



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 110 OF 2014

(Formerly Kisii High Court Criminal Case No. 94 of 2012)

REPUBLIC PROSECUTOR

-VERSUS-

NANCY ANYANGO.....ACCUSED

JUDGMENT

1. The Accused person herein, **NANCY ANYANGO**, was arraigned before the High Court of Kenya at Kisii on 19/11/2012 and faced three informations of murder. The particulars of the offences were as follows:-

“On the 13th July 2012 at Paporombe Village, Nyatike Sub-location, South East Kadem Location in Nyatike District within Migori County in the Republic of Kenya murdered FILEDON JUNIOR.

“On the 13th July 2012 at Paparombe Village, Nyatike Sub-location, South East Kadem Location in Nyatike District within Migori County in the Republic of Kenya murdered ALFONCE OKINYI.

“On the 13th July 2012 at Paparombe Village, Nyatike Sub- location, South East Kadem Location in Nyatike District within Migori County in the Republic of Kenya murdered FLEVION AKINYI.

2. The Accused person denied committing the offences and the case was set for hearing. Before the trial began the case was transferred to this Court where the trial was conducted as from October 2015 up to March 2016.

3. The prosecution availed nine witnesses who testified in support of the charges facing the Accused person. At the close of the prosecution's case, the Accused person was placed on her defence where she opted to give unsworn testimony.

4. I will now revisit the background of this case. On 13/07/2012 **DENNIS OCHIENG OMONDI (PW4)**, **VICTOR OTIENO OUMA (PW5)** and their two other friends went to River Gucha in Paporombe Village in Nyatike Sub-Location to take bath as usual. That was around 07:00pm but it was still not dark. As the four were waiting for the water in the river to fill up before they could bath; they were astonished by the cry of a baby upstream. Being afraid, the four ran away from the river but later on returned with a resolve to save the baby from drowning. They entered into the river when they saw the baby floating and on reaching it they realized that the baby was already dead. They however took the

baby out of the river and placed it on the river bank. That was about 50 meters from where they had heard the baby cry in the first instance.

5. By then **PW4** was about 13 years old whereas **PW5** was about 14 years. The other two of their colleagues were also their age mates.

6. Having retrieved the body of the baby, the four boys decided to go to the nearby villages to inform them of what had transpired and to see if they could get the baby's parents. They first entered into the homestead of one Otieno and after explaining what they had encountered at the river, the family members denied losing any of their children and advised them to find out from the other neighbouring villages. They then left to the next village of one Mama Ochieng and upon explaining what they had encountered at the river the said Mama Ochieng informed them that she had seen one ANYANGO passing near her home with four children going towards the river and wondered if one of them had drowned. Mama Ochieng however advised the boys to go to the said Anyango's home and inform them.

7. Since the said Anyango's home was some distance away from where the four boys were and as it was getting late, **PW4** opined that they instead go to his home and inform his father of the occurrence. They all agreed and headed to PW4's homestead. On reaching there, they met PW4's father one **OMONDI ZADOCK OLOO (PW1)** and accordingly informed him of the ordeal they had encountered at the said River Gucha. **PW1** hurriedly left his home and rushed to the river with the four boys. On reaching the river **PW1** truly saw a dead baby which was on the river bank. **PW1** then called some villagers using his cell phone and informed them accordingly and within a short while many villagers had gathered at the river. Although **PW1** noted that the dead baby was a girl aged around one year, he did not recognize the baby neither did he know any of its parents. That happened to have been the same position with **PW4** and **PW5** who also went forth to confirm that they did not know how the baby found her way to the river and neither did they see any one throwing the baby into the river.

8. As the villagers kept on streaming to the river, **PW1** saw the Area Assistant Chief one **MARY MUNAI KIRUM (PW2)** arrive at the scene. **PW2** was in the company of one **Nancy Anyango** whom PW1 knew quite well as he hailed from the same village with the said Nancy Anyango. PW1 was interrogated by PW2 on the incident and he reiterated what he had encountered. According to PW1 it was PW2 who called the police while at the scene.

9. As the people at the river were waiting for the police to arrive, PW1 overheard PW2 interrogating the said Nancy Anyango as to why she committed such a heinous act on her children and Nancy Anyango responded by denying and holding that her four children had instead gone missing. When the police arrived at the scene, they took away the dead baby and left with both PW2 and the said Nancy Anyango. PW1 identified the said Nancy Anyango as the accused person in this case. I shall henceforth refer to the said Nancy Anyango as '**the Accused**'.

10. Since there was the possibility of the other three children to the Accused having also drowned then according to the Luo customs, the male villagers were not allowed to leave the river until all those who were allegedly drowned were either retrieved or rescued as the case may be. That led the villagers to spend the whole night at the river. In the early morning of the next day, that is 14/07/2012, at around 05:00am PW1 witnessed one baby being rescued from the river as it was still alive. It was a baby girl aged around 4 years old. The search continued until around 07:00am when the villagers retrieved two dead bodies of babies from river. They were both boys aged around 2½ years and 1 year old. Having accomplished the mission, the villagers then called PW2 who later on came to the scene with the police and took away the dead children.

