



REPUBLIC OF KENYA

IN THE HIGH COURT AT KENYA AT KERUGOYA

HCR MURDER 9 OF 2013

BETH MUTHONI NJAGI.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGEMENT

The accused person Beth Muthoni Nyaga is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code in that on 25/10/13 at Riagicheru village in Kimbimbi Location within Kirinyaga County, unlawfully murdered B K G.

The accused person denied the charge. The facts of the case are that on 25/10/13 the deceased BMG who was a minor aged eight (8) years and a step child of the accused went missing. A report of a missing child was made on 27/10/13 at Wanguru Police Station. The deceased had gone to sleep in the house of the accused the previous night. In the morning of 25/10/13 the accused was not in her house and when she returned her hand had bloodstains which she claimed was as a result of nose bleeding and requested a witness (PWI) Lydia Wanjiru Munene to clean her. Later on 29/10/13 the body of the deceased was found at a dry area of river [particulars withheld]. The body had injuries on the head. The accused was the last person to be seen with the deceased. The mother of the deceased had separated with her husband who later married the accused as his second wife. The accused was living with the deceased in her house. The night the deceased went missing the accused had removed him from the room where he was sleeping with his sister M claiming he was screaming. Early in the morning the accused and the deceased were missing from the house. The deceased had complained that the accused was denying him food and tea. During the night the deceased had complained that there was a stranger in the house but the accused did not respond. A report of a missing child was made to the Police. Later on 29/10/13 the body of the missing child was spotted at river Nyamindi. Police visited the scene and removed the body to Embu Level 5 hospital where a postmortem was done. The doctor found that the body of the deceased had cut wounds on the head with fractures right parietal bone of the head. The cause of death was cardio –pulmonary arrest from head injury postmortem form exhibit 2. Police conducted investigations and fingers were pointed at the accused who on 25/10/13 passed through the home of PW-1- with blood stains on her hand a fact which was corroborated by Phillis Michere Nyaga who gave evidence that PW-I- had assisted the accused to wipe out the blood as the hand of the accused had a plaster. On the fateful night the accused asked the boy to sleep with her though the boy used to sleep in separate room with the daughter of accused called M who was aged ten years. This was questionable as the accused had poor relationship with the boy. The accused was then charged with this offence.

The accused in her statutory statement told the court that she could not tell what happened to the deceased.

I have considered all the evidence adduced. The issue for determination is whether it is the accused who murdered the deceased BK. The evidence adduced is circumstantial. According to PW-I- Lydia Wanjiru Munene, on the morning of 25/10/13 the accused met her in the house of grandmother at 9.00a.m PW-I- noticed that the accused had bloodstains on elbow of her right hand which had a plaster. The accused asked her to wipe out the blood which she did using a hand towel and some water. Later she heard that the body of the deceased was recovered at river Nyamindi. She went and saw the body and it had several cuts on the head.

PW-2- Grace Karioko Mutei on her part told the court that on the night of 24/10/13 the deceased went to her house with accused and her daughter called M. They ate supper together. The deceased and M went to sleep in the house of accused. Later in the morning of 25/10/13 she went to the house of accused at 7.00 am but she did not find the deceased and the accused in the house. Later she found the accused and asked her where she had gone that early morning. She noted that the palm of her fractured hand had bloodstains. The accused claimed the bloodstains were from nose bleeding she had experienced the previous night. She enquired where the deceased was and the accused claimed that she had spent the night with him after he started screaming at night and she removed him from the room he shared with M. That she had left him sitting on the bed and on her return she did not find him. Later the body of deceased was found on a dry portion of river [particulars withheld] with injuries on the head.

PW-3- SNM who is a brother to the father of the deceased and uncle to the deceased testified that the deceased and the accused did not enjoy a good relationship. He testified that the deceased had told him that the accused was denying him food and tea. PW-3- had told the deceased to be feeding in his house and he reported the deceased's complaint to his father. On the material day he learnt of the disappearance of the deceased and reported to his father.

PW-3- testified that the accused had alleged that she had left the deceased and M in the house and went to the home of Peris. PW-3- with his brother James, Gatoni and Anthony asked the accused to accompany them to the home of Peris. The lady informed them that the accused had passed by her home saying she had gone to take a casual labourer to her shamba which was nearby. When the account by accused and Peris differed the accused was asked to produce the child. The matter was reported to the police. Later he was called to identify the body which was fished from river [particulars withheld] and he identified it as that of the deceased. The body had serious injuries.

PW-4- JGM is the father of the deceased. He testified that he received a call from his brother (PW-3-) who informed him that the deceased was missing. The accused had not reported to him. He went home. Later the body of the deceased was recovered from river [particulars withheld] and he identified it as that of his son.

