



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.61 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

A M W.....ACCUSED

JUDGEMENT

The charge

A M W, the accused person, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of this offence are that on or about the 22nd day of December, 2012 at [Particulars Withheld] within Githiga Location, Kiambu County she murdered M. W. N “the deceased”. The accused denied committing this offence. The case proceeded to full trial with the prosecution calling a total of 14 witnesses in support of its case. The accused was the sole witness for the defence. She is represented by Mrs. E. B. Nyamongo, advocate.

Summary of the case

It can be gathered from the evidence that the relationship between the accused, A M W and her brother J. N. W. (PW1), father of the deceased and his wife J. K. (PW3), was not a happy one. It is alleged that the accused had at one time fought with her sister-in-law J. K. The reasons for this soiled relationship between the accused and her brother and sister-in-law were not clear but it could probably be due to sibling rivalry or any other reason including a claim over the piece of land belonging to their mother M. W. N. (PW10) where both of them lived. This rivalry played out in this case.

Evidence has been tendered that on 22nd December 2012, the deceased was sent to a shop belonging to Mary W M (PW2) to buy charcoal and onions. The time was about 6.30pm. The shop was about 200 metres from PW1’s home. The deceased bought the items but while at the shop two boys, sons of the accused, went to the shop. PW2 said that the deceased’s mood changed on seeing her cousins as though she did not want anything to do with them. She forgot to pick her change of Shs. 5/= which was given to B. the bigger of the two boys. The deceased left and was followed by the two boys. She did not however go home. Her mother PW3 became worried on noting that it was getting late and the deceased had not returned from the shop. She decided to go to the shop around 7.00pm to find out from PW2 and her husband J M (PW9) whether her daughter had been to the shop. She confirmed from them that the deceased had indeed been to the shop and had bought the items and left.

PW2 relayed this information to her husband PW1 who also went to the same shop to find out what had

happened. On getting information that the two sons of the accused had followed the deceased, PW1 asked the two children about the whereabouts of the deceased. It is alleged that the boys told their uncle that their mother had taken the deceased with her and that both had gone to Gitwe, a shopping center nearby, to buy cakes.

PW1 confronted his sister the accused upon her return home and physically attacked her and snatched her mobile phone from her demanding that she produces the deceased. The accused is said to have hidden in the home of M N N (PW4) where she stayed until police rescued her and took her into custody. The accused was charged with child theft in the first instance. These charges were to be dropped later upon the discovery of the body of the deceased and murder charges preferred against the accused.

The search for the deceased continued until the morning of 24th December 2012 when her body was found at the tea plantation nearby. The police were informed. They went to the scene, retrieved the body and took it to City Mortuary. Investigations were commenced and upon completion of the same, the accused was charged with this offence.

In her unsworn defence, the accused narrated how she spent her day on 22nd December 2012. She said that she spent the day doing her normal chores; that in the evening of that day she sent her big son, B. to buy *mandazi* for his younger brother; that at about 7.00pm she went to the home of one S N G who had sent for her; that while at S home her mother PW10 called her to ask her where the deceased was because her son B. had told PW1 that she, the accused, had been seen going away with the deceased. The accused told her mother that she did not know where the deceased was; that she sought from her son B. about the whereabouts of the deceased and B. told his mother that he had seen the deceased with another man going away; that the accused did not bother with this story; that she was attacked by PW1 and PW3 demanding that she produces the deceased; that PW1 took her phone making it impossible for her to call for help and that she managed to escape the mob that gathered demanding that she produces the child and was later rescued by the police who took her into their custody.

She denied taking the deceased with her. She also denied ever telling PW6 that she would do something in regard to her brother's family that would shake the whole village. She said she was not friends with PW6 and could not have told her anything like that.

Submissions

Mrs. Nyamongo for the accused submitted that none of the prosecution witnesses saw the accused kill the deceased; that the evidence that the deceased was seen with the two sons of the deceased did not tally with the evidence from the shopkeeper that the deceased left alone on seeing the two boys and forgot to pick her change and therefore the evidence that she was with the two boys cannot be true. Counsel submitted that the boy who informed PW1 about the accused going to Gitwe with the deceased did not testify; that there was bad blood between the accused and PW1 over their mother's land; that despite the time being in the evening no one saw the accused with the deceased as alleged and that PW1 was looking for any excuse to get rid of the accused.

