



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 36 OF 2010

REPUBLIC.....RESPONDENT

VERSUS

A A R.....ACCUSED

RULING

The accused **A A R** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge are that

“On the 7th day of December, 2010 at Mackinnon Location within Kwale County murdered A A.”

The accused entered a plea of ‘*Not Guilty*’ to the charge. Her trial commenced before Hon. Lady Justice Grace Nzioka on 7th March, 2012. Hon. Justice Nzioka heard a total of five (5) witnesses after which she became unavailable to continue with the case. I then took over the matter. The accused through her advocate **MR. CHIDZIPHA** waived her right to a *de novo* hearing so I proceeded and heard the last witness. **MS. MACHARIA** learned state counsel led the prosecution.

The brief facts of the case were as follows. The deceased ‘**A A**’ was a toddler girl aged about 1 ½ years old. The accused is the mother of the deceased. **PW1 F M** a sister-in-law to the accused told the court that on 7th December, 2010 at about 5.00 p.m. she was asleep in their home at Mackinnon road. She heard a commotion and went to check. She found the accused and her baby in the living room writhing in pain. **PW1** told the court that she detected the smell of cattle dip emanating from the mouth of the accused. **PW1** shouted for help. Neighbours came and helped rush the child to hospital. The family of accused also came and took her to Mariakani hospital. The following day the child unfortunately died. The accused was arrested as soon as she was sufficiently recovered and was taken to the police station where she was later charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto her defence. She gave an unsworn defence in which she denied killing her child. It is now upon this court to determine whether the charge of murder has been proved to the standard required by law.

The offence of murder is defined by section 203 of the Penal Code as follows

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

From this definition arises three crucial ingredients all of which must be proved beyond a reasonable doubt in order to establish the charge of murder. These are

1. The death as well as the cause of death of the deceased.
2. Proof that the deceased met his/her death as the result of an unlawful act or omission on the part of the accused.
3. Proof that said unlawful act or omission was committed with malice aforethought.

Regarding the first ingredient evidence abounds. **PW1** told the court that when she arrived at the scene she found the child writhing in pain with her teeth clenched. **PW2 A M M** a neighbour told the court that upon receiving the news of the incident she rushed to Mariakani hospital to check on the child. She confirms that the child died at 12.00 noon in her presence. **PW4 M A** was the husband to the accused and the father of the child. He told the court that he was away but received a call to rush home urgently. He complied only to find both his wife and child admitted at Mariakani hospital. He told the court that his child later died. He is the one who identified the body of the deceased to the pathologist for purposes of post-mortem.

PW6 DR. NGALI MBUUKO a pathologist conducted the autopsy on the body of the deceased. He testified that upon opening up the stomach he found chemical deposits from insecticide. He opined that the cause of death was “*organ phosphate poisoning i.e. insecticide poisoning*”. **PW6** filled and signed the post-mortem report which he produces as an exhibit **Pexb1**. This was expert medical evidence and was neither challenged nor controverted by the defence. Thus the identity of the deceased is not in doubt nor is any doubt raised that she met her death due to poisoning.

The next crucial question is whether it was the accused who administered the poison (insecticide) to her child. There is no witness who saw the accused feed the child with any food or drink much less poison/insecticide. **PW1** in her evidence stated that the accused told her that she had given the child poison. **PW2** also testified that the accused admitted to her that she had given the child poison due to ‘*anger*’. None of these two witnesses actually saw accused feed the child with any substance. Their evidence is that the accused admitted or ‘*confessed*’ to them that she is the one who poisoned the child. The law regarding admissions/confessions is very clearly set out in section 25A of the Evidence Act Cap 80 Laws of Kenya. A confession is only proof of a fact where such confession is made following due caution before a police officer of the rank of Inspector or above. Thus the statement made by **PW1** and **PW2** do not amount to evidence of a confession by the accused.

