



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 39 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

C L K.....ACCUSED

JUDGEMENT

C L K, hereinafter “the accused” is facing two charges of murder contrary to section 203 as read with section 204 of the Penal Code. Both offences are said to have been committed on 21st January 2013 at Kangemi Area, Dagoretti District within Nairobi County. The victims are B B, a female child aged 5 years and A A, a male infant aged 8 months. Both were children of the deceased. She pleaded not guilty to the two charges.

To support the case, the prosecution called nine (9) witnesses. They adduced evidence that the accused lived with her husband one P B at Trench in Kangemi. W S M (PW1), a cousin to P B told the court that he received a report from I M (PW3) mother to P B that the accused had called I M and told her to wait for three coffins. I M confirmed receiving the call from the accused and informing W S M about it. Shortly thereafter I M received a call from P B that the accused had killed the children. Both W S M and I M travelled to Nairobi. They confirmed that the two children had been killed and that the accused was admitted in hospital with a stab wound in the stomach.

Daniel Kakai (PW2) was the caretaker at the plot where the family of the accused lived. The plot comprised of 54 units and was owned by one George Ritho. Daniel operated a kiosk about 100 metres from the accused’s house. On 21st January 2013 at about 4.30pm Daniel was informed by his wife Agnes Kanana that the accused had called her (Agnes) on her phone and informed her that she (the accused) had killed her two children and would commit suicide. Daniel informed the court that his wife Agnes was a close friend of the accused. On receiving this information Daniel ran to Mr. Ritho’s house to inform him. He did not find him in. He found the wife and informed her. Both Daniel and Ritho’s wife went to accused’s house and found the door locked from inside. They could hear labored breathing from inside the house. They broke open the door and found the little boy A A lying on the sofa with a stab wounds. The girl BB, too, had been stabbed on the stomach. She was still alive. The accused was lying on the floor with a stab wound on the abdomen. The knife was still sticking from her abdomen. The girl was rushed to a nearby clinic for treatment. She did not survive. A taxi was hired to take the accused to hospital. The accused and the bodies of her two children were placed in the taxi. She was taken to Kikuyu Mission Hospital.

PW4 SGT Zachaeus Kirumi, an administration police officer, confirmed receiving report from members of public about the death of the two children. He visited the scene and confirmed finding the accused injured with a knife sticking from her stomach.

The other prosecution witnesses are Dr. Peter Muriuki Ndegwa (PW5) who examined the bodies of the two children and confirmed they both died as a result of exsanguination (excessive bleeding) due to penetrating stab wounds; PC Morris Mukara (PW6) the investigating officer; PC Joseph Kigara (PW7) an officer performing crime scenes duties. He took 15 photographs of the bodies of the two children. He produced the photographs as Exhibit 3 (a) to 3 (o); Dr. Joseph Maundu (PW8) who examined and certified the accused as mentally fit to stand trial. He also testified that the accused had a stitched stab wound on the abdomen and had been operated on the abdomen and Mr. Henry Kiptoo Sang (PW9) a Government Analyst who examined the clothes and other items recovered from the scene and confirmed the clothes were stained with both the victims' blood.

The accused opted to testify without taking oath. She told the court that she did not kill her children nor stab herself. She told the court that her husband P B is a robber and that on 20th January 2013 he did not spend the night at home. She said that he came home on 21st January 2013 with some friends one of who was carrying a briefcase. She named one of the friends of her husband as Brian. She testified that her husband told her to cook for them and she did so and served them; that after eating the husband and the friends disagreed on the contents of the briefcase and the husband pleaded with the friends that he would bring the stuff that was missing. She testified that the husband and one of his friends struggled over a knife and as a result the husband was injured on the hand; that the husband ran away leaving his family and his friends at home; that the friends of her husband attacked her and the children and stabbed them. She said she lost consciousness and when she regained it, she found herself in hospital. She denied calling her mother in law to tell her to wait for the two coffins. She denied that her husband had suffered shock and became deaf due to the death of the children. She said that her husband was arrested and charged with robbery with violence before the Chief Magistrate's Court in Criminal Case Number 346 of 2014, was convicted and sentenced to death. She said that the husband was serving sentence at Kamiti Maximum Prison.

