



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 68 of 2004

REPUBLIC.....PROSECUTION

-VERSUS -

ELIZABETH WAIHERA MARY.....1ST ACCUSED

ELISPHER MUTHONI2ND ACCUSED

J U D G M E N T

Thetwo accused herein *Elizabeth Waithera Mary (herein after referred to as the first accused)* and *Elispher Muthoni (hereinafter referred to as the second accused)* are jointly charged with murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars of the charge are that between the 21st day of February, 2004 and 27th day of February 2004 at Tukuyu village in Maragua District of Central Province jointly with others not before the Court murdered *Alexander Kungu Wangui (hereinafter referred to as the deceased)*.

The prosecution called **9 witnesses** in support of its case.

Alice Kibunja (PW 1), employed the first accused (A1) as a house girl on the 21st day of February 2004. Alice was a career woman. She left two children, namely *Kennedy Mwangi* (4 years) and two year old *Alexander Kungu Wangui* (the deceased) under the care of the first accused.

PW 1 returned at about 10.45 pm and found only Kennedy Mwangi aged 4 years. The two year old Alexander Kungu Wangui and the first accused were missing. She reported the matter to the police and investigations commenced.

On 26th April, 2004 an anonymous caller on her cell phone No.0722 393308 confided in her that a young girl had been seen with a baby matching the description of the deceased at Kabati. In the company of police officers, PW 1 went to Kabati at a place known as Mwangaza house. They found first accused [A1] but the baby was not with her.

After investigation, it came to light that the first accused [A1] in collaboration with the second accused (A2) dumped the baby, Alexander Kungu Wangui, in a pit latrine at PW5's residence at Kabati. The police summoned Fire Brigade personnel from Thika who assisted in retrieving the body of the deceased.

Grace Hiuko Kibunja (PW 2), had earlier on assisted PW 1 by taking care of the two babies – Kennedy Mwangi and Alexander Kungu Wangui while -their mother was at work.

However, on the 21st day of February 2004, the complainant, Alice Kibunja, collected the two children. She now had a maid - first accused.

She later learnt that the maid had disappeared with the deceased. She accompanied PW 1 to report the incident to the police and also to search for the baby. She was among the crowd that witnessed the retrieving of the body of the deceased inside the pit latrine in the compound of Joseph Ndungu Kamau [PW 5].

Penina Mwikali (PW 3), identified and introduced the maid, first accused (A1) to PW 1. The first accused (A1) was then employed by PW 1 on 21st February, 2004. She later heard that the said maid had disappeared with Alice Kibunja's (PW 1) younger son, **Alexander Kungu Wangui**.

Ruth Wanjiku Njuguna (PW 4), was a resident at Kabati in Muranga. She found the first accused (A1) holding a child outside a shop at night on the 21st day of February, 2004. On enquiry the accused told her that her mother sent her away with the child after disagreement. As a good Samaritan she offered the first accused and the child a place to sleep for the night. The following day, after breakfast, the first accused went away leaving the child behind. She repeated the same thing on the second day and the third day. On the third day, the first accused came back at 8.00 pm. Out of annoyance PW 4 sent the first accused away with the child. In the opinion of PW 4 the first accused appeared not to be serious about the welfare of the child.

PW 4 learnt, the following day, that the first accused had taken the child to the house of a lady by the name Njeri. Later the same day she got information that the child had disappeared. Out of curiosity PW 4 asked Njeri about the child. Njeri confided in PW 4 that the first accused had returned the child to the parents. Two days later PW 4 received information that the child had been dumped in a pit latrine in the compound of Joseph Ndungu Kamau (PW 5). It was her testimony that the child was retrieved from the pit latrine by a team of fire-brigade officers from Thika Municipal Council. Subsequently, she identified the body of the child as the one the first accused was holding the night she met her. It was the same child who had stayed in her house for three days before she sent him away together with the first accused.

