



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM : R.E. OUGO J

CRIMINAL CASE NO. 3 OF 2017 (MURDER)

REPUBLICPROSECUTION

VERSUS

MARY VIOLET KWAMBOKA.....ACCUSED

JUDGMENT

1. By an information dated the 15th February 2017 Mary **Violet Kwamboka** hereinafter referred to as the accused person, is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 7th February, 2017 at Nendekeny village in Transmara West Sub County within Narok County, she murdered **Flora Osiemo**. To prove its case against the accused, the prosecution called 8 witnesses. The accused gave a sworn statement in her defense.

2. **Saitoti Konyori** (PW1) the assistant chief of the area testified that on 7th February 2017 at about 5:00 p.m. he received a report from Kisaisai village that one child had been found dead and another poisoned. He went to the homestead and took the ill child to hospital. He inquired about the children's parents and was told that Ongeru had not been seen in 3 days but the accused had been seen heading towards Kilgoris at about 6:00 p.m. As they were looking for her, PW 2 informed them that the accused had been seen going to her sister Divina's place in Mosocho. They went to her sister's place but did not find her there. They went on looking for her and found the accused sleeping in a bush armed with a panga. They woke her up and arrested her. At that time they had already reported the incident to the police who collected the body. PW1 testified that the accused had on several occasions fought and quarreled with her husband, her sister and the children. One time she had cut her sister's child and had been charged for it. He testified that the accused and her sister used to quarrel over one husband and in one incident, she had wanted to stab her sister with a knife.

3. The accused's brother-in-law, **David Anyona Muremi** (PW2) testified that on the material day he had met the accused at about 7:00 p.m. on his way home. She told him that she had issues with her brother and that she was going to look for him. PW 2 asked about the whereabouts of her children and she told him that the children were not her concern ("*sina haja na watoto*"). At 10:00 p.m. that night, PW 1 woke him up and explained to him what had happened. They looked for the accused in the direction he had seen her going and found her in a bush at Mosocho whereupon she was handed over to the police.

4. **Paulina Kerubo** (PW 3) recalled that she had met PW 4 at her door on that day at about 7:00 p.m. PW 4 had told her that when she came from school, she did not find the deceased and PW 5 at home. She tearfully explained that one child was in the forest and smelled of "*dawa*" (medicine) and the other was not responding or moving. PW 3 found the deceased in a forest about 100 meters from her homestead and tried to wake her up but the child did not respond. She raised an alarm and people came to the scene. She testified that the other child had vomited on his clothes and smelled of poison. She took him to the hospital and the chief reported the incident to the police.

5. **Cynthia Kerubo** (PW4) gave her sworn statement after *voir dire* examination. She testified that at the time she was staying with her grandfather and grandmother but before that she used to live with her parents and her cousins PW5 and the deceased. She recalled that on the day the deceased died, she returned from school at about 4:00 p.m. and did not find anyone home. She assumed her cousins had gone with her grandfather to work and lit a fire to cook vegetables. She then heard the phone ringing and went to the shamba where PW5 was. She found him in the shamba crying and spitting. PW 5 pointed to where the deceased was lying down. PW 4 thought the deceased was asleep but realized that the deceased had died as she did not respond when she called her. She informed PW5 of this and asked him to stay in the house. She then went and called their neighbor PW 3, informed her of the deceased's death and took PW 3 and her husband to where she had left the deceased lying. PW 4 recalled that she could smell "*dawa*" (medicine) on PW 5 as she walked with him. On cross examination she testified that on the same day, she had left together with her mother, the accused and her father was the one that had been left with the two children.

6. **Felix Osiemo** (PW 5) gave an unsworn testimony after *voir dire* examination. He told the court that he could not recall what happened the day the deceased died but stated that one Divina had given him and the deceased poison and not the accused. When questioned, he testified that they used to live with the accused and on the day in question, she had gone to work.

