



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. 1 OF 2013

REPUBLIC PROSECUTOR

V E R S U S

HADIJA KANDU ASIF “alias” MWENDE ACCUSED

JUDGMENT

The accused Hadija Kandu Asif “alias” Mwendu stand 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 22nd December 2011 at Mwingi Town, Mwingi Location in Mwingi Central District within Kitui County, murdered Brian Musyoka. She has denied the charge.

The prosecution has called 6 witnesses in support of their case against the accused. The case started before one Judge and it was later taken over by myself.

PWI is Stephen Mutunde Joel Waimbe an Assistant Analyst working at Government Laboratories in Nairobi. It is his evidence that he has a Bachelor Degree in Chemistry from Moi University graduating in 1998. His official duties include identification of Poisons, Drugs and Substances Abuse. It is his evidence that on 2nd January 2012 a Police Officer PC Stephen Irungu Wanjenga from Mwingi Police Station submitted to him three samples, that is stomach sample marked as A, liver sample marked as B, and kidney sample marked as D. All were labeled Musyoka Brian. The samples were accompanied by an exhibit memo and he was required to ascertain if any contained poisonous substances.

He examined the items and found traces of Diazinon a pesticide in the stomach sample. It is his evidence that diazinon is harmful to humans if ingested. He opined that a blood sample of the deceased ought also to have been submitted for examination. He prepared his report on 3rd May 2012 and signed it, and submitted it to Mwingi Police Station on the same day.

On the 7th June 2012 however, a Police Officer named Martin Masita reported that the analyst’s report had not reached Mwingi Police Station and required a certified copy. That certified copy was prepared on the same day and signed by Joyce Njonya Wanjiku also a Government Analyst. It is his evidence that Diazinon can be obtained from any Agro vet in its liquid form, and can be used at home or in crops in the field. He did not quantify the amount of the Diazinon he found in the stomach sample but in his opinion it was a substantial amount which could cause death. He stated that Diazinon could not be used to preserve cereals. He stated also that even without the blood sample he was able to confirm the presence of the chemical in the stomach. He produced a certified copy of the report as an exhibit.

In cross examination he stated that he examined the liver and kidney samples. He stated that something

ingested might be found in some organs of the body and not in others. He stated that he advised that a blood sample should have been submitted because it is possible to find toxic substances in the blood and not in the stomach as some substances reached the blood stream directly without passing through the stomach. He also said that Diaznon is a Broad Spectrum pesticide used to control insects in the home and crops in the field. He stated that he did not know the types of crops grown in Ukambani.

PW2 is Mary Kaari Kilonzi the mother of the deceased. It is her evidence that she lived in a rented house at Mwingi with her parents, and that the accused lived in a neighboring house. She testified that on the 22nd December 2011 at around 4.00 P.m, she took a jerrican and went to fetch water. Before she left home Brian Musyoka (the deceased) one of her two children had gone to the accused's house. Then Musyoka came out with a child of the accused by the name Taabu and another called Kathini. The deceased called her and asked to accompany her to the river and they went together. While at the river the deceased complained that his stomach was paining and continued to do so, and started sweating. She fetched the water, went home and found her mother and told her that the deceased had complained of stomach ache and claimed to have eaten ugali given to him by Taabu a child of the accused. Her mother then gave her money to buy milk for Brian but he refused to drink it and was unable to stand without support.

Her mother then told her to call the accused which she did and the accused asked the deceased about the issue and he said that he ate ugali cooked for lunch and that all the ugali had already been eaten. According to this witness, the accused said that the deceased might probably have taken busaa which she sold inside her house.

It was her evidence that the children played together even near the place where busaa was sold. Her mother then took the deceased to the Dispensary and the Medical Practitioner asked them to take him to Mwingi Hospital. They took him back home changed his clothes, and the mother took him to hospital at around 5.00 P.m. She then followed arriving at Mwingi Hospital at 7.00 P.m and found the deceased admitted with tubes in his nostrils. It was her evidence that the accused had visited to the hospital earlier. According to her, the doctors asked her about the date of birth of the deceased. She telephoned the father of the deceased who came to hospital only told to go out leaving only her parents in the hospital. When the parents came out of the hospital, they said that they should go to the police station. At the police station they were told to record statements and that is when her father disclosed to her that the deceased had died. It is her evidence that the accused used to disagree with her mother. She was not aware if that disagreement had been reported to the Chief or Police. She stated that the deceased had eaten lunch at home and she had no grudge against the accused.

