



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO.34 OF 2013
REPUBLICPROSECUTOR
VERSUS
JACKLINE LIYEMA MUKOTO.....ACCUSED

J U D G M E N T

Introduction

1. The accused herein JACKLINE LIYEMA MUKOTO is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 1st day of July 2013 at about 10.00am at Namukhokhome village, Namirama sub location, Bunyala East location in Navakholo district within Kakamega County the accused JACKLINE LIYEMA MUKOTO murdered one DORINE NANJALA MUKOTO.
2. After the charge and all its ingredients were read and explained to the accused in Kiswahili a language she understood, she pleaded not guilty to the charge and the case proceeded before Hon. Mr. Justice Chitembwe who was later transferred after taking the evidence of seven (7) Prosecution witnesses. The accused was represented by Mrs. Muleshe Advocate. Directions were taken before this Court in compliance with Section 200(3) of the CPC and the case proceeded from where it had reached before Hon. Mr Justice Chitembwe.

The Prosecution Case

3. The Prosecution called nine (9) witnesses. ESTHER AMUNGA WANJALA (PW1) stated that the accused was the wife of JAFRED her son who testified as PW2. She explained that the accused came from church on that fateful day and found Jared, the accused's husband tethering cows. Soon after that PW1 was told by one of the children that the accused had sat on the child. Police went to the scene and took photos and the child (deceased) was later taken to the mortuary. When she went to the scene, she saw the accused at the scene and stated that the accused was laughing. No weapon was found at the scene.
4. On cross examination by Mrs. Muleshe for the accused, PW1 explained that she did not witness the incident but found the child had already died. She also explained that on the previous night the accused had gone for a church meeting at WATEULE KWA WOTE church.
5. The husband to the accused JARED MUKOTO WANJALA (PW2) testified that on the 1/7/2013 he was with the children as the wife had gone for a church meeting. He was with the children at his mother's compound. When the accused came home after the church service, the deceased ran to her upon seeing her. At that time, PW2 was tethering cows. Shortly thereafter his son Emmanuel informed his grandmother PW1, that the accused had sat on the child. He rushed to the scene only to find the child had been killed. They notified the Police who went to the scene. He explained that the deceased was his child and was aged two (2) years.

6. PW2 further testified he found the accused at the door and before she went to the bedroom and started laughing. There was no weapon at the scene. The deceased body was later taken to the Kakamega Provincial General Hospital mortuary. On cross examination PW2 told the Court that he did not witness the incident and that they did not attend the same church with the accused, though they had been married for about ten (10) years and had had no dispute between them.
7. PW3 ASMAN MULIKO OBIRO testified that he did community policing in that area. On the 1/7/2013 he was at his home when he heard noise. He went to the accused's house where he found the child placed on the bed. He claimed that people wanted to assault the accused and as such he took her to Lutaso Police Station where she recorded her statement. He added that the Police went to the scene and took away the body of the deceased.
8. On cross examination PW3 explained that he found the accused and the deceased at the scene. PW4 JOTHAM WANYAMA WANJALA identified the body of the deceased for post mortem purposes. PW5 was taken through a *voire dire* examination and the Court allowed her to testify without being sworn. SHARON MUKOTO (PW5) told the Court that on the material day her mother, the accused went to church and slept there and when she came back the following day she sat on the child while he was standing. She said that she was with her brother Emmanuel who ran to their grandmother to inform her that the accused had sat on their younger sister Dorine.
9. PW6 EMMANUEL WANJALA was allowed to give sworn testimony after *voir dire* examination was conducted. He told the Court that he was ten (10) years old. He testified that their mother (accused) went to church on a Sunday. She slept there and went back home in the morning. He further testified that he had told his grandmother that his mother had not slept at home that night. He stated that when the accused came back from church, she strangled their sister Dorine by holding her on the neck. The child did not cry and did not wake up. He then ran and informed their grandmother who informed their father. Their father went to the scene and found the child had died. The Police came to their home and took the body. Emmanuel identified the mother in Court.
10. Upon cross examined by Mrs Muleshe, PW6 explained that when their mother came from the church she did not greet them or cook for them. He also stated that when the child (deceased) saw the accused, she wanted to go to her. He also stated, that at the material time, there was no other person in the house.
11. DR. DICKSON MCHANA MWALUDINDI (PW7) was the one who did post mortem examination on Dorine. The post mortem was done on 3/7/2013 and the body was identified by JAFRED WANJALA (father) and JOTHAM WANYAMA WANJALA (uncle). He did the post mortem two (2) days after the death of the deceased.
12. Dr. Mchana stated that observing the body he found an abrasion measuring 1cm in diameter on the lower cheek but no defence injuries, no signs of chronic ill health. Internally there was a fracture on a bone just above the neck and one artery on the left leg was broken. He explained that the deceased died within four (4) hours of her last meal and that blood vessels on the brain were congested with no swelling. He concluded that the cause of death was asphyxia due to strangulation. He produced the duly signed post mortem report as "PEXh 1".
13. Inspector PETER ALINDI of AP Force no.210986 from Navakholo sub county told the Court that the accused was taken to Lutaso AP Posts by three men on the 1/07/2013 at about 11.00a.m. The three men alleged that the accused had killed her daughter at Namukhokhome village. He booked the accused and placed her in custody. He later went to the scene where he saw the child lying motionless on a wooden chair. He observed that the child had no visible injuries. He then informed the OCS of Navakholo Police Station who arranged for a vehicle which collected the body and also took the suspect to Navakholo Police station. PW8 identified the accused in the dock.
14. PW9 No.58682 INSPECTOR JOHN IHUGO Deputy OCS Navakholo Police Station confirmed that he was called by the in charge of Lutaso AP Post and informed him of an incident of murder at Namukhokhome village of Lutaso sub location. He then proceeded to the scene accompanied by Sgt Musyoki where he met Inspector Alindi together with members of public. He was directed to the house where he saw the body of a baby girl lying on a sofa set. He interrogated a few people among them the accused's son Emmanuel (PW6) and Sharon (PW5). The two informed him that the previous night their mother was at a "kesha" and when she returned home in the morning she grabbed the deceased, threw her to the ground sat on her stomach and started

