



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 83 OF 2011

LESIT, J.

REPUBLICPROSECUTION

VERSUS

JAMES KARIBA MACHARIA.....ACCUSED

JUDGEMENT

1. The accused person is charged with **Murder** contrary to **section 203** as read with **section 204** Of the **Penal Code**. The particulars of the offence are that:

“JAMES KARIBA MACHARIA: On the 13TH day of September 2011 within Kawangware in Dagoreti within Nairobi County murdered EMMANUEL MACHARIA”

2. The prosecution called a total of 10 witnesses. This case was commenced by Ombija, J. who heard the entire prosecution case except for the evidence of the doctor who carried out the post mortem examination on the body of the deceased. I took over the case under **section 201 (1)** as read with **section 200** of the **Criminal Procedure Code (CPC)** and concluded the case.

3. The facts of the prosecution case were that the accused and PW1 were married and blessed with one son, the deceased in this case. The accused and PW1 had some domestic issues that resulted in both of them going before the Senior Chief, Kawangware for intervention. He was PW3. In the end the discussions with PW3 resulted in a separation between PW1 and the accused. The accused intimated to PW3 that he wanted to have his son in his custody but PW3 ordered that the deceased should remain with his mother as he was very young. The deceased was three and a half (3½) years.

4. After PW1 failed to get her clothes from the accused house, the accused was locked up by PW3 for some hours after which he agreed to release PW1’s personal effects to her. PW1 and the accused then went back to their house in the company of an elder and an AP Officer so that PW1 could collect her clothes. Eventually they all walked back to the Chief’s Camp. However, according to PW1, the accused and the deceased never reached the Camp. Calls by CPL in charge at the Camp ordering the accused to take the deceased to the Camp bore no fruit. The accused called PW1 at 10pm same night and told her that he had purchased poison which he would give to the deceased and to himself. The next day the deceased was found lying on the ground of the accused house dead and the accused nowhere to be seen.

5. By the time PW6 and 8 visited the accused house they found him lying unconscious on the floor. The accused was rushed to Kenyatta National Hospital by PW8 where he was admitted for treatment for

poisoning. After four days the accused escaped from the hospital. He was arrested one week later at a Church in Kawangware and charged with escape from lawful custody and convicted for the offence. Later he was charged with this offence.

6. The accused person was placed on his defense after close of the prosecution case. He opted to give an unsworn statement and put forward an alibi as his defense. He said that he had married PW1 for some years with one child before they had some disagreements. The accused stated that before marrying PW1 he introduced her to his parents and also went to PW1's parents. The accused stated that later in 2008 PW1 said she had no plans of getting married because where she lived she used to drink alcohol which she was not getting in the accused house.

7. The accused said that after several separations and re-unions with PW1, he settled with her in his house. The accused stated that he travelled to Limuru in search of cabbages leaving his family at home. He said that when he returned back home he found his wife missing alongside her belongings. The accused later learned that PW1 had moved in with her four children to a rented house. PW1 lived with her children for six months before moving back to the accused house.

8. The accused stated that in September 2011 they started quarrelling with PW1 since she wanted to return to her work at the club. The accused testified that on 11th September 2011 he was arrested by AP'S officers from Kawangware. and detained overnight at the police post. On 12th September he was released in the morning at around 9:00am. That is when the accused learned that Waithera PW1's daughter was the one who caused his arrest. Shortly after getting home, an AP officer and a youth came to the accused house and told the accused he was required at the Chief's camp. The accused testified that he went and found PW1 talking with PW3 the Chief. PW1 said that she wanted to live alone and wanted to take her belongings from the accused house. The accused stated that at 5:30pm in the company of PW1, AP police and a youth they headed to his house. At 6:15 the AP police left the accused with PW1, Waithera and the deceased in the house.

9. The accused testified that he left the house and later returned at 6:15am. He did not find his wife PW1 and Waithera but found the deceased breathing loudly. The accused stated that he rushed outside to look for a vehicle to take the deceased to hospital but he did not find one. He stated that he went back to the house where he found the deceased unconscious and no longer breathing. There was already a crowd of people outside the accused house and AP Police Officers. The accused stated that he later found himself in Kenyatta National hospital where he was admitted for one day and discharged. The accused testified that he was unable to stay in his house and that while walking around the church compound he was arrested and taken to Muthangari Police Station and charged with this offence.

