died in what, in a layman's language, would be choking, (she said the gastric or stomach contents found their way to the trachea) she did not say that the food was diverted from the alimentary canal to the wind pipe either as a result of the deceased's assault or in course of the assault. In other words, it was never suggested that there was any link between the bruises and the choking.

Assuming there was such link, it was not proved beyond doubt that the accused occasioned the injuries. Although her husband testified that she had had 'differed with the deceased', he did not notice anything unusual on the deceased's body. He did not say that the accused assaulted the deceased and, according to him, there were no bruises on the deceased's body.

The accused herself denied having assaulted the deceased and stated, like her husband, she had been away in hospital and only came back home almost at the same time as her husband. In his testimony, her husband had alluded to the visit in hospital.

When I consider all these testimonies, I am persuaded that there are co-existing circumstances that, at the very least, weaken the inference of guilt on the part of the accused. I must hasten to add that it is quite probable, as Sgt. Muli suggested, that the accused may have beaten the

deceased because he was alleged to have stolen money and the deceased may as well have died as a result of the beating. However, the burden was always on the prosecution to prove beyond all reasonable doubt that this was the case. A trial court cannot convict on the basis of probabilities or mere speculation. Suffice it to say, the prosecution did not discharge its burden to my satisfaction.

Having held as I have that there is reasonable doubt that the accused murdered the deceased, it would be moot to consider the question whether there was any malice aforethought.

In the ultimate, I am inclined to acquit the accused of the charge of murder in accordance with section 215 of the Criminal Procedure Code, cap. 75. It is so ordered.

Dated, signed and delivered in open court this 22nd day of February, 2019

Ngaah Jairus

JUDGE