



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL (MURDER) CASE NO. 18 OF 2013

REPUBLICPROSECUTOR

VERSUS

C N W.....ACCUSED

JUDGMENT

Introduction

1. The accused person herein, C N W is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars being that on the 22nd day of March, 2013 at round 2.30 pm at [particulars withheld] Village [particulars withheld] Sub-location, Bunyala East Location in Navakholo District within Kakamega County murdered one D N E. She denied the charge when it was read to her on 06.05.2013. The accused person first appeared before the Deputy Registrar of this honourable court on 27.03.2013.

The Prosecution Case.

2. The prosecution called 4 witnesses and the evidence is as follows;- V.E a nine year old girl testified as PW4 and told the Court that on the material day and time, she was reading a book when the accused person herein arrived with a paper bag in which she was carrying a bottle. The accused person is V's biological mother. The bottle had what she described as medicine and that the accused person poured the contents of the bottle into a cup and gave it to the deceased. After the deceased had drunk the medicine, the accused person went and threw the cup into the toilet. She then carried the deceased and placed him on a sack just outside the house. Then the deceased died.

3. When cross examined by defence counsel, PW4 testified that the deceased used to stay at the accused person's house every now and again. She also said that she saw the accused person administering the medicine to the deceased and in her mind, she did not think that what the accused person gave to the deceased was anything harmful. She also told the court that when she wanted to take the deceased to his mother, the accused person stopped her from doing so. She therefore went and called J, (PW1) the mother of the deceased.

4. PW1, J W testified and stated that while she was the accused person's co-wife, the deceased was her son. On the material day, the deceased and his older brother called Vincent were playing at the house of the accused person when the accused sent off V while the deceased remained at the accused person's home. Shortly thereafter, PW4 rushed to her and asked her to go and take D who was crying. She rushed to the accused's house and found the accused carrying the deceased in her hands. He was already dead. Later the matter was reported to the police by J E N who testified as PW3. In cross examination, PW1 testified that the accused person used to stay with the deceased very harmoniously, and that she and the

accused person had no quarrels.

5. PW3 is husband to both PW1 and the accused person. The accused person is the first wife. After he received the report concerning the death of the deceased, he rushed home and later went to report the incident to the police station. The body of the deceased was taken to Navakholo hospital and on the Monday following which was 25.03.2013 post mortem examination was conducted before the deceased's body was released for burial. PW3 identified the body to the doctor for post mortem examination.

6. PW2 was P W S, a brother to PW1. He helped in taking the deceased's body to Navakholo District Hospital. He also helped in searching for the accused person who was hiding in the sugarcane plantation. On 25.03.2013, PW2 was one of the 2 people who identified the body of the deceased for post mortem examination. During cross examination, PW2 admitted he did not see the accused person administering the poison to the deceased. He testified that he only saw the bottle which was taken by the police.

7. At some point during the trial of this case, and after a number of adjournments and more specifically on 03.06.2015 Mr. Oroni, prosecution counsel told the court that he needed time to call the doctor who conducted the postmortem examination and to also call the investigating officer. The case was fixed for further hearing before Mrima Judge after due compliance with Section 200 of the Criminal Procedure Code. The evidence of the 4 prosecution witnesses was taken by Hon. Said Juma Chitembwe, Judge. On 14.7.2015, defence counsel informed the court that there was a likelihood of the case being withdrawn, a position that was confirmed by Mr. Oroni prosecution counsel. The case was then fixed for mention on 15.07.2015 for the purpose of entering a Nolle Prosequi. On the 15.07.2015, Mr. Oroni informed the court that he was not sure if any arrangement would be reached in the matter and that the case would have to proceed. The case was then fixed for further hearing on 28.07.2015.

8. On the 28.07.2015, Mr. Oroni informed the court that the Nolle Prosequi was yet to be signed by the in charge at the ODPP. He asked for a mention on the 29.07.2015. The request was granted. On the 29.07.2015, Mr. Oroni informed the court that there was no progress on the issue of the Nolle Prosequi. He then applied to close the case and submitted that the accused person be placed on her defence. He made submissions to the effect that the doctor who conducted the autopsy had confirmed that the deceased [died] as a result of poisoning.

9. Counsel for defence, Miss Mahuni, submitted that there was no evidence to whatsoever warrant the accused person being placed on her defence. Counsel also submitted that no doctor had testified to prove the cause of death of the deceased and further that even the investigating officer had not testified. Counsel urged the court to find that the accused person had not case to answer.

The Defence Case

10. After a careful analysis of the evidence on record, Hon Mr. Justice Mrima ruled that the prosecution had made out a prima facie case requiring the accused person to be put on her defence. She was therefore put on her defence.

