



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 60 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JACKLINE MILKA MURUNGA.....ACCUSED**

**JUDGMENT**

The accused, Jackline Milka Murunga, faces a charge of murder brought under section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 27<sup>th</sup> day of May 2013 at Capital Hill Estate within Ruai Location in Njiru District she murdered Wesley Mungai Njeri. The accused denied committing this offence. Ten (10) witnesses have testified in support of the prosecution case. The accused was the only witness for the defense. She is represented by Mr. Omari, advocate. The prosecution was conducted by various prosecution counsels with Ms Nduati concluding the prosecution.

The circumstances giving rise to this offence are discernible from the evidence of the ten (10) prosecution witnesses and the defense of the accused person. They are that on 27<sup>th</sup> May 2013 the accused person was working at the home of Miriam Njeri Ndung'u (PW2) as a care giver to Miriam's two children including the deceased. At around 11.00am, the accused left the homestead of Miriam Njeri and went outside to a place where construction of a pit latrine was taking place. She was found at that place by Jane Muthoni Ndung'u, PW1. The accused had left the deceased alone. The deceased suffered from cerebral palsy and could not do anything for himself including walking, talking or feeding. Jane was not happy about finding the accused away from the house and sought to know why she had left the deceased unattended. Jane followed the accused to Miriam's home and found the deceased on a sofa seat crying. It seems Jane argued with the accused over the child and left. Jane called her daughter Miriam obviously intending to tell her about the matter but failed to get her. Miriam returned the call at around 1.00pm upon which Jane told her to pass by Jane's house before going home. At about 7.30pm Miriam went to her mother's place. She was informed about the incident between the accused and Jane. Miriam left her parent's home and went to her home. She found her older son outside their gate playing, which according to Miriam was unusual. Inside the house, Miriam found the deceased in the bedroom that the kids shared with the accused covered. She decided not to disturb the child thinking he was sleeping. She did not find the accused in the house. Miriam called the accused on her phone but the accused did not respond. Miriam's suspicion was raised and she checked the sleeping baby only to find that the child had died. She called her parents Jane and George Mungai, PW3.

Mungai reported the matter at Mawe Mbili Police Post. He was accompanied to the scene by police officers. The police took over the matter. The body of the deceased was removed and taken to the Mortuary to await post mortem. The accused was arrested the following day, 28<sup>th</sup> May 2013, in the Central Business District Nairobi by PC Weldon Korir and other police officers from Kamukunji Police Station. A knife, Exhibit 2, was recovered from her. She was taken to Kamukunji Police Station and later collected by police officers from Ruai Police Station. The police visited the scene in company of the accused and a piece of wood (Ex. 1) that is suspected to have been used to assault the deceased.

In her defense given under oath, the accused denied killing the deceased. She told the court that she had worked for Miriam for 1 ½ years taking care of the deceased and that on the relevant date, she said it was 28<sup>th</sup> June 2013, she had left the house of her employer to seek help in connection with her phone from a man who was at a construction site nearby. While there Jane found her and sought to know who was taking care of the deceased. She said that Jane started insulting her and followed her home. She said Jane continued insulting her and spit on her face. She said that Jane left vowing to revenge.

She further testified that at 8.00pm Jane returned to her daughter's house and asked the accused why she had not left. She said that she tried to plead with Jane that it was at night and she could not leave but Jane slapped her and threw her belongings outside. She said she had no money and spent the night at a vegetable kiosk. She said she left the baby alive and with Jane. She said that in the following morning, she left Ruai and walked to the Country Bus Station. She said she met two girls in town who recognized her. She told them that she had left her job. She said she intended to walk to Dagoretti where her home was but was arrested and taken to Kamukunji Police Station and later transferred to Ruai Police Station.

