



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 11 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

M I.....ACCUSED

JUDGMENT

1. The accused herein M I was charged with the offence of MURDER contrary to **section 203** as read with **section 204** of the **Penal Code**. The Particulars of the Offence are that *on the 17th May 2010 in Kakamega Central District within Western Province the accused murdered P P M.*
2. The charges were read to the accused on the 2/06/2010 before Justice Lenaola and the accused pleaded not guilty to the same. Mr. Masheti was appointed to appear and represent the accused. The evidence of the prosecution witnesses was taken by two other Judges while this court only took the evidence of PW6 the investigating Officer and later heard the defence case. The Prosecution called six witnesses who testified in this case.
3. **H W “PW1”** the father to the deceased told the court that on the 17/05/2010 at 6.00 a.m. he left home to attend a Chief's baraza. He left the accused who is his 3rd wife together with the children at home. At 10 a.m. he got information of the incident at his home and upon rushing there, he found a crowd had gathered. He found the accused in her house and asked her what had happened but she never responded. He testified that he had been told by A I PW4 that P had been given poison and taken to Makunga Dispensary. He rushed to Makunga but was told that P had been taken to Kakamega hospital. He went to Kakamega Hospital but on arrival, found P was already dead. He then went to make a report at Makunga Police Station. The next day on the 18/5/2010 he witnessed the postmortem at Kakamega P.G.H.
4. PW1 was cross examined by Mr. Getanda and explained that he had no child with the accused person, though she had her own child when he married her. He also told the court that he had not built her a house but she lived with his first wife G at her house. It came out during the cross examination that PW1 was the village elder in his village and that the night before he went to the meeting he had slept in the accused's house where P was also living with his mother G. He added that in the morning as he was leaving for the meeting he left P at home. He explained that he had lived with the accused for one (1) year and that G had no problem with him marrying the accused. He further told the court that he had a bottle in the store which had been used for some medicine to kill ticks. He added that the container had no medicine. He could not tell how the deceased may have got the poison.
5. **Dr. Dickson Mchana PW2** produced the Postmortem report on behalf of Dr. Nyikuri. He explained that the said report was in reference to the body of P P M and the same was done on the 18/05/2010 at Kakamega Provincial Hospital. Two persons witnessed the procedure by identifying the body and these were H M PW1 the father to the deceased and A I. According to the report, the child was three (3) years old and his internal appearance was normal. Dr. Nyikuri opined that at that time he could not determine the cause of death and therefore sent specimens including blood,