PW-5- EW is the mother of the deceased. She testified that on 7/9/2013 she took the deceased to the home of his father (PW-4-). Later on 28/10/13 she was informed that the deceased had gone missing. Later on 28/10/13 she was informed that the body of the deceased was found at River [particulars withheld] and she went and found the body and she confirmed it was that of her son.

PW-6- Phillis Michere Nyaga testified on 25/10/13 the accused went to her house early in the morning and she enquired as to where she was coming from. The accused said she had taken a farm hand to the shamba to plant beans. PW6 asked accused why her hand had bloodstains and she stated that she was hit on the face and nose bled. They went with accused to her house. Later she was asked about the missing child. She then heard that the body of the child had been found.

PW-7- HWN was the grandmother of the deceased.

PW-8- Doctor Joseph Thuo is a psychiatrist who examined the accused and found she is normal and fit to stand trial. He produced the report exhibit -1-.

PW-9- was Doctor Godfrey Njiru who performed the postmortem of the deceased and found that he had a wound on the back of the head, that is four stab wounds. The skull was exposed and there was bleeding in the brain in the region where there was a fracture. The cause of death was head injury and bleeding on the brain. He produced the postmortem form as exhibit -2-.

PW-10- is Sergeant Loise Wanjiru Mwangi who investigated the case. She found that on the night before the deceased went missing, the accused had asked the boy to sleep with her which was questionable due to the bad relationship between her and the deceased. She was not able to tell how the child was killed.

PW-11- MW is the daughter of accused was sleeping in the same room with deceased on the fateful night. She was however not truthful and this forced the prosecution to produce her statement as exhibit -3- and it substantially differed with what she told the court. In her statement she told police that the accused had removed the deceased from the room where she was sleeping and she heard deceased saying there was a strange man coming for him. In the morning when she woke up the accused and deceased were not in the house.

The evidence adduced by the prosecution witnesses show that the deceased slept in the same house with accused on that fateful night. The accused had informed a witness (PW-2-) that he had removed the deceased from the bed where he was sleeping that night. The accused was not in her house early that morning when the deceased went missing. On her return that morning she had heavily bloodstained hand which had a plaster. She also gave a different account of where she was that morning. PW1, 2 and PW-6- gave a well corroborated account that the accused had blood stains on the plaster which was on one of her hands. PW-1- testified she is the one who used water and a hand towel to wipe out the blood. I found no reason to doubt the three witnesses who testified that the accused had bloodstains on her hand. The accused in her defence denied that she had bloodstains. I find this a mere denial. The deceased had been severely injured on the head. The accused was the last person to be seen with the deceased when he was alive when she removed him from where she was sleeping. The fact that the accused was not in her house early that morning and on her return she had bloodstains on her hand leads to the investable conclusion that the accused participated and was involved in the murder of the deceased.

This being a murder charge the prosecution had the burden to prove the charge beyond any reasonable doubts. It was upon the prosecution to adduce evidence to prove that the accused is the one who inflict the injuries on the deceased and that the injuries led to his death and further that at the time she inflict the injuries on the deceased she had formed the necessary intention to either cause death or grievous harm on the deceased. The issues which arise for determination are,

- Mens rea
- Circumstantial evidence.

1. Mens rea:

Section 203 of the Penal Code:

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

Section 204 of the Penal Code:

“Any person convicted of murder shall be sentenced to death”.

Section 206 of the Penal Code:

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

(a) An intention to cause 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 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”.

In the Case of John Mutuma Gatobu –vs- Republic (2015)eKLR :

The Court of Appeal stated;

malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code.....

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feeling. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.

In Joseph Kimani Njau –vs- Republic (2014) eKLR:

The Court of Appeal stated;

In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution

In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes of death of another.

Further in Dickson Mwangi Munene & Another –vs- Republic (2014)eKLR:

The Court of Appeal stated;

As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which is the mens rea of the crime of murder.

In a charge of murder it must be shown that the accused’s conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability of moral blameworthy on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter.

As per the evidence, the deceased who was the accused step-son had been staying with her for a period of two months before the incident date. The deceased went missing on the morning of 25/10/2013 after he had spent the night at the accused home together with PW 11. PW1 confirmed to having washed the accused’s bloody hands on 25/10/2013. PW -2- confirmed that in the morning she inquired about the whereabouts of the accused and the deceased from PW 11 who informed her that they were both not in the house.

Nobody saw him on the said morning except the accused who stated she left him when she went to PW 6 house.

