



REPUBLIC OF KENYA

IN THE HIGH AT MALINDI

CRIMINAL CASE NO. 26 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

ZABIBU KAHINDI MAKAPUACCUSED

JUDGMENT

1. The accused herein is charged with the murder of an infant, L N, on 11th September, 2010 at [Particulars withheld] Village,[Particulars withheld]. She denied the charge and was represented by Mr. shujaa.
2. The prosecution case was that the accused was a friend of P K N (PW2) the mother of the infant. Both resided at [Particulars withheld]. Also residing in that village was P A C (PW3). A day before the alleged murder on 10th September, 2011 the accused approached PW3 and requested for some pesticide for killing bed bugs. PW3 gave her a few bottle top fulls of the pesticide known as “Gladiator” and warned her it was very toxic hence required to be used with caution.
3. On the next day, the accused joined PW2 to harvest some maize at the latter's mother's shamba. On the way there, the accused had the minor child with her. Suddenly the accused brought forth the child to PW2. The child was foaming at the mouth. The accused explained that she had given her a sweet which she had. The child's condition deteriorated and all efforts at first aid failed. She eventually died at the Malindi District Hospital where he had been referred.
4. A postmortem conducted by Dr. Kaudhia (PW1) on 13th September, 2010 was inconclusive. Samples were taken for toxicology but the results were never produced. On 13th September, 2010 Joseph Kahindi Lugwaru (PW9) Assistant Chief [Particulars withheld] recovered the juice bottle which PW3 identified as the container in which she poured the portion of pesticide at the request of the accused. The accused was arrested at Dagamura Location several days later, and charged.
5. In her unsworn defence statement the accused said that she was with her friend PW2 on the material day. That they had agreed to harvest maize at PW2's mother's shamba and were on the their way there. PW2 gave her the child in order to go relieve herself. The accused had sweets. She ate one and gave some to the two girls who had joined them. She also gave the child a sweet, called “pilipili”. The child started crying. Then PW2 came and accused her of poisoning her child. She refused to take her back and ran off. The child died some hours later.
6. The basic facts of this case are not in dispute. The accused and PW2 were friends who got together on the material date to carry out some work together at the farm, owned by PW2's mother. On the way to the farm the accused had the child in her custody. She gave her a sweet. The child started crying and was foaming at the mouth. She later died.

7. The court must determine the cause of the death of the minor and whether it was occasioned by any act or omission on the part of the accused, with malice aforethought.
8. The postmortem form indicates that samples were taken of the innards of the minor for toxicology. The prosecution did not produce any report in that regard. This leaves the court with the evidence of PW1-4 who variously described the child's breath as smelling of hot paraffin, kerosene, poison or pesticide. The accused freely admitted to have given the child a sweet. Witnesses saw the sweet but it was not recovered and given to police for purposes of chemical analysis.
9. The poison bottle allegedly recovered by PW9 after questioning the accused at the police station, itself irregular, was not produced as an exhibit. The contents thereof are therefore unknown. So that, while there unchallenged is evidence to the effect that the accused indeed obtained a pesticide from PW3, a day before the material date, there is no connection between the said poison and the death of the minor. What there is is strong circumstantial evidence.
9. The accused explained that she gave a sweet to the minor and two other girls. This was at 5.00pm. The accused stated that the minor and PW2 had already had two meals, at her place first, and later at PW2's home. Although this was not put to PW2 during cross-examination, it is conceivable that the minor had had at least one meal by that hour of the day. In the circumstances of this case, it was necessary to isolate all other possible sources of poisoning. That could only have been done through a determination of the kind of poison, if any, which caused the minor's death, and connecting it with the sample accused had obtained from PW3.
10. It is true that the circumstances in which the minor's health took a turn for the worse and the observations of those close by are suggestive of poisoning, and is consistent with PW1's tentative diagnosis. I found it surprising that the accused while eager to explain her handling of the child did not refer to the poison she had obtained from PW3 on the previous day. The lingering question is whether that poison is the one administered to the minor by the accused and occasioned her death as the prosecution evidence proposes.
11. Reviewing all the evidence, I harbour doubt regarding the answer to that question, which doubt must be resolved in the accused's favor. The police investigations were shoddily conducted as evidenced by the fact that they allowed a lay man (PW9) to interview a suspect in their custody and to go out in search of material exhibits. The exhibit, a bottle was found and handed over to police who seemingly misplaced it. Similarly no explanation was proffered by the prosecution for the failure to have toxicology reports in respect of the minor produced at the trial.

The accused is acquitted for all the foregoing reasons.

Delivered and signed at Malindi this **24th October, 2013** in the presence of Mr. Shujaa for the accused, Mr. Nyongesa for the State.

Court clerk – Samwel

C. W. Meoli

JUDGE