



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE NO. 24 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

RAYMOND NGALA KASUMARIACCUSED

JUDGEMENT

1. The accused was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars in the Information state that on 6th September, 2010 at Pingilikani Village, Chonyi Division within Kilifi County, he murdered Winnie Ngala. The accused denied the charge and was represented by Mr. Gekanana.

2. The prosecution case was as follows.

The accused was married to Pamela Nazi Chilumo (PW1) for 15 years by September, 2010. They had seven children, and resided at Chonyi. The youngest child was Winnie Ngala, the deceased. She was two weeks old at the time of her death. She had been born with a deformity of what seemed to be two sets of breasts on her chest. The accused was upset about the deformity which he said was a curse. He expressed the view that the child should not live.

3. On 6th September, 2010, PW1 returned home from the clinic with the deceased child. She handed her over to Anzazi Mbotya (PW4) the mother of the accused, who lived in the same homestead. PW1 went out in search of firewood. The accused who was in the home snatched the child from PW4 and went inside his house with the infant. He struck the infant with a panga on the head inflicting a deep cut. PW4 rushed in, took the child and ran to report to the local headman before proceeding to the hospital, but the child was dead. The accused was arrested.

4. In his defence, the accused stated in an unsworn statement that prior to 6th September, 2010, he had been ailing, and was therefore recuperating at home on the material date. He said that his mother who sat outside the house was holding the infant but had "stepped aside". He was also outside his house. Feeling very bad he decided to go into the house with the baby. As he entered the house, he fell down. He does not know what caused the injury on the infant. His mother picked up the child. His vision was distorted and his throat dry, and he could barely speak. He was arrested and charged.

5. The basic facts of the case as regards the setting of the circumstances of the offence are not in

dispute. The accused was the father of the minor and he had the child in his hands when she sustained fatal injuries on the material date. The only issue falling for determination is whether the accused inflicted the said injuries with malice aforethought.

6. According to his mother, PW4, the accused forcefully took the child from her after his wife (PW1) went away on her chores. The accused's young son, William Ngala (PW2) witnessed this incident which started with an argument. He said his father took the infant eventually and took her inside the house, placed her on a table and cut her on the head. This evidence is corroborated by PW4 who entered the house in pursuit of the accused after he snatched the child. She said:

“He picked the small child and I followed him because I thought he was up to no good. He entered his house. He placed the child on a table and when I entered I found the child having been cut on the head. I heard a loud sound and entered the house. Only accused was in the house. The child was bleeding...”

7. According to the postmortem form, the child had a transverse cut on the head from the anterior to auricular region and the cranial cavity was exposed. Death was due to severe brain damage. These injuries are consistent with a panga blow as described by PW2, even though the actual weapon was not exhibited at the trial.
8. The injuries are inconsistent with the allegations that the infant fell out of the accused's hands as he himself fell. This defence was not put to any of the prosecution's eye witness during cross examination. At any rate, even if the infant fell, the accused should have some idea how the deep cut to the head happened. His explanation is not believable. His forcible taking of the child from his mother is suggestive of his motives and consistent with the subsequent deliberate assault. Since the infant was born, he had complained that it was a curse because of the chest deformity, and, had already declared that the child did not deserve to live.
9. The accused gave a detailed narrative of his alleged sickness prior to 6th September, 2010 but was surprisingly short on the details of how exactly the minor in question sustained a gaping cut on its head moments after he snatched her. It seemed to the court that the accused was alluding to some form of insanity. But he had been examined before the trial and found to be mentally fit. Besides, his statements and actions prior to and up to the moment of the offence are inconsistent with those of a man who had lost control of his faculties.

10. Section 12 of the Penal Code states:

“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

On the basis of this section the trial court is empowered in appropriate cases to make the special finding anticipated by Sections 166 of the Criminal Procedure Code.

11. The accused, upon his examination in December, 2010 was found to be fit even though he claimed to have suffered from mental illness some three months before. This issue was not raised in cross-examination with his wife who would likely be aware of such mental illness. PW4 alluded to mental illness in her evidence but her description of the behavior of the accused, like that of PW1 and PW2 is not consistent with any such illness. It seems a remote possibility that the cold, nose bleeding, diarrhea and double vision allegedly experienced by the accused were symptoms of a mental disease. Besides, he had not been treated after his arrest. Three months later he was found to be mentally fit.

12. In my considered view, all the evidence before me suggests that the accused knew what he was doing and that it was wrong. Coming from a region where the fear of curses, witchcraft etc is rife, the accused may well have believed that the deformity of his infant child was a curse. That belief however, cannot amount to a state of insanity.
13. It appeared to me that the accused and his mother, the latter who had to be summoned by the court to give evidence after ignoring several police bonds, crafted the defence of insanity in an attempt to help the accused escape responsibility for his actions. That defence does not stand and is completely displaced by the prosecution evidence. The evidence clearly shows that the accused's actions were accompanied with malice aforethought as defined by Section 206 of the Penal Code. Well before the actions that occasioned fatal injuries on the deceased infant, the accused had declared the infant a curse and unfit to be allowed to live.
14. Upon considering all the available evidence I am satisfied that the prosecution has proved its case beyond any reasonable doubt. I find the accused guilty and convict him accordingly.

Delivered and signed at Malindi this **16th** day of **October, 2013** in the presence of the accused, Mr. Mayaka holding brief for Mr. Nyakoe for the accused.

C. W. Meoli

JUDGE

COURT – Record and sentencing on 24th October, 2013

C. W. Meoli

JUDGE

24-10-13

Before Hon. Lady Justice C W Meoli – J

Mr. Nyongesa for State

Mr. Nyakoe for accused

Court clerk – Samwel

Accused – present

Interpretation – English/Kiswahili

MR. NYONGESA – I do not have his records. Treat as a first offender.

C. W. Meoli

JUDGE

MR. NYAKOE – Accused is 43 years old. He has a wife and children who depend on him. Also his parents who are aged. He has been in custody for over three years. That is enough period to realize his mistake. He seeks leniency.

C. W. Meoli

JUDGE

NOTES ON SENTENCE

Accused treated as first offender. He has been in custody for three years. I take note of the fact that the accused may have genuinely believed the child was a curse due to her deformity. But taking her life in such a cruel manner is reprehensible for a father.

C. W. Meoli

JUDGE

SENTENCE

Accused sentenced to serve 30 (thirty) years imprisonment. Right of appeal 14 days.

C. W. Meoli

JUDGE