In cross examination, she stated that she had two children that is the deceased and Safari. The accused also had four children. Taabu was a child of the accused aged between 5 and 6 years. Kathini was also a child of the accused aged 3 years. There was also a boy called Kavisi aged about 7 years and a girl aged about 8 years. She confirmed that the children of the accused and her children played together. She stated that the plot had about 12 houses and busaa was sold therein. She maintained that the deceased told her that Taabu had given him ugali. She stated also that their house had a gate and one had to go through the gate to get to another house. She confirmed that Taabu was almost the same gate of the deceased. She stated that the deceased said at the river that he was given food by the accused's child.

PW3 is Kalima Kilonzo the grandmother of the deceased. It was her evidence that she had lived in Mwingi town for 18 years with her family which included PW2. That on 22nd December 2011 at 1.00 P.m, she was with PW2, her daughter and her 2 grandchildren. Her husband was also at home. Her grandchildren were Brian the deceased and Francis a son of her elder son.

She testified that in the morning the family took githeri both for breakfast and lunch and after eating, the children went out to play. She called back the deceased because she had a grudge with the neighbour and did not want him to play there. That neighbour was the accused, who made and sold busaa. According to this witness the accused lived in house No. 2 while she lived in house No. 1. According to her, the reason for the disagreement was that the accused had insulted her by saying that she had brought thieves and that her son in-laws Mwatati was a convict at Waita Prison who had said that he would cut the

accused's head. According to her, the accused continually insulted her. She testified that Mwatati had married PW2. She stated that two days after that disagreement, Taabu beat the deceased and when PW2 asked her why, the accused made a report on the matter to the police.

It was her evidence also that after calling the deceased back, he still again went to play outside. According to her, when PW2 took a jerrican to go and fetch water she was accompanied by the deceased. When the two came back, she observed the deceased and found him crying and sweating. The deceased told her that Taabu had put ugali on his hand and he ate. She thus sent for milk but the deceased could not drink and was shivering. She then took him to Tahidi Dispensary and they were referred to Mwingi District Hospital. At the hospital, the deceased was attended but he died at 7.00 pm. It was her evidence that the mother of the deceased PW2 went to the hospital and they proceeded to the Police Station. She stated that she did not have a grudge against the accused.

In cross examination she stated that the accused had more children than PW2. Some of the children of the accused were older than PW2's children. She confirmed that the children played together. She also confirmed that Taabu was the accused's child and aged 10 years. She stated that she was told that PW2 was beaten by the accused. She also stated that Mwatati had married PW2 but that she did not know if accused had any issues with Mwatati. She confirmed that Mwatati was in jail and insisted and PW2 and Mwatati had never lived in her plot together. She denied seeing Mwatati coming to drink busaa at the accused's house.

PW4 is Florence Mumanie Mwangangi a Village Elder. It is her evidence that on 19th December 2011 at 6.00 P.m, she was at home when the accused came and reported that she had issues with PW3 and her daughter PW2. She stated that the two had insulted her. The next day this witness visited the plot and they called the accused and the caretaker as well as an elderly lady called Kathima. The accused then narrated the story, and when PW2 was asked about the problem PW2 said that the accused claimed that Kalima her mother (PW3) used to bring thieves to the plot. After listening to the story the witness advised them to stop quarrels otherwise she would report them to the chief.

It was her evidence that on the 22nd December 2011 Kalima came at 5.00 P.m crying that a boy called Musyoka was vomiting and was complaining that he had been given ugali. She advised Kalima to report the incident and take the boy to the hospital. She later learnt that the boy had died. She confirmed that the accused sold busaa and vegetables at her residence. In cross examinations she confirmed that she did not think that the disagreement was serious to cause death. She stated that she reconciled them.

PW5 was Corporal Martin Masita of Mwingi Police Station. It is his evidence that on 22nd December 2011 a woman Mary Kaari and her relatives made a report to the police that a child of Mary by the name Brian Musyoka started vomiting and sweating. They took the child to Mwingi District Hospital where he died.

On the 23rd of December 2011 the witness and others tried to trace the complainants but could not find them until 25th December 2011 when he went to their home and saw the house of the suspect who had rented a house nearby. He found that the suspect, who is the accused had moved from the house bordering the complainant. On enquiries, he found that there was a dispute which had been handled by Florence (PW4) a Village Elder on 19th December 2011 when the accused had complained. On 29th December 2011 he accompanied the grandfather of the deceased to hospital to identify the body. According to him Dr. Edward Indumwa performed the post mortem examination on the body. The exhibits were also taken and forwarded to the Government Chemist for analysis. He prepared the exhibit memo form, which he produced as an exhibit. The body was then released for burial.

In cross examination he stated that he made one statement in this case. He was shown a statement dated 6th January 2012 which did not mention anything to do with bad blood between the accused and the complainant. He stated that he did not find anything wrong which the accused had done.