Joseph Ndungu Kamau (PW 5), was the owner of the premises where the subject child was found in a pit latrine. He opined that given the size of the entrance hole of the pit latrine, the child must have been forced into the pit latrine. The head was bigger than the hole.

Alfred Mumo Mukundo (PW 6), an employee of Thika Municipal Council, deployed in the fire-brigade section, led a team of fire brigade officers in retrieving the body of the deceased from the pit latrine of PW 5. He confirmed that the body was that of a baby boy aged about 2 ½ years.

No. 51646. P.C Joseph Karanja (PW 7), attached to Thika Divisional CID office accompanied Grace Kibunja, the relative of the deceased, to the City Mortuary. Post Mortem examination was then undertaken. The post-mortem report was duly completed and handed over to him for further action.

Kezia Muthoni Mwangi (PW 8), a.k.a Mama Ken, left PW 3 and the first accused, at the house of PW 1, on the 21st day of February, 2004 at 10.00 a.m. It was a Saturday. The following day she did not see the first accused. On Sunday she heard that the first accused had disappeared with the child. Later on she learnt that the child had been found dead in a pit latrine at Kabati under mysterious circumstances.

Elizabeth Koru Nzira (PW 9), together with PW 3 introduced the first accused to PW 1. The first accused was then employed as a maid. She positively identified the first accused in Court.

No. 51947 PC Gladwel Mburu (PW 10), was briefed by Inspector Mathinge to investigate the disappearance of the deceased. A lady by the name Alice Kibunja Wangui and her sister, reported the incident. She then commenced investigations.

On 24th February, 2004, Elizabeth Waithera Mary (A1), on interrogation, told her that the child was with

Elispher Muthoni (A2) On enquiry Muthoni (A2) denied. When she confronted Elizabeth Waithera Mary (A1) with the answer she got from Muthoni (A2), Elizabeth Waithera Mary (A1) broke down. Elizabeth Waithera Mary (A1) confessed to her that with the assistance of Muthoni (A2) she had dumped the subject baby in the pit latrine at the premises of PW 5. Since it was at night she led her team to the scene the following day - 27th February, 2004.

The first and second accused persons were in that team. Having identified the toilet where the deceased was dumped he summoned the Fire-brigade personnel from Thika, under the command of Alfred Mumo Makudo (PW 6). With the expertise of the fire-brigade personnel the body of the deceased was retrieved from the pit latrine of PW 5. She facilitated the taking of the body to the City Mortuary to await post-mortem. The post-mortem was done on 2nd March, 2004. The body was then released to PW 1's family for burial. She identified Elizabeth Waithera Mary (A1) and Elispher Muthoni(A2) in Court.

Mary Jerop Kiptoo (PW 11), a Magistrate, then attached to Thika Law Courts, took confession from Waithera Mary (A1) and Muthoni(A2). The gist of their confession was that after announcement on the local radio station, that a child had been stolen by a maid, Muthoni (A2) advised Waithera Mary (A1), that the best thing was to kill the baby and dump the body in the pit latrine. They feared that if they were caught with the baby, they would be arrested and charged in a Court of Law.

Elizabeth Waithera Mary (A1) concurred with the suggestion or advise of Muthoni (A2). She then covered the mouth of the baby with her hands. In the process the child suffocated and passed on. They then hatched the plan of dumping the body in the pit latrine of Ndungu Kamau (PW 5). Towards that end, Muthoni tried to force the baby down the pit latrine but the head of the child was bigger than the hole. Muthoni then hit the child on the head with her shoes. The child then easily slid down the pit latrine.

Having accomplished their mission, Waithera Mary (A1) then went to the house of her boy-friend, one **Kariuki**. Muthoni, on her part, went to her house. Subsequently, both of them were arrested after investigations revealed that they had a hand in the death of the deceased herein.