Counsel further submitted that when the deceased died the accused was in police custody and therefore she could not have been the person who killed her and that there is no evidence linking the accused with this offence. She urged the court to acquit the accused for lack of evidence.

On the other hand, the prosecution submitted that it has tendered sufficient evidence to prove beyond reasonable doubt that the accused killed the deceased; that the shopkeeper saw the deceased and accused's children in the shop and that the deceased was scared of them; that the three of them left the shop together and the two boys saw the deceased and the accused leave together and that the accused was the last person to be seen with the deceased while the deceased was alive.

The crime of murder

Sections 203 and 204 of the Penal Code create the offence of murder and provide for the penalty

respectively in the following terms:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person convicted of murder shall be sentenced to death.”

The onus of proving the death of a person, the identity of the person causing that death, the unlawful act or omission causing the death and the presence of malice aforethought, lies with the prosecution and does not shift to the accused person.

Section 206 of the Penal Code defines malice aforethought in the following terms:

“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.”

After my careful consideration of the evidence on record, it is my view that the fact of death is not in dispute. The 9 gory photographs exhibited in court as Exhibits No. 1(a) to 1(j) attest to the painful death little M. W. N met. The evidence of Dr. Dorothy Njeru (PW13) confirms that the deceased died. The doctor testified that body had a belt around the neck and bruising of the tissues beneath the mark of the belt; there was soil in the mouth and the airways; that the soil in the airways had gone quite deep indicative that the deceased breathed in the soil. The doctor told the court that this meant that the deceased was alive when soil was put in her mouth and that it was possible that the soil had choked the deceased. The doctor’s opinion is that the deceased died due to ligature strangulation and choking.

Who caused the death of M. W. N? Analysis of the evidence on record is necessary to seek the answer to this question. In my view one thing is certain: the person who caused the death of this child is one very sick person.

The accused is charged with causing that death but what does the evidence show, does it prove that the accused caused the death of the deceased?

The record of evidence shows that the deceased was sent by her mother to the shop owned by PW2 which was situated about 200 metres from her home. While at the shop and as she was buying charcoal and onions, two boys who were her cousins namely B, the bigger boy and N. the younger one, went to the same shop. The deceased was not comfortable with their presence as testified by PW2. She left in a hurry and forgot to take her change. The change of Shs. 5/= was given to B. The deceased did not go home. According to her father PW1 the smaller boy N. told him that the deceased had gone to Gitwe with the accused. None of the two boys testified and therefore this evidence remains hearsay.

On the road near the shop and deceased’s home, L W aged 10 years (PW5) and other children including L W aged 12 years (PW6) were playing. PW5 told the court as follows:

“It was 6.00pm. We were many children playing. I saw W (deceased) with B and J (the two sons of accused). I knew them. I asked them where they were going. They told me mama C had sent them to buy charcoal and onions. They were together. I saw B’s mother coming when they were returning (*sic*). She told B and J to go home and not to pass through C home. She told them to pass through their grandmother’s. She said she was going with C to buy her cakes and biscuits at Gitwe and she would bring for them. I saw mama C asking about C. I told her C had gone to Gitwe with her aunt.”

LW (PW6) who was playing with L W (PW5) told the court as follows in respect to the same incident:

“I saw W walking and I asked her where she was going. She said that her mother has sent her to buy charcoal and onions. She was with B and B’s brother. I told W to go. B and his brother followed her. As they were returning mama B came from her home and stood there. Mama B bought cakes for B and his brother and told them to go home. She told them not to say where she had gone. Mama B took the charcoal and told C to go with her to buy biscuits. Around 7.00pm mama C started calling C. I went to where she was and told her C had gone with her aunt, A M. She is the accused in the dock.

Mama B came running to call B. I was at the place where B was. Mama C told me she was going to tell her mother (I don’t know if mother or grandmother). Mama B did not come with C. It was getting dark. Mama B entered her house. Mama C came and asked her where C was. Mama B said she did not know.”

There are some discrepancies in the two versions. Both girls said they were playing together and witnessed what happened yet their evidence does not agree. PW5 said that the accused told her sons to go home and not to pass through deceased’s home and that she was going with the deceased to buy cakes and biscuits and that she would bring some of the cakes and biscuits to the two boys. According to PW6 the accused bought cakes for her sons and told them to go home and that she told them not to tell anyone where she had gone. PW6 further stated that the accused took the charcoal and onions and told the deceased to go with her to buy biscuits.