At this stage the trial Judge was transferred from the station and I took over the case. The accused elected to proceed from where the case had reached. She also opted not to recall any witness.

PW6 is Dr. Catherine Njeri Kago. It is her evidence that she was aware and familiar with the handwriting of Dr. Edmond Indumwa who conducted the post mortem examination. She stated that she was qualified from the University of Nairobi with MBCHB and had experience of 2 years as a Medical Officer. She referred to the findings of Dr. Indumwa.

The entries in the post mortem form show that on 29th December 2011 the body was identified by two witnesses. The history was that deceased had died after he had a meal of githeri. He had vomit and diarrhea. The body was not clothed. It was the body of a male African aged 5 years with average nutrition. Stiffening of the body had commenced and the body looked pale.

Externally blood was oozing from the nose but there were no signs of struggle or external injury. The respiratory and cardiovascular digestive system were normal. The head, nerves system and spinal cord were normal. The cause of death was cardiopulmonary failure due to poisoning. A death certificate was issued and specimens removed from the body for further examination which included the stomach, left kidney and the liver. The postmortem form was signed by Dr. Indimwa. According to the witness though the doctor conducted the post mortem examination he did not conclusively find the cause of death. That is why he removed specimens for further examination. She also testified that the findings of the doctor however, in the absence of the report on the specimen removed, gave the approximate cause of death. Dr. Indumwa signed and dated the post mortem report which she produced as an exhibit.

In cross examination she stated that according to the entries in the post mortem form, the history was that the deceased started vomiting and diarrhoeing. She confirmed that many things could cause vomiting and diarrhoeing. Many things could also cause bleeding from the nose. She stated that Diazon was a chemical commonly used as a pesticide. She stated that an allergy was an abnormal reaction to a substance, and that the deceased was about 5 years old and that children of that age were inquisitive about surroundings and generally played around. They could pick things and put them in their mouths. The post mortem report however only talks about taking githeri in the morning.

In reexamination, she stated that Diazon could cause death when taken in large amount she. Stated that the death could not have been caused by an allergy.

The prosecution then closed their case. Thereafter parties counsel submitted on a case to answer. The court however put the accused on her defence and she opted to give sworn testimony.

In her sworn testimony, the accused Hadija Asif testified as DWI. She stated oath that she lived and sold vegetables and busaa in Mwingi town. She lived in rented premises with her four children where she conducted her business. The said children were Annah aged 16, Alex aged 14, Taabu aged 5 and Kathini aged 3 ½ years. She stated that Mary Kaari Kilonzo PW2 was her neighbour together with Kalima Kilonzo. She confirmed that PW2 had young children.

It was her defence that on 22nd December 2011 she was in hospital at Mwingi having gone there in the morning to take ARV drugs. She came back home at about 5.00 Pm and did not find her children and opened her business. She sold the liquor until 6.00 P.m when she got information regarding this case. She stated that her children were not with her all that time. She was informed of the incident by Kalima Kilonzo PW3. She went to the house of the complainant and saw the deceased standing on a mat and she was told by Kalima that the deceased had said that he had been given food by Taabu when they were playing together. She denied any involvement in the death of Brian. She stated that she did not know the cause of death.

In cross examination she admitted that her house touched the house of where Mary PW2 lived. She stated however that the houses were on different sides of the plots. She stated that the children played together but she did not see them when she came back. She stated that the children had taken lunch but she did not ask them where they ate. She could not say that the children in the neighbour hood had a habit of eating anywhere they found food. She stated that she heard PW3 Kalima testify in court and admitted that Kalima had told her that the decesed said that her daughter Taabu had given him food. She said that she knew Florence PW4 as a Village elder. She admitted that the Village Elder came to resolve a dispute

between them on 19th December. She stated that there was no dispute arising from the fact that the husband of Mary PW 2 was bringing thieves in the estate. ***(The court noted that the accused voice was very low during cross examination).***

She stated that she knew Loise who lived in the same estate but denied they shared food or a sleeping place. She maintained that on 22nd December she came back home at 3.00 P.m. She said that she left food behind for the children ie floor milk and sugar and that she did not give the children any additional money to buy things such as onions. She stated that she neither cultivated at home nor brought spray for the vegetables she sold.

In re-examination she said she did not know the food that Brian eat which caused his death. She stated that she agreed with Florence Mwangangi that they had a dispute however that dispute was settled. According to her, after that settlement she did not have any issue with the family of the deceased. She maintained that when she came back home she was told that the children had eaten. She stated that she was not home when the children ate. She insisted that she did not know the cause of the deceased's death.

