



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL CASE NO. 54 OF 2009**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**REBECCA TALLAM .....ACCUSED**

**JUDGMENT**

Rebecca Tallam, the accused herein was charged with the offense of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offense are that on the 7th day of January 2008 at Tenges Trading center in Baringo District, Rift valley province, murdered Alice Ruto. The accused person entered a plea of not guilty. The prosecution called a total of 7 witnesses who testified as follows;

**PW1**, Wilson Koima a male adult and cook at Tenges Secondary school told the court that on 19th January 2007, at around 12:30 p.m., he was at home when he was told to go to Tenges Hospital as his wife (deceased person) who had attended a burial had been given poison and had died. He went to Kabarnet Mortuary where he identified her body during a post-mortem. He stated that he found his mother-in-law and a police officer at the hospital and later recorded a statement.

In cross-examination, he told the court that his wife had died on 7th January, 2008 but that he did not witness the administration of the poison.

**PW2**, Mary Teriki, the deceased's mother told the court that she believed her daughter was poisoned. She testified that on 7th January, 2008, she was with the deceased at her son-in-law's burial when they met with the accused person who said that she wanted to console them. Upon reaching her house, the accused gave them 2 glasses of alcohol (traditional brew) in black and white glasses. The deceased remarked that the alcohol was very strong after sipping it and when PW2 offered to finish it up for her, the accused refused and took the remaining alcohol away. She stated that they left the accused's home and went separate ways, with the deceased taking a shortcut. She later heard from another lady that the deceased had collapsed on the road. She went and bought glucose for her but it did not work. The deceased was rushed to the hospital but she died while receiving treatment. PW2 then called her son and the accused person was arrested. The body was taken to Kabarnet hospital and she identified it during the post-mortem. She asserted that she had known the accused for a long time as a friend of the deceased but did not know whether they had a dispute.

In cross-examination, PW2 told the court that the deceased did not confide in her of any dispute that existed between herself and the deceased and that the shortcut the deceased took after they parted ways was a smooth road with no stones.

In re-examination, she told the court that the glass given to the deceased was black while hers was white. She stated that before taking the alcohol, the deceased had been well.

**PW3**, Eunice Namuyu, of Government Chemist in Forensic Division, Toxicology Section testified that she received specimens concerning the instant case on 2nd February, 2008 that originated from Kabarnet Police Station. She outlined the specimens as, liver, stomach, kidney, blood, gastric contents and suspected poison. She detected the presence of Carbofuran Carbonate Beset in the deceased's stomach and the suspected poison. She said that carbon besets are poisonous and may be harmful to humans when ingested. She also detected excessive amounts of Ethanol (alcohol) in her blood. She told the court that no other toxic substance was detected. She produced the analyst report as well as two Exhibit Memo forms as exhibits. She identified a bottle of Furaban poison which was marked MFI.4 stating that it was among the items she received.

In cross-examination, the witness stated that she was a government pathologist and she personally prepared the analyst report. She stated that there was Ethanol in the deceased's blood which was poisonous. She told the court that alcohol alone would not be poisonous.

**PW4**, Dr. Gilbert Cheruiyot who was previously based at Kabarnet District Hospital conducted the post mortem on the body of Alice Ruto and opined that the cause of her death was unknown. PW4 further testified that he forwarded blood, liver, spleen, right kidney specimens and stomach content to the government chemist for further examinations. He thereafter saw the report from the government chemist after which he stated that the cause of death was cardiac respiratory arrest secondary to poisoning (pest insecticide) which is highly toxic. He produced the post mortem report as an exhibit.

In cross-examination, PW4 stated that he did not indicate the cause of death in the post mortem report because by the time he filled it, he had not seen the government chemist report. He stated that the stomach and small intestines were inflamed, probably due to trauma or exposure to corrosive substance.

In re-examination, PW4 stated that he made the conclusion as to the cause of death upon receipt of the report from the government chemist.