In her submissions after the close of the defence case, defence counsel Mrs. B. E. Nyamongo stated that the evidence by the prosecution is based on hearsay since no witness saw the accused commit the alleged offences; that crucial witnesses, for instance the tenants in the 54 units in the accused's neighbourhood and the wife of PW2, the caretaker were not called to testify ; that leaving out these witnesses can only mean that their evidence was adverse to the prosecution case; that PW3, the mother in law to the accused was not a truthful witness because she gave selective evidence in an attempt to protect her son and implicate the accused; that PW3 could not remember the telephone number that the accused used to call her; that PW1 and PW3 lied by telling the court that the husband to the accused went into a coma due to the shock of losing two children when this was not true and that the pathologist PW5 did not know the time of death of the two children or the weapon used to stab them. It was further submitted that the scenes of crime officer PW7 did not take photographs of the scene but photographed the bodies at the mortuary. Mrs. Nyamongo submitted that the prosecution has failed to prove this case beyond reasonable doubt and asked the court to acquit her client.

Rival submissions by the prosecution are that the case has been proved beyond reasonable doubt. The prosecution counsel submitted that the prosecution has proved the intention to cause the death of the two children by adducing evidence that the accused has locked the door to the house where she and the children were from inside and that she had called her mother in law to tell her to wait for coffins. It was further submitted that the prosecution adduced evidence that the accused was the only one who could have locked the house since she was inside the house with her two children. Prosecution counsel urged the court to find the case proved beyond reasonable doubt and convict the accused for murder.

I have flagged out the issues for determination as follows:

- (i) Whether the deaths of B B and A A occurred.
- (ii) Whether the accused person caused the deaths of A A and B B either by an unlawful act or omission.
- (iii) If so, whether the accused possessed malice aforethought.

(iv) Whether the prosecution evidence hearsay.

Dr. Peter Muriuki Ndegwa examined the bodies of the two children at the City Mortuary on 30th January 2013. A A was aged 8 months. He had two penetrating stab wounds on the left praecordium. The ventricles were slit twice. The cause of death was due to a severe chest injury due to penetrating wounds. B B was aged 5 years. She had a xiphisternal penetrating stab wound with bowels hanging out. She died due to exsanguination due to abdominal injury due to penetrating stab wound. The bodies of the two children were identified by W S M and I M.

I have taken into account submission by the defence that the doctor did not indicate the time the two children died or the type of weapon causing the injuries leading to their death. I find that I have no doubt in my mind that given the available evidence, the two children died, one inside the house and the other on the way to hospital. I have noted that during cross examination the pathologist told the court that the penetrating stab wound was caused by a sharp narrow object such as a knife. It should be noted that the doctor was giving his opinion informed by the examination he had performed on the bodies. It is my finding therefore that the prosecution has proved the deaths of the two children beyond reasonable doubt.

I will consider the remaining three issues together because they are intertwined. It is the evidence in respect of whether the accused killed her children and whether she had possessed malice aforethought that is being challenged by the defence as hearsay.

By virtue of Section 62 of the Evidence Act (Cap 81 Laws of Kenya), all facts, except contents of documents, may be proved by oral evidence. Oral evidence is defined under Section 63 (1) and (2) of the same Act to mean direct evidence. This is evidence by a witness which that witness has perceived in the normal manner using the five senses of touch, smell, sight, taste and hearing. Any other evidence given in court by a witness who did not perceive the fact in the manner defined is hearsay. Generally, hearsay evidence is not admissible. But this must be clarified further. In *Subramaniam v Public Prosecutor (1956) WLR 965* Justice De Silva had this to say on hearsay evidence:

“A statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible. If however the statement is offered in evidence, not to prove the truth of the facts contained in the statement but only to prove that the statement was in fact made it is not hearsay and it is admissible.”

This is to say that if what was stated by the witness who was not called as a witness is offered in evidence to prove the truth of the facts contained in the statement, this is hearsay. However, if it is not meant to prove the truth of the statement but only to prove that it was in fact made by that person it is not hearsay and is admissible. In the case before me, PW3 Kakai told the court that his wife Agnes who did not come to court to testify told him that the accused had called her and informed her that she (accused) was planning to kill her two children and herself. On the face of this statement, it is hearsay and not admissible if it was offered to prove that what Agnes told Kakai is the truth. However, it is not hearsay if it was meant to inform the court that this is what Kakai heard Agnes telling him. The issue did not stop at receiving the information from Agnes. Kakai acted on that information. He went to look for the Landlord. He did not find him. He found the wife of the Landlord. In her company Kakai went to the house of the accused. He could hear labored breathing from the house. The door to accused's house was locked from inside. They had to break it open to gain access. When they entered the house they found one child A A lying on the sofa dead and the other child B B critically injured. They found the accused lying on the floor with abdominal stab wound and knife still stuck in the abdomen. The wife of the Landlord was not a witness. This leaves the evidence of Kakai on what they found. A fact can be proved by evidence of a single witness. Care must however be taken to ensure there is no miscarriage of justice. I observed Kakai give evidence. He impressed me as a truthful witness. I find nothing in evidence in chief

or in his cross-examination to indicate that he was lying to the court and I find no reason that he fabricated the evidence against the accused.

