



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 5 OF 2013

REPUBLIC

-VERSUS-

PNM.....1ST ACCUSED

MNM.....2ND ACCUSED

JUDGMENT

The accused are respectively husband and wife and they have both been charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. It is stated in the particulars of the offence that on diverse dates between the 8th day of February, 2013 and 20th day of February, 2013 in Nairutia within Nyeri County, they murdered DMN. The latter was their son. They denied the charge and a plea of not guilty was entered accordingly.

The 2nd accused's uncle, Reuben Muturi Warue (PW1) was the first prosecution witness to testify; he told the court that the 2nd accused came to his home on 8 February 2013 and left her clothes there. She returned on 29 February 2013 and took the clothes; this time round she was accompanied by one Ibrahim with whom she left for Nyeri town. The 2nd accused was not with her child on any of these occasions; according to Warue, she told him that she had left the child with the 1st accused. On 20 February 2013, the child was retrieved from an 80-foot abandoned well. During cross-examination by the learned counsel for the 2nd accused, the witness admitted that the 2nd accused sought assistance from his aunts, Serah and Wothaya to go and collect her child from the 1st accused. In fact, they went there on 17 February, 2013 but they did not find the child.

The 1st accused's father, David Mwai Munjuga (PW2) testified that the deceased was named after him. On 11 February 2013, at 7 AM he met the 2nd accused's grandfather as he went to deliver milk. He enquired from him whether the deceased was at home; he was curious because he had seen the 2nd accused at Nyeri town without the deceased. Munjuga promised to check where the two accused lived after he had returned home. When he went there, he found the accused's house locked; he returned there at about 6 PM on the same day but found the house was still locked. The accused's landlord told him that he had seen his tenants two days before. He and the landlord checked around the accused's house and noticed that some child's clothings had been burned. They searched for the child but they could not find him in any of his relatives' homes. Sometime after 20 February 2013 the child's body was discovered in a well that was about half a kilometre away from where the accused persons lived. The body was retrieved from the well by one Mwangi in the presence of police officers from Nairutia police station. The child's mother had been arrested apparently on the same day. By then the whereabouts of the 1st accused were unknown but he was traced three days after the deceased's body had been retrieved and taken to the mortuary. He had apparently been in Nakuru though he was arrested at Nyahururu.

In answer to question put to him during cross-examination, Munjuga admitted that the 2nd accused had been at his home on 17 February 2013, with two other ladies looking for the deceased.

The 2nd accused's grandmother, Milka Njoki Warue, testified that she raised the 2nd accused after the death of her mother and apparently lived with her before she got married to the 1st accused. It was her evidence that on 9 February, 2013, the 2nd accused returned home because she alleged that the 1st accused had beaten her. Since she did not have her child, Warue enquired from her where the child was. She told her that she had left the child with the 1st accused. The witness told the 2nd accused to go back and get the child since the child was still breastfeeding. She went back and found the 1st accused's mother who told her that the child was in the custody of the 1st accused. Since the 1st accused was nowhere to be found, she reported the disappearance of her son to the police. Later, she got information from the father of the 1st accused that the child been found in a well.

Samuel Peter Maina (PW4), a village elder at Nairutia, testified that on 12 February 2013 he was called by his assistant chief who informed him that the 2nd accused had been seen at Nyeri without her child. He called the 1st accused but he was informed by a Mr Lawrence Maina Ngatia that 1st accused was at Nakuru working at a certain posho mill. Later, when Maina came back to the village, he used his phone to call

the 1st accused; Maina had been working with him at the posho mill in Nakuru. The 1st accused confirmed to him that the deceased was in his custody. He passed this information to the assistant chief. However, on 20 February 2013 the 1st accused's mother told him that the deceased's body had been recovered in a well. He then called the police who retrieved the body from the well.

Police Constable Joel Kulusu (PW5) of Ngano police station in Nyandarua County arrested the 1st accused on 21 February, 2013 after he was informed by Sgt Muraguri of Nairutia police station that the 1st accused had taken refuge in his jurisdiction after committing an offence. With the assistance of the chief of Silwet location and police constables Ogutu and Ngeno, he arrested the 1st accused. He was later collected by officers of Nairutia police station.