11. As PW1 did not know how PW2 found her way to scene, it was PW2 herself who informed this Court that she had received a phone call from one Jack Okeyo Ochilo at around 07:30pm on 13/07/2012 and was informed that the Accused had thrown her four children into the River Gucha and fled. PW2 then called the Village Elder who hailed from the same village with the Accused one John Onyango Adiebo and asked him to look for the Accused and arrest her and to keep PW2 well informed of the progress. After a while PW2 received a call from the said village elder who informed her that he had arrested the

Accused and was with her by the roadside at Paporombe Area and that the place was crowded with members of the public who wanted to assault and lynch the Accused.

12. PW2 then rushed to where the Accused was and managed to restrain the members of public from either assaulting or lynching the Accused as she awaited the arrival of the police whom she had called. When the police arrived at place where PW2 and the Accused were, PW2 handed over the Accused to the police.

13. The police in the company of PW2 and the Accused then proceeded to the River Gucha where they collected the body of the first dead child and left only to return the following morning to collect the bodies of the two other dead boys.

14. As the village was in deep shock from the incident, PW2 convened a public meeting where she learnt that the Accused was a daughter to one of her subjects and that she had been married elsewhere, had children but later on returned to her parents' home together with her children. Those were the children who had been thrown into the river leading to the deaths of three of them. PW2 however did not know the Accused prior to the incident neither did she know any of the Accused person's children.

15. **MICHAEL AKUMU WAMBOGO** testified as **PW3**. He was the father to the Accused and confirmed that indeed the Accused had been married but returned home with her four children and since then the Accused had lived well with her children and his family at large. PW3 ruled out the possibility of the Accused having caused the deaths of her children as he knew the Accused as a law-abiding person and that there had been no previous disagreement in the family which might have made the Accused reach such a decision. PW3 however confirmed that the children who had drowned belonged to the Accused although he maintained that he did not know them by their names since they were very young. He however knew them by physical appearance. He further testified that based on his relationship with the dead children he was the one who actually buried them after post-mortem examinations were conducted on their dead bodies.

16. The post-mortem examinations were preceded by the identification of the bodies of the three children by two people. They were **JOASH OWINO ODINDO (PW7)** and **ELISHA OGALO MAINA (PW8)**. PW7 was the Accused person's brother. He also confirmed that the three children who died were the children of the Accused person. Although he also did not know any of them by names he knew them physically and so identified them for purposes of the post-mortem examination. **PW8** was a neighbour to the Accused and lived about 300 metres away from the Accused person's homestead. Although he also knew that the children who had died to be the Accused person's, he equally did not know any of them by name. He however identified the children for the purposes of the postmortem examinations.

17. **Dr. GANDA** is the one who carried out the postmortem examinations on all the three dead children. That was on 18/07/2012. The said Doctor then filled in the Post Mortem Forms which he signed and stamped on the very day of the examinations. Those reports were however produced in evidence by one **DR. MICHAEL KIBISU (PW6)** as the said Dr. Ganda was on a study leave for two years. PW6 had worked with the said Dr. Ganda and knew his handwriting and could identify both his handwriting and his signature. Amid no objection, the three Post Mortem Forms were produced as exhibits. In each of the three examinations, the cause of death was drowning due to lack of oxygen.

18. The last prosecution witness was the investigating officer who testified as **PW9**. He testified that upon receiving a report about the murder of the children and that the suspect had been arrested from PW2, he in the company of other police officers visited the scene and collected the bodies which they took to the mortuary for preservation and postmortem examinations. The police also re-arrested the Accused from PW2. He commenced investigations and recorded statements from various witnesses and eventually preferred the charges before Court. He produced a Sketch Map of the scene and informed this Court that he had escorted the Accused for mental examination which examination found her fit to stand trial.

19. The prosecution then closed its case and by a ruling of this Court, the Accused was placed on her

defence.

20. The Accused person elected to give unsworn testimony. She briefly stated that on the 13/07/2012 she had left her children at home who were all very happy and well fed and proceeded to look for gold at the Nyatike mines. As she was returning home in the evening, she was only confronted by people on the way with accusations that she had left her children to die. As she was surprised on what she heard, PW2 and the police arrived and she was arrested, taken to police custody and eventually charged in Court. It was her further testimony that when she had been arrested by the police she was taken to the River Gucha where she was shown a dead baby whom she did not know. According to the Accused, she left her children at her parents' home when she left for the Nyatike mines and since then she has never seen them. She therefore denied that her children died and averred that if it was true that her children died then she had not been informed of their deaths.

21. At the close of the defence case Counsel for the Accused Mr. Gembe made brief oral submissions in urging this Court to acquit the Accused person since there was no evidence connecting his client with any of the alleged offences. The prosecution on the other hand submitted that there was water-tight evidence to warrant convictions on the murder charges before Court.

22. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the Accused is guilty of the offences she is facing.