At the conclusion of the case, Mr. Omari for the accused and Ms Nduati for the prosecution submitted in support of their respective cases. It is the submission of the defense that the prosecution has failed to prove the offence of murder against the accused. It was submitted that the accused had taken care of the deceased for a long time and that despite the deceased's physical and medical challenges, the accused had no

reason to kill him. It was submitted that the accused was chased from the house of her employer by Jane Muthoni and left that house during the day when the deceased was alive; that Jane Muthoni was the last person to be with the deceased and must know what happened to him; that there is no evidence connecting the knife found with the accused with the injuries causing the death of the deceased; that the prosecution has failed to prove malice, whether constructive or implied, on the part of the accused. Mr. Omari cited several authorities to support the submissions by the defense. He urged the court to acquit the accused person.

On the other hand, Ms Nduati submitted that the prosecution has proved the case against the accused beyond reasonable doubt by proving that death of the deceased through the evidence of the pathologist Dr. Oduor who stated that the deceased died due to head injuries due to blunt force trauma; that the accused was the last person with the deceased and that PW1 found the deceased alive at 11.00am; that the prosecution is relying on circumstantial evidence and that this court has been invited to look at the conduct of the accused.

A clear reading of the evidence of the prosecution reveals that there is no direct evidence against the accused. The case for the prosecution therefore is based purely on circumstantial evidence. Circumstantial evidence must be subjected to certain legal parameters before the trial court can base a conviction on it. Circumstantial evidence is defined by **Black's Law Dictionary, Ninth Edition** as "**Evidence based on inference and not on personal knowledge or observation**" and "**All evidence that is not given by eyewitness testimony.**" In **R. v. Taylor Weaver & Donovan [1928] 21 Cr. App. R. 20**, circumstantial evidence is defined as follows:

***"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics."***

Despite this accolade, there is a caution to the courts when relying on circumstantial evidence to narrowly examine circumstantial evidence because this type of evidence can be fabricated to cast suspicion. Before drawing the inference of accused's guilty basing on circumstantial evidence, courts are cautioned to ascertain that there are no other co-existing circumstances which would weaken or destroy the inference (see **Teper v. R (1952) AC 489**).

It is the duty of this court to examine with care all the evidence tendered by the prosecution and the defense and determine whether it meets the test of circumstantial evidence and whether it can result in a conviction or acquittal. Essentially circumstantial evidence must not leave any gap. It must conclusively lead to the accused as the only person, to the exclusion of all others, who must have caused the death of the deceased.

According to the evidence of the prosecution witnesses, specifically Miriam and her mother Jane, the accused was the only person with the deceased on 27<sup>th</sup> May 2013. Miriam's older boy had been in school that day but came home later. On the date under reference an altercation occurred between the accused and Jane over accused's behaviour of leaving the deceased alone and un-attended. The fact that the accused had left the baby un-attended is admitted by the accused. Jane testified that when she followed the accused to the house she found the baby on a seat crying and she pacified him. The evidence of Jane on what happened is captured as follows:

***"I called Jackline and told her that if she was unable to take care of W to tell his mother to get another worker..... I talked to her for some time reminding her that she too was a woman and she did not know God's plans. I left after cautioning her not to leave Wesley."***

The accused on the other hand told the court as follows in reference to the same incident:

***"Jane started insulting me about not taking care of the baby yet I ate and slept for free. She spit on me on the face. She told me she would revenge. She left me. I did not respond to her. She left the home around 11.00am..... At 8.00pm Jane Muthoni came back. My employer had not come back. Jane asked me why I had not left. I told her it was at night and I could not leave. She took the baby and slapped me twice. She threw my items outside. I had no money. I went to spend the night at the vegetable kiosk."***

According to the accused Jane went to her daughter's house twice on 27<sup>th</sup> May 2013: in the morning around 11.00am and again at 8.00pm. In both occasions there was a confrontation as testified by the accused. In the morning Jane insulted the accused and in the evening he threw her items out of the house. The defense of the accused is that Jane is the last person to be with the deceased and she is the one who knows what happened to the deceased. Jane did not testify to her visiting her daughter's house twice that day. In fact, after she confronted the accused, Jane went to visit her friend and went home. She called her daughter to ask her to pass by her house. This evidence was confirmed by Miriam who testified that her mother called her but missed her. She said she returned the call at 1.00pm and her mother asked her to pass by her house. She said she went to her mother's house at about 7.30pm. This time was confirmed by Jane who testified that Miriam went to her (Jane's) home at about 7.30pm.