- strangling her.
15. PW9 also stated that Emmanuel told him that seeing the strange behavior by his mother, he ran and called his grandmother who went with his father. Inside the house they found the mother standing at the door while the baby (deceased) was lying on the floor dead. The father put the dead child on the sofa set. PW9 then re-arrested the accused and took the body to the Kakamega Provincial General Hospital for post mortem examination which he witnessed.
 16. On cross examination PW9 explained that what he told the Court is what he was told by those who were at the scene, and that he was the one who recorded witness statements.
 17. The Prosecution closed its case after PW9 testified. This Court considered the evidence by the Prosecution and was satisfied that the Prosecution had established a prima facie case against the accused person and put her on her defence. After complying with the provisions of Section 306 (2) of the Criminal Procedure Code the accused opted to give sworn evidence. She had no witness to call.

Defence Case

18. JACKLINE LIYEMA MUKOTO the accused herein testified that she knew that she was in Court on allegations of murdering Dorine Nanjala. She recalled that on the 01/07/2013 though she also claimed she did not remember the date, she just found herself in jail after she gained consciousness in the morning on a day in the month of September. She claimed that she never went to church as alleged and that before she was arrested she was on treatment for HIV. She acknowledged that DORINE NANJALA MUKOTO was her child aged (2) years old. She claimed that she did not know whether the child was alive or not and she could also not tell whether she killed the child or not. That she just found herself in jail.
19. She was cross examined by Mr. Omwenga. She explained that she was on treatment for HIV but did not have any evidence to prove it. She maintained that she did not know whether she went for overnight prayers and also that she did not remember whether she even got hold of her child. She said that all she remembered was that she saw herself in heaven. On being examined by the Court, accused admitted that she knew her name. She also said that she heard a voice telling her that she was in heaven.

Issues for Determination

20. The issues for determination is whether the Prosecution has satisfied the provisions of Sections 203 and 206 of the Penal Code. Section 203 of the Penal Code provides that “**Any person who of malice aforethought causes the death of another person by an unlawful act or omission commits and is guilty of murder.**” There are three essential ingredients of the offence of murder which the Prosecution must prove beyond reasonable doubt:-

- (a) death of a person
- (b) That the accused caused that death through an unlawful act or omission and
- (c) That the accused had malice aforethought.

Analysis and Findings

21. The first ingredient to be proved by the Prosecution in this case is that the deceased died. The Prosecution witnesses (PW1 to PW6) saw the body of the deceased lying lifeless on a sofa on 1/7/2013. PW4 identified the body of the deceased for post mortem examination on the 3/7/2013 when PW7 conducted the post mortem examination. The body of the deceased was also identified by PW2 who was her father. It was the evidence of PW7, DR. DICKSON MCHANA MWALUDINDI that the deceased had an abrasion on the left lower cheek with no defence injuries. He also said there was no evidence that the deceased suffered any chronic ill health. Internally the deceased had a fracture on a bone just above the neck and one artery on the left leg was broken. In his opinion the cause of death was asphyxia due to strangulation. The Doctor

produced the Post Mortem Report which was marked as “PExhibit 1”.The Prosecution therefore proved beyond reasonable doubt that the deceased died on 1/07/2013 from asphyxia due to strangulation.