23. The offences facing the Accused are three informations of murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63 of the Laws of Kenya. In essence the Accused is charged with the murder of her three children namely **Filedon Junior, Alfonse Okinyi and Flevion Akinyi**. For the prosecution to secure a conviction in any charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

(a) ***Proof of the fact and the cause of death of the deceased;***

(b) ***Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;***

(c) ***Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.***

I will consider the above issues herein below: -

(a) **Proof of the fact and cause of death of the deceased persons:**

24. The informations laid before Court has that three children were murdered by the Accused on 13/07/2012, at Paporombe Village in Nyatike Sub-Location within Migori County of the Republic of Kenya. Evidence has it that the three children were minors of tender ages. This Court has seen the medical evidence produced by PW6 confirming the causes of the deaths of the three minors. They are contained in the Post Mortem Forms which were produced as Exhibits 1a, 1b and 1c respectively. All these exhibits confirm the causes of the deaths of the minors to be lack of oxygenation due to drowning. That position has not been disputed and this Court finds that the minors died as a result of drowning.

25. There is however the issue as to whether the three minors who died are actually those people referred to in the three informations. Whereas the Post Mortem Forms give the names of the deceased children as those appearing in the three informations, the evidence tendered before Court reveals that apart from PW9 (the investigating officer) none of the other witnesses identified the deceased children by their names. The close family members of the deceased minors who included PW3 and PW7 stated that they did not know them by their names but only by way of physically appearances. That was the like position with the neighbours to the family of the deceased children who included PW8. The rest of the witnesses did not even know the deceased children at all. When the Accused person was placed on her defence, she also did not mention the names of her children which she alleged to have had left at home

when she went to the Nyatike mines. However according to her, her children are still alive as she has never been informed of their demise.

26. The question which now begs an answer is how PW9 came to know of the names of the three deceased children. PW9 stated that he got the names of the deceased children in the course of the investigations. That statement was not rebutted. Although the record was not favored with any Certificates of Birth of any of the deceased children, there is indeed ample evidence that the three minors who died and who are subject of this case are the children of the Accused. That was confirmed by PW3 and PW7 who were the grandfather and uncle to the deceased children respectively and the father and brother to the Accused respectively. Infact PW7 and PW8 who attended the autopsies further vouched that position. Whereas this Court finds it highly surprising that even the closest family members of the deceased children who lived with them in the same homestead, interacted with on daily basis and even buried their bodies were unable to know the names of those children, not even their *alias*' names, there is nothing more that this Court can do rather than holding it at that.

27. That being so, this Court finds that the fact and causes of the deaths of the three children were adequately proved.

(b) Proof that the deaths of the deceased persons were the direct consequence of an unlawful act(s) or omission(s) on the part of the Accused person: -

28. This issue is aimed at establishing whether it was the Accused who actually caused the deaths of the deceased persons and if so, whether it was by unlawful act(s) or omission(s).

29. From the evidence on record, it is clear that none of the witnesses who testified identified the Accused as the perpetrator of the deaths of her children. Apart from some evidence which can be safely regarded as hearsay and highly speculative, no other evidence was tendered which attempts to connect the Accused with the commission of the offence even circumstantially. The police may have gathered evidence that linked the Accused with the offences during their investigations but unless and until that evidence is properly laid before a court of law, such evidence remains of no consequence to a trial.

30. On the other hand, the Accused has raised a defence which cannot be just wished away. It was not challenged that the Accused left her children at her parents' home in the afternoon of 13/07/2012 and proceeded to the Nyatike mines. Further the arrest of the Accused still leaves some lingering doubts in the mind of this Court. The Accused stated that she was arrested on her way back home in the evening of 13/07/2012 from the said mines. It was not clearly explained how and where the Accused was arrested by the village elder when the elder was instructed by PW2. Further the elder did not testify as a witness. That doubt can only be resolved in the Accused's favour. The prosecution has therefore failed to place the Accused at the scene of crime and as the perpetrator of the offences. The Accused person's defence therefore stands and casts serious doubts into the prosecution's case.

31. From the foregone analysis it can be deduced that the Accused may have been charged by virtue of being the mother of the three deceased children. Whereas there may be some suspicion on the Accused person's involvement in the deaths of her children, suspicion alone, however strong, cannot be a basis of a conviction. In buttressing the foregone this Court fully associates itself with the finding by the Court of Appeal in the case of **James Tinenga Omenga vs. Republic (2014)eKLR** where it held that: -

“ 20 Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion.....”

It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic -Criminal Appeal No. 17 of 1998, the court held,

'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'

See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.

32. I therefore find that the prosecution has failed to establish this second ingredient as against the Accused.

33. Having found that there is no nexus between the Accused and the commission of the offence, it will serve no purpose at all for me to deal with the third ingredient.

34. As I come to the end of this judgment, I wish to sincerely thank and appreciate the dedication by Mr. Gembe, Counsel for the Accused and Ms. Owenga Learned State Counsel in the conduct of the trial. It was only through their joint efforts that the trial in this case was conducted in less than five months.

35. The upshot is that none of the three informations of murder facing the Accused has been proved. The Accused is hereby found not guilty of any of the murders of **FILEDON JUNIOR, ALFONCE OKINYI** or **FLEVION AKINYI**. She is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 28TH day of APRIL 2016

A. C. MRIMA

JUDGE