The accused was the only person inside her house when Kakai and the Landlord's wife broke open the door. She was in company of her two children A A aged 8 months and B B aged 5 years. It is doubtful to this court that the house was locked by someone else who escaped. Circumstantial evidence points to the accused as the only person who could have locked the door from inside.

The accused claimed that after her husband left, the friends he had brought home stabbed her and her children. She singled out one Brian as the person who stabbed her. If her evidence is to be believed, it does not explain how the door got locked from inside. She has no duty to prove her innocence but I find her evidence doubtful and incredible. Her husband may be a criminal as she alleges. I am aware the defence has attached to the submissions copy of judgement in Chief Magistrate's Court Criminal Case Number 346 of 2014 where one P B S was jointly charged with others, was tried and convicted for the offences of robbery with violence. Even if this court were to believe that the P B indicated in that judgment is the same one who is husband to accused, this court in arriving at the findings in this case is guided by the law and evidence.

I agree with defence counsel that the case for the prosecution is anchored on circumstantial evidence. This is evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue (see **Mohamed and 3 others v. Republic [2005] 1KLR**). In this case and having considered and believed the evidence of Kakai, the circumstances are such that the accused was found inside a locked house with the little children. There was no entry into the house because the door was locked from inside. Kakai and others had to break it open to gain access. The children and the accused had been injured, one child was dead the other child was critically injured. The accused was also critically injured. The inference to be drawn from these circumstances is that there was no other person other than the accused who could have locked the door from inside and stabbed the children and herself. Had such a person existed, there would have been an escape route from the house which this court was not told it existed.

I M received a call from the accused on the same day the children were killed and told her to wait for coffins. It is true that I M told the court that she did not remember the telephone number of the accused and that she had not met the parents of the accused. This, in my view, does not mean she was lying to the court. I M was cross examined at length and she did not change her evidence. Her demeanor on the witness box was convincing and I find no reason to disbelieve her evidence that the accused called her. She told the court that she was not aware the accused and her husband were having any domestic problems but described them as hot tempered people.

I agree with the defence counsel that the investigations were not carried out in an exhaustive manner. There were neighbours who may have seen or heard something. Agnes and the wife of the Landlord were not summoned to testify and this court was not given reasons as to why. However, even with these failures on the part of the prosecution and the investigating officer, I have considered the available evidence and I am persuaded to find that the accused is the person who stabbed her two children and then stabbed herself. Before she did so, she called her mother in law and her friend Agnes and told them she would do so. This is cry for help in my view and had action been taken immediately Agnes and I M received those calls, perhaps the children would have been rescued. As stated in this judgement, the information given to Kakai by Agnes his wife led Kakai to go to the house of the accused. Further this court cannot ignore the evidence of I M that the accused called her and told her to wait for two coffins.

It is my finding therefore that the deaths of the two children A A and B B have been proved beyond reasonable doubt. I am also persuaded that the accused is the person who stabbed the children thereby occasioning fatal injuries that led to the death of the two children. The remaining issue is whether the accused had formed the intention to kill her two children.

In the course of determining this case, this court could not help but wonder what drove the accused to kill her own children and attempt to end her own life; or what frame of mind she was in before she committed

these heinous acts; or whether she was capable of making rational decisions and knowing the consequences of her actions. The accused did not raise defence of insanity or provocation or any available defences. Instead she told the court that the friends of her husband are the ones that stabbed her and her children which version this court has discounted. It is true she called her mother in law about what she intended to do. She also called Agnes and threatened to kill her two children and herself. I have stated in this judgement that I believe this evidence because the information was acted on by Kakai and confirmed to be so. I must admit that I have agonized over her mental condition at the time. I cannot help wondering what would drive a mother, a giver and nurturer of life, to end the lives of her little helpless children in this cruel manner. Despite this agony, this is a court of law that must be guided by the law and evidence. Evidence shows what the accused did. By calling her mother-in-law and Agnes the accused seemed to have made up her mind on what to do. By locking the door from inside, the accused prepared to execute that plan by stabbing her helpless children and herself. I find that I cannot run away from the un-escapable conclusion that she had formed the intention to commit the two crimes. Consequently, I find the two offences of murder proved beyond reasonable doubt. As a result, I hereby convict the accused C L K for the two counts of murder. It is so ordered.

Dated, signed and delivered on this 12th day of April 2017

S. N. Mutuku

Judge