- stomach contents one kidney, urine and others to the Government Chemist for analysis. The Government Chemist Report ref. no. H151/2010 matches the Police Reference 91/562/2010 which states that the deceased had toxic chemical in his stomach. The report was signed by the Government Analyst on the 9/6/2010. Dr. Nyikuri later signed the burial permit no [particulars withheld]. On cross examination by Mr. Onsando who was holding brief for Mr. Getanda PW2 explained that physically the cause of death could not be detected. He however went further and stated that the cause of death was chemical poisoning.
6. **E M PW3** was taken through a voire dire examination after which the court was satisfied that she could testify under oath as she knew the meaning of speaking the truth and also she knew God. She told the court in Kiswahili that she did not know her age but that she was older than P the deceased. That on the 17/05/2011 she was at home with P inside the house eating avocados when the accused came and took the child and said she was going to give him porridge. The accused went with the child to the house and gave the child medicine which she mixed with the porridge. PW3 testified that she saw the porridge and yellow medicine which she explained was in a bottle that was in the house. She said that P started vomiting and crying as soon as she took the medicine and she also started crying saying that “our child is dying”. She added that people came and the accused told them that the child had taken medicine. She also testified that her uncle K came first and started beating the accused and that her elder brother took P to Hospital. She told the court that the elder brother was called “M” and that P never came back but he came back dead. She explained that she knew the accused who is her step mother and who was the one who called P that morning to go and give him porridge and medicine.
 7. When cross-examined by Mr. Onsando PW3 told the court that she is E M and that on the day of the incident they were five children playing together with the deceased. She explained that there were two other ladies older than her. That it was Z and herself. She maintained that it was true that the accused came to where they were and took P and that when they tried to follow them the accused chased them away. She also maintained that she saw the deceased vomit yellow things.
 8. **PW4 A I** told the court that on the 17/05/2011 at 7.00 a.m. he had gone to their farm when he was attracted by the noise of the children and rushed back home. He found P crying and vomiting. There were about five (5) children at the scene at that time. He saw E PW3. He rushed the child to Makunga Hospital but he was referred to Kakamega General Hospital. He claimed that he could smell medicine from the child. He further told the court that he knew M I the accused herein whom he did not see at the scene. When he reached Kakamega Hospital the child was pronounced dead and they were told by the doctor that the child had taken some poison.
 9. On cross examination by Mr. Onsando PW4 explained that the accused was his mother being his father’s 3rd wife. He denied assaulting her and maintained that when he saw the child he realized that he had to take him to hospital and when he came from the hospital he found the accused had been arrested by the Police.
 10. **PW5 S M M** also testified that on the 17/05/2010 while at home at about 8.00 a.m. he heard a child crying saying that our child has died. He went to the scene where he found the deceased had vomited. He could smell medicine from the deceased. He then gave the deceased milk and eggs before the child was taken to Makunga Hospital where they were referred to Kakamega Provincial Hospital. The child was pronounced dead on arrival at Kakamega. On cross examination he told the court that when he went to the scene he found the accused who was seated but was not helping the child. He explained that the children were crying saying P is dead. He said that he did not see the container with the poison but he smelled poison. He was not able to tell which poison it was. He claimed that he was the first to arrive at the scene after he heard the children crying as the accused’s husband was not present at the time. He claimed that the accused’s husband does not keep cattle. He retracted his earlier testimony by saying that he did not take the child to the Hospital but the child was taken to the Hospital by PW4.
 11. **PW6 was Number 72599 P.C Hilary Kerich** of Kakamega Police Station but previously of Makunga Police Base testified that on the 17/05/2010 while at Makunga Patrol Base. He received a report from the Assistant Chief of Shinovi Sub-Location, one Josephat Mutinye alleging that there was an incident of food poisoning. He told the court that he went to the scene accompanied by The in charge of the Police Base, Sgt David Opiyo. Before they arrived at the scene they met with the Assistant Chief and other members of public carrying the accused on a bicycle. The accused appeared unconscious.

12. PW6 also stated that upon interrogation the accused could not talk and they were informed that the accused was suspected to have also taken some poison. He instructed the Assistant Chief to take the accused to the hospital and they proceeded to the scene of crime. At the scene, they learnt that the victim who was a child had also been rushed to Makunga Hospital and later to Kakamega General Hospital. When they arrived at the scene they encountered the smell of poison and Sgt. David Opiyo collected a blue container suspected to have carried the poison. He further testified that they interrogated two people who accompanied them to the Police Station.
13. He further testified that they went to Makunga Health Center where the accused had been taken for treatment and found her in a stable condition. They then requested her to accompany them to the Makunga patrol base for investigations. He told the court that at about mid day the father of the child arrived at the Patrol base and informed them that the child (2 and 1/2 years) had died and the body of the deceased was lying at the Kakamega General Hospital awaiting the post mortem. That on the 18/05 /2010 he proceeded to the Kakamega General Hospital Mortuary in the company of relatives of the deceased where the body of the deceased was identified by the relatives and post mortem done in his presence. He added that since the cause of death was suspected to be food poisoning he took the samples of blood, liver and intestinal contents which the Doctor had preserved, to the Government Chemist Nairobi on the 27/06/2010. That later a memo form was sent to the OCS Kakamega Police Station confirming that indeed the deceased died of food poisoning. The Police file was thereafter sent to State counsel for advice which advice was that the accused be charged with the offence of murder.
14. On cross-examination by Mr. Getanda PW6 confirmed that he investigated the matter together with Sgt. Opiyo and established that the deceased was the step son to the accused. He told the court that he established that the mother of the deceased was at the shamba at the time of the incident. He also established that the deceased was staying with the actual mother but in the same compound with the accused. He also established that the deceased had been in his mother's house with other children before the accused called them to go to her house for breakfast. He named E PW3 as one of the children he talked to and whose statements he took but the others were too small to have their statements recorded. He further testified that there were other members of the family who he talked to like A PW4 who was an adult and who was working in the nearby sugar plantation. He also established that the husband of the accused had risen early and gone to Nambacha Market and that the accused had a baby aged between 2 and 2 ½ years but he could not say whether it was a boy or a girl since it was dressed in unisex clothes. He maintained that the deceased had been poisoned and reiterated that as they went to the scene of crime they met the accused being carried on a bicycle accompanied by the Assistant Chief and that the accused was unconscious and that it was suspected she had also taken poison. He also confirmed that after visiting the scene they went to Makunga Health Centre where the Doctor there confirmed that the accused had not taken the poison. He told the court that although the accused had a sick sheet they did not take possession of the same to confirm whether she had taken the poison or not. He did not know where the blue container picked by Sgt Opiyo was but explained that since he was transferred it was the current Investigation Officer who should avail the container.
15. PW6 also maintained that based on the evidence of PW3 he was convinced as the Investigating Officer that it was the accused who had administered the poison. He also testified that he interrogated the accused after her discharge but she did not tell him that she was also working at the shamba that morning. He however did not establish whether the accused and her co-wife had differences. He explained that it was the father of the deceased (PW1) who had used the container and kept it at the accused's house. He was given PW1's statement to read by the Defence Counsel which he said confirmed what he had said about the container but he did not confirm the actual spot where the container was kept. He agreed that the container should have been kept out of the reach of children but did not establish the same. He did not also establish whether PW1 warned accused about the presence of the poison in the house.
16. Mr. Ngetich re-examined PW6 who told the court that PW4 only reacted after PW3 raised an alarm and that PW4 had been working at the sugar plantation. He confirmed that after visiting the scene they went to Makunga Health Center after questioning PW3. He also said that by the time they went to hospital he had formed the opinion on the possibility of poisoning. He was satisfied with what the clinical officer had told him and established that it was only the deceased who had taken the porridge. He told the court that from the investigations they did not go into domestic