Sgt Muraguri (PW6) himself testified that on 20 February, 2013 he received a call from the area elder that the deceased's body had been recovered in a well. He proceeded to the scene with the Officer in charge of Nairutia police station. While on their way, they got a call to the effect that the 2nd accused had been arrested by members of the public at Gatutia township. They went there and rescued her from irate members of the public. Together they proceeded to the scene and removed the deceased's body from the borehole and took it to the mortuary. While at the scene, Sgt Muraguri gathered information to the effect that the 1st accused was in Ngano area of Nyandarua County. With the help of the area police, he arrested the 1st accused.

Agnes Wangeci (PW7), the assistant chief of Nairutia sublocation testified that on 9 February, 2014, she received a call from a Mrs Kirigo Mwai to the effect that the accused persons had fought on 8 February, 2014 and that she did not know who was in the custody of the deceased. For this reason, she asked her to call the 2nd accused's grandmother and enquire the whereabouts of the deceased. She managed to talk with the 2nd accused who told her that she had fought with the 1st accused and that she ran away leaving the deceased with 1st accused. On 12 February, 2014 she received a call from the 2nd accused grandmother who wanted to know in whose custody was the deceased. She tasked a village elder to enquire where the deceased was. Meanwhile, she asked the grandmother of the 2nd accused to report the matter to the police. On 20 February, 2013, she received a call from Sgt Muargauri telling her that the deceased's body had been recovered in a well at Maragi area.

The accused's landlord, Anthony Wambugu Ndegwa's (PW8) evidence was that on 22 January, 2013 at about 7 am, he was leaving his home to a place near where the accused lived when he met the 2nd accused. When he enquired from her where she was going that morning without her child, she told him that the 1st accused had chased away and that she had left the deceased with him. While at the place where he was going, he heard the deceased crying in the house where the accused were living. He managed to speak to the 1st accused who told him that he had disagreed with the 2nd accused.

Sometime later an employee of the father of the 1st accused asked him to go to the house where the accused were living. He went there together with the 1st accused's father and even broke the window of the accused's house but they did not find the deceased. On 19 February, 2013 he got information that the deceased's body had been located in a borehole; it was retrieved on 20 February, 2013.

Dr Obiero Okoth (PW9) conducted the postmortem on the deceased's body on 27 February, 2013. He observed that the body had decomposition changes. No external injuries were noted. He opined that the deceased must have died of drowning. In coming to this conclusion, the doctor explained that drowning was a default diagnosis; in other words, it was a diagnosis by exclusion.

A scenes of crime officer Inspector Fredrick Simiyu Sirengo (PW10) testified that he did not visit the scene of crime but that he received four photographic enlargements from police constable David Wanyonyi of Nairuta police station on 1 March, 2013. Wanyonyi requested him to certify the photographs and authenticate them for production in court. The photographs showed the deceased being retrieved from the borehole. The photographs were taken by police constable Wanyonyi (PW11)

Constable Wanyonyi himself testified that he was the investigations officer and that on 20 February, 2013 he together with police constable Salim and a police driver went to Ngare village where they found the 2nd accused who had been arrested by members of the public. They rearrested her and went together with her to the well where the deceased had drowned. The investigation officer and the driver remained in the vehicle guarding the 2nd accused while the officer in charge of Nairutia police station and members of the public went to the well to retrieve the deceased's body. They took it to the mortuary and locked the 2nd accused at Nairutia police station. The body was identified for post-mortem purposes by the parents of the accused. The officer confirmed that the 2nd accused had made a report of a missing person before the deceased's body was retrieved from the well. The report was made at the time she was residing with her grandmother. He also confirmed that the 2nd accused and her grandmother made efforts to trace the deceased.

The officer admitted that though he took the photographs, he was not a gazetted scenes of crime officer and also that he developed the photographs at one of the commercial photo studios.

Based on this evidence, I held that the prosecution had made out a case against the accused sufficient enough to require them to make a defence. The 1st accused opted to give unsworn statement in his defence while the 2nd accused testified on oath.

The 1st accused admitted that indeed he is the 2nd accused's husband and that the deceased was their son and was 10 months old at the time of his demise. He also admitted that they lived in a rental house at Kimuri village. He stated further that he parted with the 2nd accused on 8 February, 2013 and went to Nakuru on 9 February, 2013. He left the child with his (the 1st accused's) mother, Cecilia Kerigo Mwai. According to him, his mother had said that should the 1st accused leave, she should never leave with the deceased and it is for this reason that he left the child with her. He undertook to support his mother in return for taking care of his son.