11. The accused person gave a brief unsworn statement in which she testified that at about 3.30pm, on the material day, the deceased collapsed and died. She called PW1 who took the child to Navakholo Hospital. She stated further that at about 7.00Pm, Police Officers from Navakholo Police Station came to her home and interrogated her before taking her away with them. She finally testified that she lived very harmoniously with her co-wife PW1. The accused person had no witnesses to call.

12. At the close of the defence case, parties were ordered to file and serve their final written submissions by 17.09.2015, Counsel for the defence filed the submissions on 17.09.2015. The State did not however file any submissions. On the 18.09.2015, the Deputy Registrar of this Honourable court informed the accused person and her counsel that judgment would be delivered on notice.

13. The file was then taken away by Hon. Mr. Justice Mrima, who had since been transferred to Migori High Court to write the judgment. However, due to illness on the part of my learned colleague, he could

not write the judgment. He brought back the file to me to write the judgement. On 06.10.2016, I mentioned the case and after due compliance with Section 200 of the CPC, the accused person elected to have her judgment written by this court. That is the reason why I have done so. The court regrets the delay in having this judgment written and delivered within reasonable time. This was due to circumstances beyond the control of Hon. Mr. Justice Mrima.

Analysis and Determination

14. After carefully considering the evidence on record, the submissions filed on behalf of the accused person, and also after carefully considering the law, the issues that arise for determination are the following;

- a. Whether the prosecution has proved the fact and cause of death of the deceased.
- b. Whether the accused person has been shown to be the one who caused that death through an unlawful act or omission and
- c. Whether the prosecution has proved that in killing the deceased the accused person did so with malice aforethought.

Determination

a. Whether the prosecution has proved the fact and cause of the deceased

15. The evidence before court clearly shows that the deceased died soon after a substance was administered to him by the accused person. PW4, Victoria, told the court that the deceased died. So did PW1 PW2, and PW3. Even the accused person in her defence told the court that the deceased died although she said that the deceased simply collapsed and died. The deceased was eventually buried after a post mortem examination was done on his body on 25.03.2013.

16. The only troublesome issue under this sub-heading is whether the cause of death was proved. In my considered opinion, the cause of death was not proved by the prosecution. Although the witnesses said that the substance administered to the deceased by the accused person was poison, no medical evidence was adduced to confirm that the substance administered to the deceased was poison. First of all no postmortem report was produced and secondly there was no indication by the prosecution that the substance had been tested by the Government Analyst and confirmed to be poison. Victoria who testified that she saw the accused administer a poison to the deceased was not a doctor, although her evidence as to the fact that the accused person administered something to the deceased remained unchallenged. I have also carefully considered the accused person's defence and find that it offers no challenge to the prosecution case that she administered a substance to the deceased before the deceased died soon thereafter. The above finding notwithstanding, the absence of medical and scientific evidence, including absence of post mortem report leaves some reasonable doubt in the mind of this court as to what the cause of the deceased's death was. Maybe he simply collapsed and died as alleged by the accused person.

17. Having reached the conclusion that no evidence was led by the prosecution to prove the cause of the deceased's death. I find it unnecessary and maybe only an academic exercise to delve into the final issue as to whether the prosecution proved mens rea on the part of the accused person. I will therefore say no more on the same.

18. The only other issue that deserves mention is why the prosecution seemed so unsure of its stand in this case. At one point there were indications that a nolle prosequi would be entered against the accused person, and almost in the same breath, the prosecution indicated it would proceed with the case before suddenly, and in my view, quite unceremoniously, bringing the case to a close.

19. Having given no explanation for failure to call other crucial witnesses in the case, the only inference this court can make is that the evidence of such witnesses would have been prejudicial to the

prosecution's case. It is only the accused person who can get the benefit of such lingering doubts in the mind of the court.

Conclusion

20. For the reasons advanced hereinabove I find that the prosecution has not proved the case of murder against the accused person herein beyond reasonable doubt. It may be that indeed the accused person poisoned the deceased but that remains unproved in the absence of expert evidence to that effect. If she did it, the accused has the burden of carrying her guilty conscience with her wherever she goes for the rest of her life. From the evidence, there is no case against her. I accordingly acquit the accused person herein C N W, of the charge of murder as provided by Section 322(1) of the Criminal Procedure Code.

21. Unless she is otherwise lawfully held, the accused person is to be released from prison custody forthwith.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this.....27thday ofOctober.....2016

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Oroni(present).....for state

.....Mr. Shifwoka for M/S Mahunifor Accused

.....Mr. Polycarp.....Court Assistant.