10. Mr. Ong'aro for the accused and Ms Njuguna for the State gave submissions. The defence counsel in his submission urged the court to look at two aspects. First that the accused was attempting suicide. The defence counsel argued that the prosecution concealed this information from the court, which submission is not correct as it was part of the prosecution evidence through PW6 and 8. He argued that the accused was suicidal and his memory of facts may not be accurate. The second aspect he urged was that the accused was charged in Kibera for attempted suicide and unlawful escape from police custody. Counsel urged the court to acquit the accused for the offence charged as he was not in his rightful mind at the time of the incident.

11. Ms. Njuguna, learned Prosecution Counsel, in her submissions urged that PW4 and 5 found the accused at the scene lying unconscious in his house. Counsel urged that the accused was rushed to Kenyatta National Hospital for treatment from where he escaped from police guard. Counsel urged that the accused was later re-arrested and charged with this offence. Learned counsel submitted that the prosecution had proved the charge against the accused person on the required standard and urged the court to convict him for the offence charged.

12. I have carefully considered the entire evidence adduced by the prosecution and the defence together with the submissions by both counsels.

13. The burden in this case like in all criminal cases lies with the prosecution to prove its case against the accused beyond any reasonable doubt. The accused faces a charge of murder contrary to **section 203** as read with **section 204** of the **penal code**. In order to prove the charge against the accused, the prosecution must adduce evidence to establish that by some unlawful act or omission, the accused caused injury to the deceased person and that out of that injury the deceased died. The prosecution must adduce evidence to establish that at the time the accused caused the injury leading to the deceased death, he had formed the intention to cause death or grievous harm to the deceased.

14. The law sets out what constitutes malice aforethought under **section 206** of the **Penal Code** as follows:

“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.”

15. Having considered the evidence adduced in this case and the submissions by counsel, I find that the issues for determination in this case are as follows:

I. Whether the circumstantial evidence adduced by the prosecution is sufficient to establish the case against the accused.

II. Whether the prosecution has established that the accused person had the intention to cause death or grievous harm to the deceased.

III. Whether suicide or being suicidal was pleaded by the accused as his defence; and if so, whether that is a defence known in law applies to this case and to what effect?

16. The accused has not disputed that the deceased died of poisoning. There is no dispute that the deceased was found dead inside the house of the accused. Dr. Ndegwa, PW9 who performed postmortem examination on the body of the deceased, in conjunction with the Government Chemist’s Report by PW7 concluded that the cause of the deceased death was Diazinol, an organ phosphorous pesticide which is poisonous if ingested by humans. The post mortem report was P. Exh. 3; while the Chemist Report was P. Exh2.

17. There was no eye witness in this case. The prosecution is relying on circumstantial evidence to link the accused with the offence. It has been held that circumstantial evidence is very often the best evidence. This was the holding in the English case of **R. vs. Taylor Weaver & Donovan (1928) 21 Cr. App. Reports 20**, where the court held:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

18. In order to sustain a conviction on the basis of circumstantial evidence the prosecution needs to

adduce evidence that will meet the threshold set out in the case of **ABANGA alias ONYANGO V. REP C.A. No. 32 of 1990(UR)** thus

“It is settled law that when a case rest entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn must cogently and firmly established.

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

19. In regard to whether the circumstances from which an inference of guilt is sought to be drawn has been cogently and firmly established by the prosecution in this case. The prosecution has shown that there was a disagreement between the accused and deceased, who had been living as husband and wife prior to the incident. The Senior Chief of their Area, PW3 ordered an elder and Admin Police Officer to escort PW1 to accused house to get her personal effects. PW1 said that she was escorted and managed to get her clothing. PW1 testified that however, on their way back to the Chief’s office, the accused disappeared with the deceased. PW1 testified that attempts by CPL of AP Camp to order the accused on phone to return the child to the AP Camp proved fruitless. PW1 testified that the accused called her later to say that he had bought poison and that she was not going to see the deceased again.

