



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO.31 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**M M.....ACCUSED**

**RULING ON CASE TO ANSWER**

**Introduction**

1. The accused **M M** was charged with the offence of Murder of **B M** contrary to **Section 202** read with **Section 205 of the Penal Code**. The deceased was a five year old son of the accused person.
2. The defence, in submitting for a no case to answer summarized the prosecution's case. The court has gone through the evidence provided by the nine (9) prosecution witnesses. The evidence can be summed thus;

PW1 testified that in the morning of 12<sup>th</sup> May, 2014 she was woken up by screams in their homestead and on further investigation she found that it was her mother's house help Mary Mukui screaming for help from the dam. The witness testified that the gate to the dam was locked and M M and her child were inside the dam. According to the testimony given by PW1 the witness did not see M M go into the dam, and the witness could not access the dam without a key for the gate and could not explain how the accused got into the dam with the gate locked.

From the testimony of Pw2 it follows that she only saw that accused the previous night. The witness did not see the accused in the morning of the incident, she did not see the accused and the child that morning although they slept in the same house and she was only informed of the incident by the village elder thus she did not see M M and her child in the dam.

PW3 testified that he heard a scream coming from the dam and he woke up and rushed toward the scream, when he got to the dam he found that the accused was in the dam with her child and the accused was screaming for help and also screaming for her child. The witness also testified that when he got to the dam the accused was also drowning and he had to rescue her by pulling her out of the dam with a rope and he could not rescue the child since he was already dead. According to the testimony of the witness that was the first time he had seen the accused that day when he found the accused and the child in the dam.

According to PW7 the accused person left the house with her deceased son on her back and left the witness in the bathroom. The witness testified that the deceased was dressed in his school uniform and this led the witness to conclude that the accused person was taking her son to school. The witness testified that few moments after the accused had left the accused came back again looking disturbed and told the

witness that some people were following her and that she required escort to take her son to school. The witness stated that she never took the accused seriously because she thought that the accused was deluded since some years back the accused had a mental illness for which the accused was prayed.

PW9 who is A Police Officer and also the investigating officer testified that the accused person had pushed her child into the dam and had also tried to commit suicide. This statement by the officer is contradictory from all the information given by the other witnesses who got to the dam first. It is not possible for a person to decide to commit suicide to also scream for help while she is drowning. PW3 testified that when he got to the dam the accused was screaming for help and also screaming for her child to be rescued. This only means the officer did not do any conclusive investigations.

The police did not also investigate the fact that the earlier that day the accused person had told PW7 that she was being followed by some people and that she required escort to take her son to school. It is very possible that those same people following her would have led her to fear for her life and the life of her son and in that moment led her to run and jump over the fence guarding the dam to hide and at that moment accidentally get into the dam which is when she screamed for help.

3. The defence counsel referred to the investigating officer's statement that when the accused was brought to his office escorted by members of the public she looked shocked and disturbed. The defence submitted that the only explanation for this is that the accused was in shock because of the loss of her child whom she had tried to save but failed. The defence submitted that the investigating officer states that the accused person confessed to pushing her son into the dam but never produced any evidence of such confession. It was submitted that this statement was fabricated. The defence submitted that murder is defined as the killing of another human being with malice or forethought. The prosecution has not proved a single ingredient of the offence. It did not produce any evidence that the accused person intended to kill her son in the incident. The prosecution did not also produce any evidence to show that it is the accused person who pushed her son into the dam. It was submitted that the prosecution has failed to make a *prima facie* case against the accused person.

4. The State did not submit on the case to answer and relied on the pleadings.

### **Determination**

5. The role of this court is to establish if a *prima facie* case has been established to put the accused person on her defence. A *prima facie* case in criminal proceedings is a case which, after the close of the prosecution's case, discloses a viable trial, a trial whereupon the defence can reasonably be called upon to explain his or her conduct in the alleged crime. An establishment of a case to answer requires an accused person to be accountable by way of evidence. That accountability can only happen if the prosecution has established principles upon which the accused can be called to answer. Among those principles is that the prosecution's evidence has established a case as charged, that is, the ingredients of the charge must be clear by the time the prosecution closes its case.

6. In the present case, there is a common issue of concern, right from the institution of the case, and that is, the mental capacity of the accused person. The accused was assessed for mental capacity on **25<sup>th</sup> June, 2014** by **Dr. Muuga Edgar**, a Psychiatrist who found out that the accused was not fit to plead to the charge. Further mental assessment was then scheduled in the presence of accused's relatives. A further report dated **28<sup>th</sup> January, 2015** by the same doctor cleared the accused fit to plead. However, the second assessment was not done in the presence of the accused's relatives as the doctor had earlier requested. Nonetheless the doctor was satisfied that the accused was fit to plead to the charge and so she pleaded and the case proceeded.

7. In the course of the proceedings however, the witnesses stated without any contradiction that the accused was mentally unstable.

**8. PW9 No. 58350 Cpl. Gideon Kilimo** testified that the accused admitted pushing the child into the pond to die. In cross-examination the same witness testified that he had noted that the accused person

looked disturbed, and appeared to be in shock when she was being investigated by PW9. There are also indications that the accused also intended to kill herself due to her mental instability.

9. So clearly, there appears to be a disconnect between the charge of Murder, and the prosecution's evidence at the close of its case.

10. In criminal jurisprudence there are two ingredients to be proved in order to prove a charge, that is, action, *actus reus*, and mental capacity, that is, *mens rea*. The two must meet. In other words, there must be the intention to commit an offence, and the action for committing the offence.

11. In this case, with main witnesses raising doubts about the accused's mental capacity, and with mental assessment reports which, despite indicating that the accused is fit to plead, actually add more to confirm the accused's unstable state of the mind, it is clear that it would be a herculean task for the prosecution to establish that *actus reus* met *mens rea* and that the accused had an intention to kill her child. There is no need, and no time, for this court to experiment whether or not the prosecution will succeed. The fact is that the ingredients of the offence of Murder have not been established at the close of the prosecution's case.

12. The verdict of the court is that the prosecution has not established a case to be answered by the accused. The accused is therefore set free for no case to answer.

Orders accordingly.

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**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2017**

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**DAVID KEMEI**

**JUDGE**

**In the presence of:**

Court Assistant – Kimonge

Kamanda – for accused

Saoli – for State