7. **Doctor Peter Morebu Momanyi** (PW7) carried out the post mortem on the deceased's body on 14th February 2017 at St. Joseph Mission Hospital. He testified that the deceased was aged 4 years and 6 months old. Her clothes were soiled with vomit and had faecal matter. He informed the court that the salient features he had observed from the internal examination were in the digestive system. He noted that the stomach contents had the smell of Triatix and concluded that the deceased had succumbed to poisoning. He took specimen including the stomach contents, liver and kidney for testing.

8. The government analyst, **Richard Kimutai** (PW 6) produced the report dated 4th April, 2017 which had been prepared by his colleague, Jane Mabutua Waya. He had worked with her for 7 years and was familiar with her handwriting. He testified that his colleague received a police memo form on 22nd February, 2017, from the DCI Transmara marked CR 701/71/2017. The memo forwarded a ligatured stomach, piece of liver and kidney from the deceased marked 'A' with instructions to check if they had a toxic substance. The stomach was opened and its contents were extracted using chloroform which was dried and dissolved in rectified spirit. There was a thin chromatographic layer which tested positive for Triatix which is an organophosphate. The extract was also scanned through an ultraviolet spectrometer machine which confirmed that the substance was Triatix. The conclusion was that the exhibit contained an organophosphate which is poisonous when consumed.

9. **Constable Gregory Malakwen** (PW 8) testified that he was one of the investigating officers in the case. He recalled that on 7th February 2017, he and the head investigator Cpl Joel Abisai were asked to attend a scene of murder reported by the area assistant chief, PW1. Two children had been poisoned and one of them had died instantly. When they arrived at the scene, they found the deceased had already died and PW5 was receiving first aid. They rushed him to Transmara sub-county hospital where he was admitted and took the deceased's body to St. Joseph Mission Hospital. The witnesses' statements were recorded and the postmortem conducted. It was established that the death was due to poisonous substance. They took the deceased's stomach, liver and kidney to Kisumu Government Chemist for testing and charged the accused with the offence of murder after PW 4 informed them that the accused was the one that had given them something to eat. PW 8 told the court that the accused was a 2nd wife and the deceased referred to her as mother.

10. When placed on her defense, the accused stated that on the day in question, she had prepared breakfast which they took together with her husband and the children. She left the deceased and PW 5 with their father and went out with PW4. PW 4 went to school and she went to work where she spent the night. During the night, she heard people waking her up. PW 1 identified himself and she opened the door for him. He told her that something had happened where she stayed and asked her to accompany him. PW 1 informed her that the children had been poisoned and asked her to enter into a vehicle to identify the children. She did so and she saw the deceased's body. She testified that they had taken the body to the mortuary and gone to the hospital where PW5 was. She remained in the vehicle as they went to see him. She wrote her statement at Kilgoris Police Station the following day and was told that she would remain in custody until the one who had poisoned the child was found. Up to that point she did not know who had poisoned the children.

11. The offence of murder is defined under **section 203** of the **Penal Code** thus; "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" From this definition, the prosecution is expected to prove beyond reasonable doubt; the death of the deceased and cause of that death; that the accused committed an unlawful act or omission that led to the death and that the accused committed the unlawful act with malice aforethought.

12. The fact and the cause of the deceased's death is not in dispute. PW1, PW 3, PW 4, and PW8 all confirmed that they had seen the body of the deceased at the scene. The investigating officer PW 8 took the body to St. Joseph Mission Hospital where a post mortem was conducted by PW 7. PW 7 observed that the deceased's clothes were stained with vomit and faecal matter and an internal examination of the body revealed that the contents of the deceased's stomach had the smell of Triatix. Specimen including the stomach, liver and kidney were extracted from the deceased's body and taken to the Government Chemist for analysis. Tests were conducted by PW 8's colleague who prepared a report that was produced by PW 8 in line with **section 77** of the **Evidence Act**. The analysis of the specimen confirmed that there were traces of Triatix in them which is an organophosphate and poisonous when consumed. This finding confirmed PW 7's conclusion that the deceased had succumbed to poisoning.

13. As for whether the accused poisoned the deceased, the prosecution led circumstantial and direct evidence to prove her guilt. The prosecution established that the deceased who was 4 years old at the time of her demise, was the accused person's niece and that they lived together as a family with the accused person's husband Ongeru, PW 4 and PW5.