22. The second ingredient of murder to be proved in this case is that the accused caused the death of the deceased through an unlawful act or omission. In essence the Prosecution is supposed to prove first that the accused is the person who strangled the deceased and secondly that the strangulation of the deceased was unlawful.
23. PW6 who is a minor together with his sister PW5 were the only witnesses who saw what happened to the deceased on the 1/7/2013. Although the accused testified that she did not remember going to a church meeting for an overnight prayer meeting the previous night, she was clearly not in her house that night. The children PW5 and PW6 together with the deceased were therefore excited to see her the next morning. According to PW6 on cross examination the deceased told the father, PW2, upon seeing her mother that she wanted to go and see her. PW6 testified that when the mother came home, she never greeted any of them nor did she cook for them any food, but got hold of the deceased, threw her down, sat on her and then twisted her neck.
- 24.The issue of strangulation was corroborated by the injuries observed on the deceased during the post mortem examination. PW7 in his testimony said that the cause of death was asphyxia due to strangulation. I am satisfied that PW6 and PW5 saw their mother strangling the deceased. In his testimony PW6 said that “she held her on the neck.” PW7 confirmed that the deceased suffered a fractured bone just above the neck which is clear indication that the deceased was strangled. The other witnesses did not see the incident. They were only called after the incident. The accused has not denied that she was at home on the 1/07/2013 and that she was with the deceased before the deceased died. She was seen at the scene by PW1, PW2, PW3, PW5 and PW6. PW5 and PW6 saw her as she strangled the deceased. She was the only one at the scene. There was no weapon at the scene. The deceased also had no visible injuries.
- 25.From the circumstances herein the only person who could know what happened to the deceased is the accused person. Her defence is that of denial. PW9 the Investigating officer told the Court that Emmanuel told him that when he (Emmanuel) saw the strange behaviours of his mother, he ran and called his grandmother, PW1. It is normally standard procedure in cases of murder for the Police to take murder suspects for psychiatric evaluation and for evidence to be adduced showing that the mental status of an accused person is normal or otherwise.
- 26.In this particular case the Defence Counsel requested that the accused be taken for mental assessment before plea was taken. The Court ordered for the mental assessment and the result was that she was fit to take plea. She was accompanied for the examination by her sister Winnie. This Court also examined her after she had given her defence and she properly responded by stating her name and repeating what she had said on cross examination. Her “strange behavior” therefore cannot be construed to mean mental illness.
- 27.Having come to the conclusion that the accused was lucid and devoid of features of mental illness, this Court finds that the Prosecution has proved the second ingredient of murder in addition to proving that it is the accused who killed the deceased by strangling her which was an unlawful act.
- 28.Lastly this Court has to determine the issue of malice aforethought. Section 206 of the Penal Code defines malice aforethought in the following terms:-

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

- a. **An intention to cause the 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 is the 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.”**

29. In other words, the prosecution must prove the accused person herein committed any one of the four circumstances enumerated under Section 206 of the Penal Code. It is not a requirement for the Prosecution to prove all the circumstances.

30. The question that arises in the instant case is whether there is evidence on record tending to prove any of the circumstances stated above against the accused. As stated earlier, the accused herein was found to be of sound mental health. She was fit to stand trial. The circumstances of the case show that she was with the deceased. PW6 saw her strangling the deceased as she sat on her. Strangulation was found to be the cause of death.

31. It is my considered view that the accused must have known that sitting on a 2 year old child and twisting her neck would lead to the death of the deceased herein. The evidence that the accused was laughing raises some questions in my mind. Why was she laughing? Was it that she had accomplished a mission? It seems to me she was not remorseful or even surprised with her act. Her explanation that she regained consciousness while in the Police cells was not substantiated. None of the Prosecution witnesses testified that the accused lost consciousness at any one time either before or after her arrest. PW3 told the Court that they took the accused to the Police Station for fear that she would be assaulted by the crowd. It is my finding that accused was not beaten by anybody.

32. I find therefore that the Prosecution has established the requisite mens rea on the part of the accused person, and has also established that the accused had the requisite malice aforethought for the offence of murder. Having come to the above conclusion, this Court finds that the Prosecution has proved all the ingredients of the offence of murder against the accused person beyond all reasonable doubt. Accordingly, I find JACKLINE LIYEMA MUKOTO guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. I convict her of the same.

33. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 19th day of January 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Omwenga for the State

Mr. Shifwoka h/b for Mrs Muleshe for the Accused

Mr. Okoit - Court Assistant