20. The evidence of PW1 was corroborated by the Senior Chief, PW3. PW3 confirmed that the accused and PW1 had gone to discuss their broken down marriage. PW3 said that the couple could not reconcile or agree on the custody of the child. PW3 testified that he ruled that the child, the deceased in this case, being only three years old had to remain with his mother. PW3 confirmed detailing one Elder Patrick, and one APC Ndirangu to escort PW1 to get her clothes from the accused house. PW3 testified that the next day APC Ndirangu gave him the sad news of the deceased death.

21. The prosecution adduced the evidence of PW1 that after PW2, a tenant where the accused lived reported that he found the deceased dead in the accused house, she proceeded to the accused house with two Police Officers and found deceased dead near the door with three empty bottles near the body.

22. PW2 confirmed finding the deceased dead inside accused house, at 4.00 a.m. of the night the accused took the child. PW2 testified that the deceased was alone in the house but that before he left, the accused entered, informed him that he had gone to look for a vehicle to take deceased to hospital. PW2 said that after giving him that information, the deceased collapsed. PW2 then went to give that report at the AP’s Camp.

23. The prosecution called the evidence of PW6 who confirmed finding the accused being guarded in his house by AP. The prosecution also called PW8, I.P. Saleh who testified that he received the report of the murder of the deceased and that he visited the house of the accused where he found the deceased and accused lying on the ground side by side, with three empty bottles next to the deceased body. He is the officer who took the accused to Kenyatta Hospital and left him guarded as he received treatment.

24. On the other hand the prosecution has proved that the deceased died of poisoning from ingestion of a pesticide. The pathologist, PW9 found the deceased stomach had corroded and was bleeding, consistent with ingestion of corrosive substance.

25. The accused does not dispute the fact he had had a disagreement with his wife, PW1 and that they went to PW3 to try and resolve their differences. What the accused disputed is prosecution evidence that he separated from PW1. He said that the two of them reconciled after the elder and AP escorted PW1

back to his house. He said that they even spent the night in his house and that the following day he left his wife and deceased in his house. The accused contends that on returning in the evening, he found the deceased foaming from his mouth on his bed but that despite trying he was not able to get a vehicle in time to take him to hospital.

26. The accused did not discuss his poisoning or having been admitted in hospital. What he said was that he had gone to Limuru to buy vegetables for his business and on returning he found the deceased foaming on his bed. He said he left his wife and the deceased in his house that same morning.

27. I find that the prosecution has adduced sufficient evidence to show that the accused forcefully took the deceased from PW1 in defiance to PW3's directive that he should remain with his mother due to his age. Further the evidence of PW3 was that PW1 slept at the Chief's Camp on the night of 12th due to fear of her life. That evidence firmly establishes that the accused took away the deceased and that by the next morning the child was dead, out of poisoning. What the accused said that he had spent the night with the deceased and PW1 was not true.

28. I find that the evidence adduced by the prosecution establishes the circumstances upon which the inference of guilt is sought to be made and that the circumstances are of a definite tendency unerringly pointing towards guilt of the accused. The circumstances adduced establish that the deceased was last seen alive in accused hands and that the next time the deceased was seen the deceased was lying dead next to unconscious accused.

29. The prosecution has proved that prior to this incident, the accused had issued threats to poison the deceased and that he had called PW1 to inform her that he had purchased poison and that he would give it to the deceased. The very next day the deceased was found dead of poisoning and the accused lying besides the deceased unconscious of poisoning. The prosecution has also adduced evidence to show that from the accused house police recovered three bottles labeled Diazonol. The government chemist report established that Diazonol, an organ phosphorous pesticide was detected in the three bottles and in the stomach of the deceased. This was proof that the deceased had ingested Diazonol.

30. I find that it was not a coincident that the deceased had been poisoned, and that the accused had also ingested same poison. I find that the circumstances in which the accused and deceased were found unerringly proves that it was the accused and him only who had the opportunity and intention to cause the deceased death.