**PW5**, No. 25594 P.C Francis Owino testified that on 7th January, 2008, he was working at Kabarnet Police station's report desk when at 6 p.m members of public made a murder report following an incident that had happened in Tenges. The public brought in one Rebecca Talaam as a suspect and handed him some poison in a tin that was wrapped in a blue polythene paper bag. He re-arrested the suspect and handed the poison to the investigating officer. He could not remember the deceased's name but he identified the accused at the dock. He also identified a white plastic tin which contained the poison as MFI 6 (a) and the blue polythene paper bag as MFI 6(b).

In cross-examination, he stated that he did not get the names of the members of public who handed the accused to him. He said that the typed statement does not give details on the exhibits but he did not know the reason why the details were omitted.

**PW6**, No. 86043 PC Stephen Okwara was stationed at Kabarnet Police Station at the time of the incident. He testified that on 7th January 2008, he was at Karbanet when he was asked by the OCS, Joshua Kasero to rush to the station. On arrival, he found many members of public together with the accused. They also had with them the body of the deceased. PW5 who was at the report desk told him that the accused had been handed over to him and had re-arrested her. He recorded statements of witnesses who had accompanied the accused and the body of the deceased and gave a letter for the deceased's body to be taken to the mortuary. He gave an account of events that led to the death of the deceased person and said that he prepared an exhibit memo form dated 16th January 2008 which he sent to the government chemist together with the pesticide that had been taken to the station and samples of some of the deceased's organs for further testing. He testified that after the post-mortem, he opened a murder file and forwarded the same to the state counsel to

open an inquest file pending the outcome of the results from the government chemist. PW6 produced the original typed exhibit memo form as P.Exhibit 7.

In cross-examination, he stated that P. Exhibit 7 was prepared on 16th January, 2008 but this date did not appear on the form. He said that the date was to be filled by the person who received the exhibits at the government chemist but that form did not have the information - it was recorded in a different form. He stated that he was informed by members of the public that the accused had been arrested at around 3 p.m. at her house. He stated that he went to look for the shop keeper who had sold the alcohol to the accused person to record her statement. He also added that P. Exhibit 7 did not indicate what was received by the government chemist but that that information was contained in the exhibit memo forms. He told the court that the police searched the accused's house for the glasses that the deceased and her mother drank from but did not find them.

In examination, he stated that all the exhibits taken to the government chemist have a specific number and Kabarnet Police Station's number is 790/057.

**PW7**, No. 48283 PC Chrispas Masibai of Kabarnet Police Station testified that he took over investigations of the case from PW6, PC Okwara. PC Okwara handed over to him the original police file and a pesticide exhibit. He later fell sick and handed over investigations to PC Cheptum who was at the time of his testimony admitted at Iten District Hospital. He stated that he could then not access the exhibits and sought an adjournment to be able to produce them.

On cross-examination, he stated that he did not carry out any investigations and reiterated that he had handed over the investigations to PC Cheptum who was in hospital. However, on further probing he stated that the exhibits were in the exhibit room and the keys were kept by PC Kairithia who was based at Kabarnet Police Station and that he could have gone to get them from the store.

At this juncture, the prosecution applied for adjournment to allow the exhibits be availed but that application was opposed because PW7 made no effort to look for the key to get the exhibits. Defence argued that the case was old and ought to be closed. Court concurred with the submissions of the defence citing that it had reluctantly indulged the prosecution on two other dates and it would be unjust to allow a further adjournment.

On 8th May 2014, the court made a ruling on a case to answer where upon considering the evidence adduced, ruled that a prima facie case had been made and the accused was put on her defence.