- issues between the accused and her co-wife but they focused on the criminal element of the complaint against the accused.
17. The accused was placed on her defence after the court found that the prosecution had established a prima facie case against her. She chose to give a sworn testimony without calling any witnesses.
 18. The accused who testified as DW1 told the court that she was aware of the charges facing her. That on the 17/05/2010 at about 7.00 a.m. PW1 her husband left home for Nambacha. He left her together with her co-wife G (1st Wife to PW1). She went about her household chores and thereafter told her co-wife that she was going to split firewood. She asked her to look after her 1 and a ½ year old child who was asleep. She then went outside the home about fifty meters away to split the wood. She told the court that her co-wife had three (3) children aged 15 years, 10yrs and 3 years old.
 19. While splitting the wood she heard her co-wife's child by the name K (15 years) calling her about four (4) times when she responded. K was crying while carrying the deceased. She told the court that the deceased P P was vomiting through the mouth and nose. She testified that K told her that the deceased had taken poison and that he found him outside the house.
 20. Before she could do anything S M M, PW5 came to the home and started beating her asking her why she had left the child to take poison. He was joined by another brother in law by the name P K and they continued to beat her until she lost consciousness. She told the court that she regained consciousness at Makunga Health Centre from where the Police took her to Makunga Police Station. She was later taken to Kakamega Police Station where she recorded her statement.
 21. She told the court that though she heard what the prosecution witnesses told the court in their testimonies, she denied giving the deceased child poisoned porridge and said that it was her co-wife who gave the children tea and had prepared a mixture for porridge. She also claimed that she had no knowledge the presence of a pesticide as her husband never told her about it. She added that her husband kept no animals but only chicken. She also stated she had been married for three years before the incident herein occurred, and further that they stayed in peace with her husband. She claimed that her husband told her that he had disagreed with G and for all that time he was not sleeping in her house and that is why he married her. She also claimed that G children used to go to her house and they used to visit each other with G when the husband was not present. She denied the charge against her.
 22. During cross examination the accused person maintained that she did not kill the deceased child. She explained that when she left to go and split firewood she left the deceased with G, E (PW3) and P's twin sister called K and by that time they were taking tea and G had prepared the porridge mix. She added that K was not at home when she left to go and split firewood. She further explained that by the time K went to her she had already split firewood for thirty (30) minutes. She further explained that when K went to call her he told her that he had not left any one at home. She did not know where G had gone since she had left her with the children. She explained that she was beaten by PW5 before losing consciousness. She told the court that the evidence of PW3 is what her mother G must have told her to say. She maintained that her relationship with G was cordial and that it was only H (PW1) who had an issue with G. She denied making any porridge on the fateful morning..
 23. She was also examined by the Court and told the court that PW5 went to where she was with K some 2minutes or so after K had arrived. The Defence then closed their case.
 24. Mr. Getanda for the accused relied on his earlier submissions and urged the court to consider the testimony by the accused. Mr. Ngetich on the other hand relied on the evidence on record and submitted that the accused was guilty of the offence and urged court to convict her accordingly.
 25. From the evidence on record what comes out clearly is that the incident herein happened within the homestead of PW1. It was witnessed by a child of ten years who the court found was intelligent enough and knew the consequences of telling lies. Everything according to both the prosecution and the defence happened in the morning between 6.00 a.m. and 8.00 a.m. It was during breakfast. What came out from the evidence was that the child was poisoned and this was proved by the postmortem report PEx1 and the report of the Government Analyst PEx3. PW1 confirmed that he had a bottle of medicine in his house which he used to kill ticks and wash cows. The question now is how did the deceased consume the contents of the said poison whereas the same was kept away from the reach of children.
 26. From the evidence of PW1 he was married to G who was the 2nd Wife and the accused who is the