Miriam testified that after her mother narrated to her about what had happened that day, she left and went home. This is when she discovered that the accused was not at home and that the baby was dead. Miriam told the court in cross-examination that she arrived home at about 8.40pm. There is no evidence from the prosecution witnesses, especially from Jane and Miriam, that Jane visited Miriam's home twice on 27<sup>th</sup> May 2013. The two witnesses were not cross-examined on that issue. Jane was not cross-examined about her killing the deceased nor was she cross-examined about assaulting the accused.

There is the evidence of Tabitha Njeri, PW5. She was Miriam's neighbour. Tabitha told the court that on 27<sup>th</sup> May 2013 at about 1.00pm to 2.00pm, the accused went to her house and borrowed Kshs. 250 to travel home because her father was sick. Tabitha did not give the accused any money because she did not have it. Tabitha told the court that the accused told her that she had disagreed with Jane and that Jane had spit on her. The accused did not mention Tabitha in her evidence.

While I am alive to the legal principles that the accused has no duty to prove her innocence and that the burden of proof never shifts to the

accused person, I find the evidence of the accused incredible. I do not believe her evidence that Jane went to Miriam's home twice on 27<sup>th</sup> May 2013. There is no evidence to support this apart from what the accused testified. The evidence of Jane, Miriam and George Mungai was not tested in cross-examination on this issue. Miriam was at her mother's home at about 7.30pm. This is when she became aware of what had happened in her home earlier that day. She left her mother's home and went to her home only to find the accused gone. Jane cannot have been at Miriam's home at 8.00pm on the same evening when she was meeting her daughter about 7.30pm at her home. Indeed Jane informed Miriam during Miriam's visit that she had cautioned the accused against not taking good care of the deceased. Granted that Jane may not have disclosed to Miriam in detail all that she may have said to the accused, she at least told her about talking to the accused about neglecting the deceased and cautioning her.

Miriam told the court that the accused would have called her about the baby if any other person had done anything to him. She said that it was normal for the accused to call her and inform her about the baby if the baby had been injured during a fight between the accused and Jane, or if a neighbour had hit the baby or if the bigger boy had hit the baby.

Going back to the ingredients of murder, I find the prosecution has proved the fact of death of the deceased beyond reasonable doubt. Dr. Oduor Johansen, PW9, told the court that on 29<sup>th</sup> May 2013 he examined the body of the deceased Wesley Mungai and found bruises on the right kidney, scalp hematoma on the frontal and right parietal with extensive subdural hematoma. He formed the opinion that the cause of death was head injuries due to blunt trauma. The evidence of Dr. Oduor confirms the death of the deceased. The cause of the injuries leading to the death of the deceased was blunt trauma thereby proving beyond reasonable doubt that this was an unlawful death.

The second issue to consider is the identity of the person who inflicted the injuries that led to the death of the deceased. The defense put forward several hypotheses: that anyone including the deceased's grandmother Jane, his brother or a neighbour could have inflicted the fatal injuries on the deceased.

I have considered the circumstances surrounding the death of the deceased. Firstly the accused had had an altercation with Jane after she was found outside with the baby left alone in the house with no one to care for him. Miriam told the court that had she found the accused having neglected the baby she would have behaved like her mother by cautioning the accused about it. As I have stated in this judgment the extent of that caution is not known since it is the word of the accused against that of Jane. Secondly, the accused did not call Miriam to report anything had happened to the baby. The inference I make here is that she did not call her because she was involved in what happened to the baby. Thirdly, she went to borrow money to go home from Tabitha the neighbour and she conceals this in her evidence. By going to borrow money from Tabitha, the accused had made up her mind to leave employment. Fourthly, she did not mention anything about borrowing money from Tabitha in her evidence in court despite her being aware of Tabitha's evidence in court. It is my view that the accused was acting in bad faith or she had something to hide. This is why she did not call Miriam and inform her that she had made up her mind to leave or wait for Miriam to come home so that she could inform her about her decision to leave. Fifthly, she lied to court about Jane visiting the home of her daughter twice that day. She also lied to the court by stating that she left the baby with Jane and therefore Jane must have known what had happened to the deceased. To my mind the logical thing for the accused to have done at the time was to wait for Miriam and inform her that she wanted to leave and ask for her salary for the month of May 2013. That she went to ask for money from Tabitha at about 1.00pm or 2.00pm after her altercation with Jane is proof that she had made up her mind to leave before Miriam came home. The accused has something to hide.