That was the close of the defence case as the accused chose not to call any other witness. Thereafter counsel for the accused and the prosecution counsel made oral submissions which I have considered.

The accused herein stands charged with the offence of murder. Murder is the causing of unlawful death of a human person with malice aforethought. The burden is always on the prosecution to prove a case against an accused person beyond reasonable doubt.

In a murder case, there are three ingredients that the prosecution has to prove against an accused person beyond reasonable doubt. Firstly, the prosecution has to prove that indeed the deceased died. Secondly, the prosecution has to prove again beyond reasonable doubt that the death was unlawful and was caused by the accused person. Thirdly, the prosecution is bound to prove beyond reasonable doubt that the accused caused such death with malice aforethought – see the case of REPUBLIC –VS- GACHANJA (2001) KLR 428.

The case of the prosecution herein is that Brian Musyoka was died. The evidence on record is that Brian was a 5 years old boy child of PW2. He lived in the neighborhood with the accused at Mwingi Town. On the 22nd of December 2011 he complained of stomach ache and claimed that he had been given ugali by another child, which he ate. He was taken to the Dispensary for treatment and later to Mwingi District Hospital where he was admitted. The evidence is that he died at 7 P.m in the Hospital. A report was made to the Police about the incident. The Doctor conducted postmortem examination and filled the postmortem form. The cause of death was entered food poisoning but the Doctor took samples of the deceased's liver, kidney and stomach for further analysis by the Government Analyst in Nairobi. The original report from the Analyst was not traced. However a certified copy was produced in court and there was no challenge to it by the defence. It confirmed that the stomach sample had diaznon a common pesticide which could cause death. It is this court's finding that indeed the deceased died and that the cause of death was through food poisoning as found by the postmortem doctor.

The prosecution has also to prove that the accused caused the death and that the death was unlawful. With regard to the death being unlawful the fact that the deceased died of poisoning does not mean that such death was automatically unlawful. It is possible that such poisoning would either be self-inflicted or merely accidental, even if it is caused by a third party.

The evidence on record is that the deceased died of diaznon poisoning after being given ugali by Taabu to eat. Taabu was not called to testify. She was also not charged in court. There is no allegation made against Taabu by any of the witnesses. Therefore, even with Taabu, it is not certain whether if it is true that she did give the alleged poisonous ugali, it would amount to unlawful death.

Coming to the connection between the accused and the death, the allegation is that there was a dispute between the accused and the deceased family. They were certainly neighbours living in one estate of

rented house at Mwingi Town. There was a dispute which was confirmed by the Village Elder PW4, and which was reported to her by the accused. According to the Village Elder she discussed the issue then asked the families to reconcile.

The prosecution was required to call evidence to connect the death of the deceased with that dispute, if the death was to be connected to the accused who according to the evidence did not give the alleged ugali to the deceased. They did not do so. Secondly, there is no evidence or even a suggestion that the accused instructed or asked Taabu to give the ugali to the deceased. As such assuming then that the ugali contained Diaznon and was given to the deceased by Taabu to eat, such evidence would only lead to possible Criminal culpability on Taabu and not the accused person.

In my view in order to connect the accused to the offence, the prosecution should have brought evidence to show that that ugali either emanated from the accused or that the accused instructed or persuaded or at least misled Taabu to give the ugali to the deceased. No such evidence was tendered by the prosecution. There was no evidence from the prosecution that the accused prepared food or the ugali for the children or was there or was near when they were eating or giving each other ugali. The fact that there had been an earlier family dispute and the fact that the deceased stated that Taabu gave him ugali, does not, in my view, connect the accused to the death of the deceased. It is thus the finding of this court that the prosecution failed to prove beyond reasonable doubt that the accused herein caused or was involved in the death of the deceased. They are merely relying on suspicion which cannot be the basis of a conviction. On that basis alone the accused is entitled to an acquittal. On this I rely on the case of SAWE –VS- REPUBLIC (2003) KLR 364 at page 375 where the court of appeal stated :-

“We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except suspicion. The suspicion may be strong but this is a game with clear settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt”.

Having found that the prosecution did not prove or establish accused caused the death of the deceased, it follows that I have to find that there was no malice aforethought. This finding on malice aforethought is consequential as it flows naturally from the fact that the accused did not cause the death of the deceased, and therefore cannot be said to have malice aforethought in the death of the deceased.

In the result I find that the prosecution has failed to prove its case against the accused beyond reasonable doubt. I find the accused not guilty and acquit her of the offence charged. These are the orders of the court.

Dated and delivered at Garissa this 22nd September 2015.

GEORGE DULU

JUDGE