The 1st accused testified further that he was arrested on 22 February, 2013 while buying maize in Nyahururu to sell at Nakuru. He denied

having killed the deceased.

Like the 1st accused, the 2nd accused admitted that the former was her husband. It was her evidence that on 8 February, 2013, the 1st accused arrived home drunk at about 10PM. A quarrel ensued and he beat her up. She then left and went to her grandmother's home on 9 February, 2013. She admitted that she met her uncle Reuben Muturi (PW1) but that she did not carry anything with her. She left the deceased with the 1st accused because his mother had told her not to leave with him. When she arrived at her grandmother's house, she told her that she had left the deceased with his paternal grandmother. Her own grandmother doubted her and so she called the assistant chief to confirm the truth of what she told her. The 1st accused also talked with the assistant chief and told her that she had differences with the 1st accused and that she had left him and had also left the deceased behind. The assistant chief told her that she would investigate the matter. On 13 February, 2013 the assistant chief told her that she had confirmed that the deceased was with the 1st accused's mother. The 2nd accused stayed with her grandmother till 17 February, 2013 when she decided to go for her child; according to her, her grandmother could not allow her to continue staying with her without the child. She travelled with her aunts Esther Wothaya and Sarah Wangari. They went to where they used to live and found the house locked. She then went to her mother-in-law's place. She found her. When she enquired of the whereabouts of her son, her mother-in-law told her that she did not know but asked her to look for the 1st accused and ask him to hand over the deceased to her. It was her evidence that the 1st accused's mother told her that even if the child was dead, she still wanted him; she would know where to bury him. Since she did not know where her husband was, she went back to her grandmother. On 18 February, 2013 she discovered that her husband was in Nakuru; however, he could not answer her calls when she called him. She then asked his friend called Maina to call him; the latter called him in her presence. The 1st accused told him that the deceased was in his custody and that they were both in Nakuru; he promised to bring him back by 4 PM the same day. On 19 February, 2013 she reported the loss of her son to the police at Nairutia police station and then went back to her grandmother's home. On 20 February, 2013, while she was on her way from a funeral, she was confronted by a group of people who told her that they were looking for her; they wanted to lynch her but she was rescued by police who also took her to the farm where the deceased's body was recovered. However, she remained in the vehicle and did not see the body of the deceased. She also testified that her child was 14 months old and though he had started walking, he could not walk for a long distance.

This is the evidence with which this court was confronted.

The law on the offence of murder is found in **section 203** of the **Penal Code**; that section defines what the offence entails; it reads as follows:

203. Murder

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

Section 204 under which the accused were also charged has since been declared to be contrary to the Constitution to the extent that it prescribes death as a mandatory sentence (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**).

Turning back to section 203, it is necessary that in order to establish a case of murder the prosecution must prove death of a person; it must also prove that the death was as a result of an act or omission of another person; that the act or omission was unlawful; and that the person who did the unlawful act or omitted to act had malice aforethought.

As far as the question of death is concerned, I am satisfied that the prosecution proved beyond doubt that a person identified as DMN existed before he died of drowning. The prosecution witnesses comprising the 2nd accused's uncle, Reuben Muturi Warue (PW1), her grandmother, Milka Njoki (PW3), the 1st accused's father David Mwai Mujuga (PW2), their landlord, Anthony Wambugu Ndegwa (PW8) and the accused themselves were all consistent that the deceased was the accused's son.

There was also evidence from all these witnesses to the effect that the lifeless body of the deceased was retrieved from a well. Although the 2nd accused testified that she did not have the opportunity to see the body and confirm whether it was that of her son, it was positively identified at the mortuary by the 1st accused's parents. In a nutshell, there was no basis for a reasonable doubt that the body recovered from the well was that of DMN.

The pathologist in his report described the body as that of an African male who was about 14 months old which is the same age that the deceased's mother gave as being the age of her son. He went further to certify that DMN died and his death was caused by drowning; he signed a certificate of death to that effect. His post-mortem report was duly admitted in evidence.

Equally important is question of the custody in whom the deceased was before he died; in my humble view, it is upon the answer to this question that the culpability of the accused can be determined. Was the deceased in the custody of both his parents or either of them or, none of them at all, at the time material to the prosecution case? The analysis of the evidence in its entirety should provide the appropriate answer.