These two girls testified without taking oath. This court administered *voir dire* examination on them and ruled that the two did not understand the nature of oath but were intelligent enough and understood the importance of telling the truth. Their evidence requires corroboration. There is no other evidence on record corroborating that of the two girls.

Further evidence on record shows that the accused was arrested on the evening of 22nd December 2012. By the time the accused was arrested, the deceased had not been found nor her body recovered. The body of the deceased was discovered on 24th December 2012, the third day from the date she went missing. PW1 told the court as follows:

“Deceased had been strangled. I do not know who did it. She was placed there (at the scene) after the rains. At that time the accused was at the police station at Githunguri. Police had taken her in their vehicle. It was a police vehicle from Githunguri Police Station. I did not see her come back. At the time deceased was found strangled the accused was at the Githunguri Police Station.”

Police Constable John Ong’aria, PW12, testified that he arrested the accused on 22nd December 2012 at 10.00pm. She was charged with child stealing and taken to court on 24th December 2012. PW12 further testified that on 24th December 2012 when the body of the deceased was found, the accused was in custody at the Githunguri Police Station and at no time did she leave the station.

PW12 testified in respect of the finding of the body of the deceased as follows:

“On 24th December 2012 the OCS received a report of the body of a child near Gitwe River.

In company of PC Burugu we visited the scene. We confirmed and preserved the scene. We called scenes of crime personnel who came and took photographs.

The body was fresh. It looked as if she had been killed that morning. The blood was fresh. It had rained at night but the body was not wet. There was a jacket belt tying the neck. There was mud in the mouth.”

The totality of this evidence is that by the time the deceased was killed the accused was in police custody having been arrested two days earlier. It would be stretching our imagination too far to state that the accused killed the deceased on the morning of 24th December 2012. With this evidence, I can only pose the question: did the accused have any role to play at all in the murder of the deceased?

Section 20 (1) of the Penal Code defines principal offenders to include the person who actually does the act or makes the omission; every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence; every person who aids or abets another person in committing the offence and any person who counsels or procures any other person to commit the offence. The prosecution did not pursue the line of argument that the accused may have been working with someone else. But even if the prosecution has pursued this line of reasoning, the onus would still be on the prosecution to tender evidence in proof of the same.

From the evidence tendered, the deceased must have been lured away from her home. I doubt she went away on her own volition. The PW12 testified thus:

“We had arrested two people, accused and her boyfriend. He was called P N K. There was no direct evidence to link him with this offence. I interrogated him and recorded his statement under inquiry. We took items recovered to Government Analyst.”

He was cross-examined on this evidence and he stated as follows:

“I arrested accused’s boyfriend. He was a suspect of child stealing (sic). I confirmed he used to visit accused. We took his phone but found no connection with this offence.’

Given that the accused was in police custody when the deceased was killed, it was ill-advised for the police to make a decision to release the suspect. It was obvious that there was someone else or some other people who were culpable and therefore any suspect would have been subjected to due process to eliminate him/her from being a suspect in this matter.

My considered view, after subjecting all the evidence to serious scrutiny, is that the prosecution has failed to prove beyond reasonable doubt that the accused was involved in one way or another with the death of the deceased. The evidence of PW5 and PW6, being evidence of minor children who testified without taking oath, requires corroboration, which corroboration as I have stated above is lacking. It is not enough, in a criminal case, to state that the accused and PW1 and PW3 had a long standing grudge. The accused had motive to kill the deceased due to the bad relations between her and her brother and sister-in-law. However, motive, as it was held in **Musili Tulo v Republic [2014] e KLR**, is not *mens rea*.

Section 9 (3) of the Penal Code provides that:

“Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”

This is not to say that motive is not relevant in a criminal trial. Where a case rests purely on circumstantial evidence, motive becomes one of the issues for consideration (see **Libambula v Republic [2003] KLR 683**).

Having arrived at the conclusion that the prosecution has failed to prove the case against the accused person beyond reasonable doubt it is my duty as required by the law to find and hold, which I hereby do,

the accused not guilty of the murder of M. W. N. I have no reason to order her continued stay in custody and I hereby order her immediate release from custody unless for any other lawful cause she is so held. Orders shall issue accordingly.

Dated, signed and delivered this 14th day of December 2016.

S. N. Mutuku

Judge