- 3rd wife. His 1st wife had passed away. The 2nd Wife lived in her own house and the accused lived in the house of the 1st wife. According to PW1 he left the accused and the children at home at 6.00 a.m. PW1 did not mention where he left Gladys his second wife.
- 27.The evidence of PW3 struck me. She was the only child who testified. Her evidence was consistent even when under stiff cross examination. She saw the accused take the deceased on the pretext that she was going to give him porridge. She also saw the accused giving the child medicine which she said was mixed with the porridge. PW3 described the medicine as being yellow and explained that the medicine was in a bottle in the house. She saw the deceased drinking the porridge. PW4 confirmed the evidence of PW3. He found the deceased in the house with the accused and the deceased was vomiting. He took the deceased to the hospital. PW5 also confirmed that he found the accused at home with the deceased.
- 28.So that means that the accused was at home with the deceased and not in the shamba as she claimed. She was seen by three witnesses. No one saw her at the shamba. In her evidence she admits that the child died of poisoning. I wonder why G did not testify but it is clear from the evidence that she (G) was at the shamba and not at the home as the accused wanted this court to believe. If G, the mother of the deceased was at home, why would K carry the deceased to where the accused was splitting firewood 50 metres away? In my view that piece of evidence by the accused was an afterthought.
- 29.PW6 properly investigated the incident herein. He and others went to the scene where they found the bottle of poison and where they interrogated witnesses. This he did the same day of the incident. He witnessed the postmortem and took samples of the deceased's body parts for analysis to the Government Chemist. He did not describe what he saw at the scene and I think that he should have been keen enough to note everything at the scene even what the child vomited. He however established the relationship of the accused and the deceased. He also established where the mother of the deceased was when the incident occurred. She had gone to the shamba to plough.
- 30.On the whole I am satisfied that the Prosecution has established all the ingredients of Murder as set out under Section 206 of the Penal Code. By administering poison mixed with porridge to the deceased, the accused knew that such an act was likely to cause the death of or grievous harm to the deceased. It does not matter that such knowledge was accompanied by indifference on the part of the accused whether death or grievous would be caused or not, or by a wish that such an eventuality would not occur.
- 31.There is also proof from the Post Mortem Report that the deceased died, and that the cause of death as per P Exhibit 3 was due to indigestion of a pesticide. There is evidence that, it is the accused who administered that pesticide to the deceased. In light of all this evidence, the accused's contention that she was not at home when the deceased took the poison is unbelievable and the same does not shake the Prosecution's case against her. I also find the accused's allegation that the testimony of PW3 is what her other G told her to say cannot be true. The accused stated with her own mouth that she and G were on good terms, and that being so, G would have had no reason to frame the accused.

The upshot of what I have stated above is that the Prosecution has proved the offence of Murder against the accused person beyond any reasonable doubt. I found her guilty as charged and convict her accordingly under Section 322 (1) of the Criminal Procedure Code.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 23rd day of July 2015

RUTH N. SITATI

JUDGE

In the presence of

Mr. Omwenga.....for State

Mr. Getandafor Accused

Mr. Lagat..... Court Assistant