The accused gave an unsworn statement of defence that on 7th January 2008 she was at home and prepared food for lunch for her children and planned to leave the house soon thereafter. She left her husband with the 2 children and 2 of her in-laws. She went to her place of work where she did flour business and at around 2.00 p.m. she found her in law in the house drunk. She indicated that she decided to go to the shop and on the way, she met with the deceased's father who told her of a person at the funeral who had been taken to the hospital due to drunkenness. She stated that she bought vegetables, took them home and proceeded to the hospital to visit the sick person.

She stated that when she was near the chief's office, the chief called her and advised her not to go to the hospital as the mother of the drunk person was angry with her. She then returned home and shortly thereafter, the administration police officers went to her house and arrested her. She was taken to Kabarnet Police station and was held in the cells for 2 days before being taken to court.

The accused further stated that she recorded two statements, one on the 9th of January 2008 and another on the 19th of January 2008. She stated that it was not true that she had been with the deceased and her mother. She stated that if she was with them, it was in a meeting on 5th January following the death of their in-law where they made contributions for funeral expenses. She indicated that it is only the deceased's family members who testified. She stated that her mother could confirm her story. She averred that she and the deceased were close friends who never

quarreled. They were blood cousins as their fathers were brothers and that they were brought up in the same house. She denied she murdered her.

## **SUBMISSIONS**

The prosecution submitted that the accused's culpability could be deduced from PW2's testimony who testified that the deceased was unable to continue with her drink which was too bitter and when her mother suggested that she takes the drink, the accused refused. The prosecution cited that the witnesses' testimonies were corroborative and moreover, that of the government chemist confirmed that the deceased had been poisoned. They added that the accused did not call any witness to corroborate her testimony and did not also produce any exhibit in support of her alleged defense.

Counsel for the accused submitted that the prosecution had failed to prove their case, citing contradictions in the witness testimonies. He submitted that PW1 testified to being informed of the incident on 19th January whilst the incident is said to have occurred on 7th January. Counsel cast doubt on the results that came from the government chemist. He stated that the deceased had drunk from the same bottle with PW2 and the fact that PW2 did not know the cause of the death of the deceased person made it questionable. He further submitted that the doctor (PW4) who conducted the post mortem on the deceased's body found the body normal and concluded that the deceased could have died due to trauma. Hence there was no evidence that linked the accused to the death of the deceased.

He further submitted that proper investigations were not done as no poison was recovered from the accused's house. As such, the accused was merely being framed by her neighbours for a crime she never committed. It was urged that the accused be acquitted.

## **EVALUATION OF EVIDENCE**

In REPUBLIC V ANDREW MUECHE OMWENGA [2009] EKLK, the learned judge Maraga J. (as he then was) defined the offense of murder and stated the following as its ingredients;

*“What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the accused's state of mind at the time; usually intention or recklessness is required. The Latin maxim—actus non facit reum, nisi mens sit rea—“the act itself does not constitute guilt unless done with a guilty mind,” encapsulates this principle.*

*With these two important elements of crime in mind, I can now define murder as the unlawful homicide committed with “malice aforethought.” Homicide of course is the killing of a human being by another. Murder is therefore the killing of a human being by another with malice aforethought...*

*It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.*

*In the first element, there must be evidence proving that the death of a human being (the deceased) actually occurred. The evidence required to prove the death is usually the autopsy reports given by pathologists. But there are circumstances where the cause of death is too obvious to require medical evidence like where the deceased person was stabbed through the heart*

or where he is decapitated or his head is crashed. Stating this principle in NDUNGU VS REPUBLIC [1985] KLR 487 the Court of Appeal stated at p. 493 that:-

*“...in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crashed, where the cause of death would be so obvious that the absence of a post-mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.”*

The three ingredients of the offense of murder which ought always to be established were also encapsulated in the case of PATRICK BULUMA ONDILO V REPUBLIC [2013] e KLR C.A AT KISUMU CRIMINAL APPEAL NO. 650 OF 2020 as follows;

1. Proof of the fact and the cause of death of the deceased.
2. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the '*actus reus*' of the offence, and
3. Proof that the said unlawful act or omission with malice aforethought which constitutes the '*mens rea*' of the offence.