14. On the material day, the accused's brother in law PW 2 met her at about 7:00 p.m. as she was going to look for her husband. PW 2 asked her about the children and she responded that the children were not her concern ("*sina haja na watoto*"). At the same time, PW3 was also returning home when she met PW 4 in a hysterical state. When she arrived home from school, PW 4 had gone in search of her cousins PW 5 and the deceased and found them in the shamba. She testified that the deceased did not move or respond when she called her and PW 5 had a distinct smell of medicine on him. She alerted PW 3 who raised an alarm. The assistant chief, PW 1 arrived at the scene and took PW 5 to hospital after which he began looking for the deceased's parents. He was informed that the deceased's father Ongeru had not been seen in 3 days but the accused had been seen heading towards Kilgoris. With the help of PW 2, he was able to locate the accused. They found her at Mosochi sleeping in a bush and according to PW 1, she was armed with a panga.

15. The principles against which these circumstantial facts must be weighed in order to establish whether the prosecution has proved a case against the accused were outlined by the Court of Appeal in the case of **Abanga alias Onyango v. Rep Cr. A No.32 of 1990(UR)** as follows;

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else." (emphasis mine)

16. In the more recent case of **JoanChebichii Sawe v Republic Criminal Appeal No. 2 of 2002 [2003] eKLR** the Court of Appeal held;

“... In order to justify, on circumstantial evidence, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other 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.”

17. As I apply the above principles to the prosecution’s case, a few gaps emerge which leave this court in doubt that the accused committed the offence she is charged with. First, it is not conclusive from the facts presented that the last person the deceased and PW 5 interacted with was the accused. PW 2 who was the first person to see her after the incident did not see her in the company of the children. Her indifferent retort to PW2 that the children were not her concern, raised suspicion against the accused when the deceased’s body was found. PW1 also testified that when they found her, the accused was sleeping in a bush and was armed with a panga. He testified that the accused was quarrelsome and had in one occasion cut her sister’s child with a knife and in another incident threatened to stab her sister. According to PW1 and PW 8, the accused and her sister were not in good terms since they shared one husband. It is however trite law that suspicion however strong, cannot provide the basis of inferring guilt. (See *JoanChebichii Sawe v Republic (Supra)*).

18. The accused raised an alibi stating that she had left for work and was not at the scene when PW 5 and the deceased were poisoned. She testified that she prepared breakfast and went out with PW 4. When an accused raises an *alibi*, it remains the prosecution’s duty to disprove it. During cross-examination, PW 4 confirmed the accused person’s testimony that they had left PW 5 and the deceased in the company of their father when they left that morning but PW2 testified that he lived close to the accused and had seen her in the evening before the deceased’s body was found.

19. The only eye witness to the incident was PW 5. He testified that he and the deceased had taken the poisonous drink from one Divina and not from the accused. PW 8 had told the court that PW 5 was the one that had implicated the accused but his evidence was mere hearsay and was not confirmed by PW 5 during the hearing. When he begun testifying, PW 5 could not recall what had happened on the material day. Given his age and condition at the material time, it is possible that he did not comprehend or recall the events that led to the death of the deceased.

20. Once a the chain of circumstances is broken and evidence adduced weakens that chain of circumstances as in this case, it is no longer safe to convict the accused based on uncorroborated circumstantial evidence. In her written submissions, the accused complained that the named Divina had not been called to testify in the case. As much as the prosecution is not obligated to call a superfluity of witnesses, where the evidence called is barely adequate, the court is entitled to draw an inference that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. (See *Bukenya and Others Vs. Uganda 1972 EA 549*)

21. I have considered the prosecution’s case and it is my view that the prosecution has failed to prove that the charge against the accused beyond reasonable doubt. I therefore acquit, **Mary Violet Kwamboka** for the murder of **Flora Osiemo**. She is free to go unless otherwise lawfully held.

Dated, signed and delivered at Kisii this 15th day of August 2019.

R.E. OUGO

JUDGE

In the presence of;

Accused Person Present

Mr. Nyagwencha Present

Mr. Otieno Senior State Counsel Office of the DPP

Rael Court clerk