31. The accused has a statutory burden to discharge a rebuttable presumption created under **Section 111 (1) and 119 of the Evidence Act**. The two sections stipulate as follows.

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

32. The accused has a burden to explain how the deceased ingested the poison; how the deceased came to be by his side dead and how he too had ingested poison. The accused should also explain how the three bottles labeled Diazonol ended up in the accused house besides the deceased body. The law creates a rebuttable burden for the accused to explain these facts and failure to explain will result in the court presuming the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events and human conduct.

33. The accused made an explanation to the effect he found deceased dead in the house after leaving him with his mother that same morning. That explanation was not true. As I stated earlier there was evidence that PW1 had slept at the Chief's Camp that night. She was not home with the deceased as alleged.

34. From the circumstances in which the deceased was found with the accused, I find that the accused gave him poison as he had earlier threatened, that the accused also took the poison and then lay next to the deceased. It is the accused who was the author of what befell the deceased.

35. I find that the circumstances established by the prosecution in this case when taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

36. As to whether the prosecution has established that the accused person had the intention to cause death or grievous harm to the deceased. I find that by obtaining the poison and administering to the deceased, the accused had formed the intention to cause either death or grievous harm to the deceased. The poison the accused administered to the deceased was a pesticide. It is quite clear that at the time the accused gave the substance to the deceased, he intended to cause him death or grievous harm.

37. As to whether suicide or being suicidal was pleaded by the accused as his defence. I find that the accused did not in his defence plead suicide or that he attempted to kill himself, or that he was not in control of his mind. The defence was raised for the first time by the defence counsel in his final submission.

38. As to whether being suicidal is a defence known in law, and whether it applies to this case and to what effect. It was the defence submission that the court ought to find that the accused mind was affected at the time in question and that he was suicidal and therefore not in control of his actions.

39. I was not able to find a Kenyan case on the point. In the Tanzanian case of **Liundi Vs Republic [1976 – 1985] EA 251 (Mustafa J)**, where the appellant had administered poison to her four children and herself after a domestic quarrel with her husband. Three of the children died, but she and another child survived. She was convicted of murder. She pleaded insanity at the time of the commission of the act on account of the quarrel with her husband. Her husband had told her on the material day that he should not find her at his house by the time he came back from work. Letters were found at the time of the commission of the offence, addressed to the police and to whomever it may concern, to the effect that her husband should not be harassed over what she had done.

40. Psychiatric evidence on the accused showed that she was disturbed and stressed at the time of the commission of the offence, but that she knew what she was doing, that she was killing her children, although she might have known that what she was doing was wrong. Her plea of insanity was rejected and she was convicted.

41. On appeal, it was held that although she was under a lot of stress at the material time, the appellant knew what she was doing and that she ought not to have done the act because she was doing wrong, looking at the contents of the letters she had done shortly before the incident.

42. In the instant case, we do not have equivalent psychiatrist report showing that the accused may have been under any stress. Conversely there is evidence from PW1 that the accused called him on phone at 10 pm same night and said that he had bought poison and that he would administer it to their son and himself. That same night at 4am the deceased was reported dead. On analysis it was found that poisoning

is what caused the death.

43. I find the fact that the accused did to the deceased and himself exactly what he told PW1 on phone that he would do, speaks of a person who schemed, planned and executed his threats. It speaks of a person who knew exactly what he was doing and did it anyway. It is clear that the accused went to the shops and bought three bottles of pesticide. He then went ahead and administered it on the deceased. Clearly the accused was in his right mind and that he intended to cause death or grievous harm to the deceased.

44. Having come to the conclusion I have of the case, I am satisfied that the accused is not entitled to defence of insanity, or of any other defence. I reject that defence in total. I find that the prosecution has proved the charge of murder contrary to **section 203** of the **Penal Code** beyond any reasonable doubt. I find the accused guilty of murder as charged and convict him under **section 322** of the **Criminal Procedure Code**.

SIGNED AND DELIVERED THIS 15TH DAY OF DECEMBER, 2016.

LESITT, J

JUDGE