PW II who had initially refused to testify claiming that she had been warned, later adduced evidence contrary to the statement she had recorded at the police station. While testifying the court noted that she appeared fidgeting and nervous. She contradicts even the evidence of the accused and stated she slept with the deceased until morning when the accused made tea. Thereafter she made lunch which they ate together with dad and the deceased and in the evening they ate supper and slept. However, the accused confirmed that on the incident date, PWII went to school and she remained with the deceased in the house whereby she went to the house of PW 6.

Her statement was that the accused had called the deceased at night to spend the night with her. In the morning the accused’s

door was locked from outside and she went to school (this corroborates the evidence of PW 2 whom she had informed she did not know whereabouts of the two). After coming back from school she inquired of deceased's whereabouts and accused said she did not know and they ate food and slept.

Bearing in mind that she had been chased by her father PW 4 and was currently staying with the parents of the accused there was likelihood of interference and why she proceeded to change her statement.

None of the prosecution witness actually witnessed the incident therefore the evidence was based on circumstantial evidence.

The deceased was a step-son of the accused. Evidence was adduced by PW3 that the accused and the deceased did not enjoy good relationship. He testified that the child had complained that the accused was denying him food and tea. This was confirmed by PW-11- in her statement that the accused used to deny the deceased food and she had to secretly give food to the deceased. The accused was living with the deceased who was not her child. The fact that she was mistreating him and denying him food and tea shows that she did not like this child and she must have hatched a plan to eliminate him. The bad relationship the accused had with the deceased was what could have led her to eliminate the deceased. The accused may have formed an intention to cause the death of the deceased as what she was doing to the deceased had been known by the members of the family (PW-3) who intervened and told deceased to be eating in his house. It is not unusual for step parents to eliminate their step children who they feel have become a burden.

2. Circumstantial evidence.

Republic –vs- Michael Muriuki Munyuri (2014) eKLR:

The Court held;

In SAWE –V- REP (2003) KLR364 the Court of Appeal held.

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. -----

5. -----

6. -----

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

In ABANGA alias ONYANGO –V- REP CR.A NO. 32 of 1990(UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“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.”

There is circumstantial evidence which has been adduced in this case since it was confirmed that bad blood existed between the deceased and the accused who was his step-mother and the deceased was frequently denied food. Furthermore, she was the last one to be seen with the deceased on the night of 23/10/2013 and on 24/10/2013 her plastered hand had blood which she asked PW1 to assist clean it.

Contradictions in accused evidence;

- She had informed PW2 that she slept with the deceased the previous night but left him sitting on the bed but upon coming back from PW6 house he was not there. In her defence she stated that the deceased slept with PW 11 on that night.
- The accused stated that she had gone to PW6 to ask her to assist plant beans but she informed PW 6 that she had taken some farm hand to plant beans.
- PW3 informed PW4 of the disappearance of the deceased and told him to come home whereby he tried to call the accused but she was unavailable thus he called Martha who took the phone to her. The accused however states that she was the one

who informed PW4 to come home.

In light of the above, the circumstantial evidence pointed to the accused as the culprit while her defence on the other hand was mere denial and with lots of contradictions.

Having analyzed the evidence on record, I am satisfied that the prosecution proved beyond reasonable doubt that the deceased died through the unlawful and voluntary actions of the accused person. There is adequate evidence which establishes beyond doubt the existence of mens rea. The accused therefore is guilty of murder and is convicted accordingly.

L. W. GITARI

JUDGE

12/4/18

Read out in open court, accused present, Mr. Mwangi holding brief for Mr. Ngigi for accused, M/s Kiarie for State, C/A Kinyua this 12/4/18.

L. W. GITARI

JUDGE

M/s Kiarie:-

Mitigation:-

Mr. Mwangi:-

The accused is remorseful. She is a 1st offender. She is a mother of two kids, one aged five and the other twelve. She is also of young age 31 years old. She is the sole bread winner of her two children. Though she is charged with a capital offence, there is new jurisprudence on sentence. I pray for leniency. I urge court to give a lesser sentence.

L. W. GITARI

JUDGE

SENTENCE

I note that this offence is very serious. Though the accused is remorseful, it should not escape the mind of this court that the accused caused the death of an innocent young soul who the accused should have nurtured other than butcher him mercilessly. These incidents of violence against children who are helpless and defenseless must be discouraged. I am of the opinion that the sentence provided is deserved. I therefore sentence the accused to death as provided under the law. There is right of appeal within 14 days.

Dated and delivered at Kerugoya this 12th day of April, 2018

L. W. GITARI

JUDGE

12/4/18