



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 43 OF 2016 (Murder)

REPUBLIC.....PROSECUTOR

VERSUS

MZADZE MBUI.....ACCUSED

RULING

1. The accused person, MZADZE MBUI is charged with two counts of murder contrary to section 203 as reads with section 204 of the penal code.

The particulars in respect of count 1 are as follows;

“On 20th of November, 2016, at about 1030 hours at Magotoni village Vigurungani location in Kinango sub- county, within Kwale county, the accused LUNGWA murdered Lungwa LALO MWAKUPHA”.

The particulars for count 2 are that;

“ On 20th On November,2016, at about 1030 hours at Mogotoni village, Vigurungani location in Kinango sub- County, within Kwale County the accused murdered MBEYU LALO MWAKUPHA”.

2. The accused person was first arraigned in court on 2nd December,2016 whereby she was informed of the charge against her but was not required to plead until such time as she will have been examined by a psychiatrist to establish her mental capacity and assign counsel to represent her by the Deputy register of the High court.

3. On 4th May, 2017, the charges and their full information were read over and explained to the accused person in Kiswahili language which she understands and she pleaded NOT GUILTY to both counts.

4. The trial commenced on 10th September, 2017 whereby the prosecution called two (2) witnesses and closed their case.

5. Briefly, the facts are that on 21st November, 2016 Pw1,LALO MWALUVA NDEGWA MKALLO, who is the husband to the deceased left home for work as his wife, who had just fed their children was to leave for the stream to fetch water. Pw1 said that when he got to the shops at Dzimanga, after about 1 ½ hours, his phone rang but he did not recognize the number. He however answered it and the caller informed him that his two children Lungure and Mbeyu had been murdered by their mother. He said that before he could establish who had called him to verify the information the call was disconnected.

6. Pw1 informed the assistant chief, CHIKWE MWANZIA who happened to be at the shopping Centre of the report he had received. The Assistant chief accompanied him to his home on a motorcycle and they confirmed that his two children had died in the forest. They went to the forest in the company of the Assistant chief the children and many other people who he had found gathered at his home. There he saw his children who had been slaughtered on the neck (throat).

7. The police from Vigurungani came to the scene and collected the bodies of the two children. Pw 1 said that he was overwhelmed with grief and confusion that he did not get out of the vehicle that carried his dead children but he saw his wife, Mdzadze on the vehicle. He, later followed the vehicle to Kinango where the bodies were taken to hospital. Pw1 said that he kept inquiring from people if his wife had truly killed her children but no one confirmed this to him. He did not see his wife kill his children.

8. Pw2, MBEYU MWAKUPHA, is the mother to Pw1 and mother in- law to the accused person. She confirmed to this court that Pw1 and the accused were husband and wife and husband respectively and had five (5) children. Pw2 also told court that of the five children, two of them namely Lugwe and Mbeyu died but could not remember when they died. She said that she learnt about this while at her home from

a child by the name UMADZI LALU. She said that this child told her that Lugwe was bitten on the neck but did not tell her who had done this.

9. After the prosecution closed its case, the issue for determination now becomes whether the prosecution has established a prima facie case to warrant the accused person being placed on her defence.

10. The offence of murder under section 203 of the Penal code is defined as;

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

11. From the definition, three ingredients that require to be established and eventually proved by the prosecution for the offence of murder are as follows;

- (a) that the deceased died and the cause of the deceased’s death;
- (b) that the accused caused the deceased’s death by her unlawful actions or omission;
- (c) that the said unlawful act or omission was caused with malice aforethought.

12. From the evidence of the two prosecution witnesses who testified, none of them gave evidence of having witnessed the deceased children being slaughtered or saw the person who slaughtered them.

13. Pw1 told court that he was informed by an unidentified caller that his two children had been murdered by his wife, the accused person. This person could therefore not be traced and called to verify and confirm this information.

14. Pw2 said that he was told of the deceased having been bitten on the neck by one UMADZE LALU but this child was not able to testify.

15. Pw1 said that he was accompanied to his home by the Assistant chief where they found many people gathered and they all went to the forest where they saw the said children lying dead. None of these people were called to testify about what they saw and the circumstances surrounding the incident.

16. And so, from the evidence of the two witnesses, it is clear that none of the ingredients of offence can be said to have been established. In fact the prosecution’s evidence against the accused person with regard to the offence against her is insufficient and has not pointed at her in any way.

17. In the circumstances, the prosecution, has failed to establish prima facie case against the accused person to warrant her being placed on defence for the offence of murder in either count.

18. I therefore find accused person has no case to answer and acquit her accordingly under section 210 of the Criminal Procedure Code for the offence of murder in each count.

Orders accordingly.

Ruling delivered, dated and signed this 12th day of April 2019.

HON.LADY JUSTICE D. O. CHEPKWONY

In the presence of :

M/s Ochollo counsel, for the state

Mr Odhiambo counsel holding brief for Mr. Obara counsel for the accused person.

Accused person

C/clerk- Beja