I recall Miriam telling the court that the accused used to pinch the deceased. I also recall the evidence of the accused admitting that she had been found by Jane outside the employer's house three times and all these times she used to leave the baby alone in the house. This does not portray the conduct of a caring person.

All the facts of this case and the circumstances narrated above point to the accused person to the exclusion of any other person as the one who caused the blunt trauma on the baby that resulted in his death. Dr. Oduor classified the causes of blunt trauma to include a fall or some force applied by someone. The evidence is not clear what object was used to inflict those injuries. The piece of timber exhibited in court (Ex. 1) was said to have been recovered from the bed by CPL Weldon Koech, PW10. From the evidence of CPL Koech he did not seem certain that the piece of timber was the murder weapon. He told the court that the accused led police to recover the piece of timber and claimed that it is the stick used by Jane to hit the deceased. It is my view that the injuries sustained by the deceased could have been caused by any object and may have resulted from a fall caused by having the deceased dropped down or his head hit against a blunt object or surface. What is not in doubt is that the deceased has severe head injuries that led to his death. The inference to be drawn here is that the accused caused those fatal injuries. She was the only person with the deceased as evidence shows. Consequently I hereby reject her defense as untrue. I however agree with the defense that the knife said to have been recovered from the accused and that was produced in evidence has no nexus with the injuries suffered by the deceased.

I have considered the evidence and the submissions including the cited authorities. These included **Republic v. Daniel Musyoka Muasya & 2 others [2014] eKLR**; **Reppublic v. Ben Simiyu Wesela [2015] eKLR** and **Republic v. Samson Lotukei Loitasia [2017] eKLR** all emphasizing on circumstantial evidence and **Republic v. Albert Tirimba Ogata [2014] eKLR** on the ingredients of murder. Although the defense relied on these authorities to support their submissions that the circumstantial evidence on record does not accord with the guilt of the accused, it is my finding that the circumstantial evidence point to the accused as culpable. As stated in **Republic v. Kipkering Arap Koske and another 16 EACA 135**, it is my finding that the inculpatory facts of this case are incompatible with the innocence of the accused and are incapable of explanation upon any other hypothesis that that of her guilt.

Basing my reasoning on the evidence as shown above, it is my finding that the prosecution has tendered sufficient circumstantial evidence that has met the legal requirements to prove beyond reasonable that the accused caused the death of the deceased.

Did the prosecution prove malice aforethought on the part of the accused? My view on this last ingredient is that I do not find evidence whether direct or circumstantial pointing to the proof of malice aforethought beyond reasonable doubt. Given what had happened that morning and given that the accused had lived and taken care of the deceased for about nine months, although not without some negligence of leaving the deceased unattended, it is my view that her actions of that day were not pre-meditated. I harbour some doubts that her dark side may have been triggered by the altercation she had had with Jane that morning.

The outcome of my analysis is that the prosecution has proved beyond reasonable doubt that the unlawful death of the deceased occurred as a result of an unlawful act or omission on the part of the accused. However, it is my view that the prosecution has failed to prove beyond reasonable doubt that the accused was driven by malice aforethought as defined by section 206 of the Penal Code. Consequently, the prosecution has failed to prove the offence of murder contrary to section 203 as read with section 204 of the Penal Code and I hereby acquit the accused of the offence of murder. Instead I find sufficient evidence to prove beyond reasonable doubt the offence of manslaughter contrary to section 202 as read with section 205 of the Penal. I enter conviction against the accused for the offence of manslaughter. Orders shall issue accordingly.

**Delivered, dated and signed this 20<sup>th</sup> day of March 2018.**

**S. N. MUTUKU**

**JUDGE**