The very first prosecution witness, Reuben Muturi Warue, testified that when the 2nd accused came to his home on 8 February, 2013, she told him that she had left the child with the 1st accused. When she went back to her grandmother's home, she also told her that she had left the child with the 1st accused. Samuel Peter Maina (PW4), a village elder, testified that he spoke to the 1st accused on 12 February, 2013; the latter, who was then in Nakuru assured him that the deceased was in his custody. The assistant chief of Nairutia sublocation, Agnes Wangeci Kiboi (PW7) testified that when she spoke to the 2nd accused on phone on 9 February, 2013, she told her that she had left the deceased with the 1st accused. The couple's landlord, Anthony Wambugu Ndegwa (PW8), also testified in the same breath, that he met the 2nd accused early in the morning; she told him that she had been chased away from the matrimonial home and that she had left the deceased with the 1st accused. When he went where the accused lived, he heard the child cry in their house.

In her sworn statement, the 2nd accused was also categorical that a disagreement arose between her and the 1st accused when the latter came

home drunk at night. She was compelled to go back to her grandmother's home, leaving her son with the 1st accused.

To lay this question of custody of the deceased to rest was the unsworn statement of the 1st accused himself; he admitted that the deceased was left in his custody but that he had left him with his mother, Cecilia Kerigo Mwai, when he went to Nakuru. As a matter of fact, he more or less, agreed with the 2nd accused's testimony when he stated that his own mother had said that should the 1st accused leave, she should never leave with the deceased. He thus left the child with his mother with the promise that he was going to support her mother in consideration of taking care of his son.

My assessment of this this evidence is that it vindicates the 2nd accused as the person who may have been in custody of the child before he disappeared and later found drowned in a well. In the same vein, it points to the 1st accused as the person who was in the custody of this child before he met his fateful death.

According to the sketch map produced by the investigations officer, the distance between house where they lived and the well in which the deceased was found drowned was about half a kilometre. The 2nd accused's evidence was that the deceased was a little over a year old and could not possibly walk all that distance; there is therefore no basis for assumption that at that age, the deceased could have lost his way and drowned by himself. What appears certain is that the drowning of the deceased was an act of another person and looking at the evidence on record, this other person could not have been any other person than the 1st accused.

The 1st accused's statement that he left the deceased with his grandmother is not supported by any evidence and I would regard it as a mere afterthought. I have come to this conclusion because his own father, who from the evidence available, lived together with his mother, did not know where the deceased was and from what I gather, he was as anxious as everybody else about the whereabouts of the deceased. If the 1st accused had left the deceased in his mother's custody, as he suggested, his father would certainly have known. In any event, when the 2nd accused returned to the 1st accused's parents' home in search of the deceased, the 1st accused's mother told her that the deceased was in the custody of the 1st accused and that she should look for him and bring him back; according to 1st accused's mother, she already had somewhere to bury the deceased if he had died. This testimony was not only not controverted but it also suggested that the 1st accused's mother might have had some hint that the deceased had died. In the face of this evidence, I am inclined to find as fact that the 1st accused murdered the deceased by drowning him.

The next question which the prosecution was bound to prove was the motive behind the attack. There was uncontroverted evidence that the disappearance and subsequent death of the deceased was against the background of a marital disagreement between the two accused. It is not quite clear from the evidence whether the murder of the deceased was as a result of the dispute between the 1st and 2nd accused; however, it is settled that malice aforethought does not always have to be express; it can be implied as well. It is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (see **DPP v Smith [1961] AC 290**). It is also captured in section 206 of the Penal Code; that section prescribes circumstances under which malice aforethought is deemed to have been established; it states as follows:

206. Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that 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 of any person who has committed or attempted to commit a felony.

Whatever reason the 1st accused must have had and whichever means he must have employed, the act of drowning his son in an eighty-foot well goes to show that he either intended to cause his death or wanted to do him grievous harm; alternatively, he must have known that his act would probably cause his son's death or do him some grievous harm. Either way, there was no justification for his action, meaning that it was unlawful and, in any event, it was motivated by malice aforethought.

In the final analysis, I am satisfied that the prosecution has proved its case against the 1st accused person for the offence of murder beyond all reasonable doubt and he is convicted accordingly.

For the reasons I have given, I find that the 2nd accused was not responsible for the death of her son and she is acquitted accordingly; she is hereby set at liberty unless she is lawfully held.

Dated, signed and delivered in open court this 26th day of April, 2019

Ngaah Jairus

JUDGE