On proof of the death of the deceased, PW1 did see the body of the deceased on arrival at the hospital. PW6 PC. Stephen Okwara stated that the accused was taken to the hospital alongside the body of the deceased. To seal the fact of the death, PW4, Doctor Gilbert Cheruiyot conducted the post mortem and concluded that the deceased died from cardiac respiratory arrest secondary to poisoning.

On whether the death of the deceased was caused by an unlawful act or omission on the part of the accused, PW2, the deceased's mother did confirm that, before the deceased drunk the alcohol served to her by the accused, she was in good health. It is the accused, who, on her own volition invited the deceased and her mother to her house. And as soon as they were in her house, she excused herself to go to the shop to buy them a drink. The drink happened to be the deadly alcohol. She served it in two separate glasses. When the deceased complained that the alcohol in her glass was too strong, her mother offered to taste it, but the accused immediately restrained her, took away the deceased's drink and poured it.

This clearly showed that the accused knew that the content in the deceased's glass was different from that in her mother's. She specifically targeted the deceased who was served alcohol in the black glass.

Blood samples and the stomach content that were analysed by the government chemist showed the presence of carbofuran (furan), a carbonate pesticide that is poisonous and harmful to humans if ingested. The same pesticide was detected in the suspected poison that was handed over to the police officers and taken to the government chemist for analysis. Alcohol was also detected in the deceased's blood with a concentration of 267 Mg per 100 mls of the sample, indicating a minimum intake of 6½ bottles of beer or 14 tots of whisky.

The Analyst Report definitely linked the content collected from the accused's house with what the deceased had ingested. And of course, from PW2's evidence, the only thing they had drunk from the accused's house was the alcohol she had served them with. The accused had laced it with the poisonous pesticide and from her conduct in the manner she served her visitors, it is clear she intended to eliminate the deceased. The act of poisoning the alcohol amounted to the *actus reus* of the offence of murder.

Moreover, the cause of the death was confirmed by PW4 who indicated that the deceased died of cardiac respiratory failure secondary to poisoning.

It is not therefore true as submitted by the defence that the death was unrelated to poisoning. In fact, PW4 was categorical that the inflamed intestines may have been caused by either trauma or corrosive substance. And given the strong evidence that the accused poisoned the deceased, it is obvious that the inflammation of the intestines was as a result of corrosion caused by the poisonous substance.

I thus conclude that the prosecution proved that it is the accused's act of poisoning the deceased that led to her death. And although no one saw her lace the alcohol with the poison, the circumstances under which the alcohol was administered and the subsequent unfolding event leave no doubts that the accused was the author of the deceased's misfortune.

As to whether the accused had malice aforethought, it is important to first establish what constitutes malice aforethought. The same is defined under Section 206 of the Penal Code thus;

*“206. 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. ”*

In the instant case, when the accused laced the deceased's alcohol with carbofuran (furadan) pesticide, she knew that it would cause her death. This is vindicated by the fact that after PW2 offered to taste what was in the deceased's glass, the accused quickly grabbed it and poured it. This was a pointer that she intended that the poison be only drunk by the deceased. Hence malice aforethought is established.

In the result, I find that prosecution witnesses gave a consistent account that pieced together the chain of events linking the accused to the death of the deceased. The accused's defence was ousted by the strong prosecution evidence. She indicated that her own mother would corroborate that she did not poison the deceased and that she was not with the deceased at the material time, but she failed to call her as her witness for reasons best known to her. I dismiss her defence as lacking in merit.

In the end, I find that the prosecution has proved the case beyond all doubts. I find the accused guilty of the offence of murder as charged under Section 203 of the Penal Code and I convict her accordingly.

**DATED and DELIVERED at ELDORET this 28th day of October, 2014.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Maritim holding brief for Chepkwony for the Accused

Miss Oduor for the State