



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HIGH COURT CRIMINAL CASE NO. 70 OF 2011

REPUBLIC PROSECUTOR

VERSUS

JACKLINE INGATO OTIENOACCUSED

RULING

The accused was charged with 3 counts of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 21st October 2011 at Mulaha Sub-location, Siaya District within Nyanza Province she murdered her three children Sheril Otieno (Count 1), Unity Apiyo Otieno (Count 2) and Peace Adongo Otieno (Count 3). She pleaded not guilty on all three counts and a trial ensued.

The Prosecution called a total of six witnesses. The star witnesses Margret Juma Otieno (PW1) the accused's sister in-law and Rose Akinyi Owito (PW2) the accused's mother in-law told the Court that they were in their farms working when at around 9AM on the material day they heard the accused shouting for help. According to PW2 she was calling out to her husband to go and take her to hospital and was saying that two children were already dead. On rushing to her house they found two children dead and two in critical condition. The latter two were taken to hospital but on the way there one died. These two witnesses told the Court that the accused was also taken to hospital. The Court heard that the accused and her husband were in the process of what is referred to as “establishing their own homestead” meaning building a home away from the home of her husband's parents and that only the accused and their four children were in the house at the material time. These two witnesses stated that they did not know what killed the children. However Macelus Oketch Murunga (PW3) the area Assistant chief testified that when he received a call from one Owino Oteyo it was to the effect that the accused had taken poison and also given it to her four children and two were already dead. It was he who directed that the children who were still alive be taken to hospital and sure enough by the time he got to the scene the accused and two children had been taken to hospital. The third child had died by the time he (PW3) arrived at the hospital. Like PW1, and PW2 he stated that the accused's relationship with her husband and the rest of the family was cordial.

Postmortems in respect of the deceased children were done at Siaya District Hospital. Doctor Evans Ogoti (PW4) produced the Postmortem reports on behalf of Dr. Oginya Keziah with who he worked at the Hospital but left. He stated that the cause of death for all the three deceased children was poisoning. Police Constable Timothy Muia (PW6) the Investigating Officer in the case testified that after word reached the police station that a woman had poisoned her children at about 10.30AM on the material day he went to the scene with the O.C.S.(Officer Commanding Station) and Assistant Chief. They found two children who were dead lying on a mattress. Their mother who had also ingested the poison had also been taken to hospital. When they entered the bedroom they found a bottle of diazol which they

suspected contained the poison. They took it and removed the bodies to the Mortuary. When he later visited the mother of the children now the accused at the hospital she told him that she did not know what had happened. He prepared the diazol bottle and sent it to the Government Chemist for analysis. According to Stephen Matinde Joel (PW5) an Assistant Government Chemist when he analyzed the contents of this bottle and the stomach samples of the three children taken during their postmortems he concluded that the same pesticide in the bottle was also in the stomach samples. He told the Court that the organophosphorus pesticides found in the bottle and in the stomach are poisonous and may be harmful to humans if ingested.

At the close of the prosecution's case Mr. Siganga, Learned Counsel for the accused, submitted that the prosecution had not established a prima facie case against the accused person sufficiently to warrant her to be put on her defence. He stated that apart from placing the accused at the scene of incident the prosecution failed to prove that the chemical belonged to or was handled by the accused person. He contended that there was evidence that the accused was also affected by the chemical and stated that the evidence of the government analyst was simplistic and did not comply with Section 8 of the Poisonous Substances Act. He also urged that the Postmortems conducted were simplistic and that there was no conclusion that whatever caused the deaths was linked to poisoning. In support of his submissions he relied on the following cases:

- ***Agnes Kasyoka Ibrahim V. Republic [2012] eKLR***
- ***Ruth Wanjiru Maina V. Republic [2011] eKLR***
- ***Republic V. Mathew Kitavi [2016] eKLR***

For the state it was submitted that scientific evidence is intended to aid the Court to reach a conclusion but is not a conclusion in itself; whether to place the accused on her defence depends on the cogency of the evidence and that the six witnesses have proved beyond reasonable doubt that the accused had malice aforethought to cause the death of the children. Prosecution Counsel, Miss Wakio, urged the Court to place the accused on her defence.

At this stage of the trial the issue for determination is whether or not the Prosecution has established a prima facie case against the accused person sufficiently to warrant her to be put on her defence.

What amounts to a prima facie case was defined in **Bhatt V. Republic [1957] E.A. 332**, cited with approval by my sister Sitati J in **Republic V. Mathew Kitavi (Supra)** as:-

“.....one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

From the evidence on record there is no doubt that the three deceased children died as a result of poisoning. This was the opinion of the doctor who performed the autopsies and in my view I see no reason to depart from that finding. There is also proof that the poison was the organophosphorous pesticides found in diazol. This again was the finding of the government analyst whose opinion I have seen no reason to disagree with. There is also evidence that the diazol was contained in a bottle found in the bedroom where the accused and the three deceased children were found. This was the evidence of the investigating officer PW6 much as the star witnesses do not seem to have seen it although the investigating officer (PW6) testified that it was pointed out to him by Rose Akinyi (PW2). If that was the case it did not come out in her testimony. This Court can only rely on the testimonies of the witnesses adduced in Court. The statements they record at the police station are never part of the record unless tendered in evidence.

To prove these charges the prosecution must not only establish that the deaths were as a result of an unlawful act or omission of the accused person but that it was with malice aforethought. In this case there was an attempt to establish that it was the accused person who poisoned the deceased children. I call it an attempt because whereas there is evidence, as I have stated, that the children died of poisoning and that the poison was contained in a bottle found in the bedroom, there is no evidence whatsoever to prove that it is the accused person who administered that poison to the children. Indeed there was no evidence at all

to connect the accused person to that bottle. The only person who seemed to suggest that the accused gave the poison to the children was the Assistant chief (PW3). A closer look at that evidence will however show that it was all hearsay as the person he alleges told him that the children were poisoned was never called as a witness. The accused's sister in-law (PW1) and mother in-law (PW2) who were the first to arrive at the scene did not mention the bottle and both stated they did not know what killed the children. If it was in their statements it did not come out in Court. As for the investigating officer he relied on what these two witnesses allegedly told him but which did not come out in their testimonies in Court. In the end there was no evidence at all to connect the accused to the administration of the poison. This is a huge gap in the Prosecution's case. Prosecution Counsel correctly submitted that the decision whether to put the accused on her defence depends on the cogency of the evidence. In this case I find that no reasonable tribunal properly directing its mind would convict the accused person were she to remain silent. To put her on her defence would be tantamount to asking her to fill the gap in the prosecution's case. Accordingly I find she has no case to answer and acquit her of the charges under Section 210 of the Criminal Procedure Code. She shall be released forthwith unless otherwise lawfully held.

It is so ordered.

Signed, dated and delivered at Kisumu this28th...day of ...April.... 2016

E. N. MAINA

JUDGE

In the presence of:-

Miss Wakio for the state

Mr. Siganga for the accused

CA: Sarah