What reason would accused have had to poison her own child? All the witnesses testify that the accused too was a victim of this ‘*poisoning*’. She too apparently ingested the same chemical and was admitted in hospital in a coma. What reason did accused have to kill herself and her child. None is given much less even suggested. **PW4** the husband of the accused states that he was living peacefully with his wife and child and that there was no problem between them. He says

“Before the incident there was no disagreement between me and my wife. I am not aware of any disagreement between my wife and my mother.”

There is no evidence to suggest that the accused was suffering from any mental impairment that would cause her to commit such an abominable act.

Aside from there being no concrete evidence to prove that it was the accused who administered the poison to the deceased, the accused in her defence claims that it was actually her sister-in-law **PW1** who offered her a glass of juice laced with the poison. The accused stated that **PW1** called her to meet her mother-in-law. The accused went there with her child. As she waited in the living room **PW1** offered her a glass of juice which she sipped. As is common the child also drank from her mother’s glass. The accused said she began to feel uncomfortable and lost consciousness. She has no idea what happened to her child. This defence places a doubt on the prosecution case. The defence is given credence by the fact that **PW1** and her family only took the child to hospital. They did not bother with the accused but left her lying unconscious in the house and called her own family to come and attend to her. **DW2 S A** a brother to the

accused testified that he was called and informed that his sister was lying in a critical state at her mother-in-laws's house. He rushed there and found the accused lying unconscious in the house. He got a taxi and took her to hospital. This version is confirmed by **PW4** the husband of the accused when he states

“My wife was brought [to hospital] by her family members.”

Here is a situation where a mother and child have both ingested poison and both are ill. Why would **PW1** and the family take only the child to hospital and leave the mother lying unconscious in the house. They did not bother to alert the family of the accused. **DW2** states that he was called by a neighbour. Could it be that the intention was to eliminate the accused, and that is why no efforts were made to get her immediate medical attention? In the light of this the defence of the accused cannot be dismissed as entirely out of hand.

Further inconsistencies raise more doubt. **PW1** told the court that it was she who on 8th December, 2010 collected a bottle containing the pesticide and a green cup as well as the accused's clothes which she then took to the police station and handed over. However, **PW5 CHIEF INSPECTOR STANLEY WAFULA** the Deputy OCS of Taru police station testifies in his evidence that it was he who recovered the cup, the bottle of cattle dip and the clothes from the house. **PW5** states that

“I recovered the items from the accused's house.”

Firstly, **PW1** had already claimed that she is the one who recovered the items and took them to the police station and secondly **PW5** says that he recovered the exhibits from accused's house yet the incident did not occur in the house of accused – it occurred in the house of the accused's mother-in-law. **PW1** accused's sister-in-law claims to have recovered the exhibits in the kitchen of the house she lived in with her mother. **PW4** confirmed that he and his wife did not live in the same house as his mother. Who here is telling the truth? The exhibits could not possibly have been recovered in two different locations and in two different houses. Under cross-examination **PW5** states that

“It would be false if someone said they recovered the items herein and handed them over to police.”

By this **PW5** suggests that **PW1** lied to the court. If **PW1** was lying – then to what end. Was it to cover her tracks and shift the blame to the accused? In any event this is an inconsistency which remains unexplained that severely compromises the prosecution case.

On the whole I find that the evidence adduced by the prosecution in this case does not pass muster. There is no evidence to prove beyond a reasonable doubt that it was accused who administered the poison which killed her child. The defence raised by the accused is plausible and in my view casts doubt on the prosecution case. The benefit of this doubt must be awarded to the accused. The prosecution have failed to prove the *actus reus* for the offence of murder. As such I enter a verdict of ‘*Not Guilty*’ and I acquit the accused of the charge of murder. The accused is to be set at liberty forthwith unless she is otherwise lawfully held.

Dated and delivered in Mombasa this 16th day of June, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Mushelle for Accused

Mr. Mureithi for State

Court Clerk Mutisya