Dr Jane Wasike Simiyu (PW 12) , produced the post-mortem report, in respect of the deceased herein, on behalf of Dr. Maundu courtesy of the provisions of section 33 as read together with section 77 of the Evidence Act (Cap 80) Laws of Kenya. In the report Dr. Maundu opined that the cause of death was asphyxia due to drowning. The post-mortem report was received in evidence as Exhibit 2.

Dr. John Irungu Kamau (PW 13), assessed the age and mental status of Elizabeth Waithera Mary (A1). He opined that the first accused was *less* than 18 years of age. As regards the mental status, the good doctor gave her a clean bill of health.

The said doctor also undertook age and mental assessment of Elispher Muthoni (A2). He opined that Muthoni (A2) was an adult of sound mind.

At the close of the prosecution's case, after critically examining the available evidence, I put both accused on their defence after explaining to them the provisions of section 306(2) of the Criminal Procedure Code.

Both accused chose to give sworn statement and did not call any witness.

Elizabeth Waithera Mary (A1), in her defence duly acknowledged having been employed by PW 1 as a maid at the material time. In that capacity she was entrusted with two small children, one of whom is the deceased herein. On 21st day of February, 2004 at about 10.00 a.m, her employer (PW 1) left for work. About 6.30 pm she received communication that she was required at Kabati by a lady known as Njeri. She weighed her options leaving both children in the house or going with one. Since the deceased was too young and started crying when she wanted to leave, she decided to go with him.

By the time she reached Kabati it was dark. She missed Njeri but fortunately met PW 4 at the bus stage. PW 4 gave her and the baby accommodation for the night. The following day a brother to Njeri by the name **Kariuki** came to collect her with a view to taking her to Njeri's house. She instead went to

Kariuki's house leaving behind the child at Njeri's house. Unfortunately Kariuki detained her in his house despite the fact that she had left the child behind. The following day she asked Kariuki about the child. Kariuki informed her that Njeri had taken back the child to the parents. About 7.30 pm. Njeri came with some policemen. She told the police that she did not know how the child died. She was **17 years** at the time of the incident. This fact was supported by medical evidence produced by PW3. She denied the charge.

Elispher Muthoni (A2) in her defence testified that the police arrested her in the company of her small child. She tendered to the police the birth certificate of her child but they nevertheless arrested her on a claim that she knew about the disappearance of the child, Alexander Kungu Wangui (deceased).

She was taken to Thika Police Station. After interrogation, she was charged with the murder of the child-Alexander. She was **20 years** at the time of the incident. She denied the charge.

Against that backdrop of evidence, it is clear to me that (A1) was employed as a maid of PW 1 on the 21st day of February, 2004. In that capacity she was entrusted with the care of the two young children, one of whom is the deceased herein.

On the same day 21st day of February 2004, Alice Kibunja (PW 1) went to work. She left behind her two children, namely, Kennedy Mwangi (4 years old) and Alexander Kungu Wangui (2 ½ years old) in the custody of the said maid (A1). She returned from work about 10.45 pm but found only Kennedy Mwangi. The younger child, Alexander Kungu Wangui, and Waithera Mary (A1) were missing. She reported the matter to the police and investigations commenced.

On 26th April 2004, an anonymous caller confided in her [PW 1] that a girl matching the description of Elizabeth Waithera Mary (A1) was seen with a baby matching the description of the deceased-Alexander Kungu Wangui.

In the company of the police, PW 1 went to Kabati at a place called Mwangaza. They found Elizabeth Waithera Mary (A1) but the baby was nowhere. Waithera Mary was arrested and accordingly interrogated.

On 27th April, 2004 Elizabeth Waithera Mary (A1) confessed before Mary Jerop Kiptoo (PW11) that when announcement of loss of baby Alexander was aired on the local radio they panicked. They feared that if they were caught with the baby they would be arrested and charged with the offence of stealing a child.

They then hatched a plan of killing the baby. Towards that end, Muthoni (A2) then covered the mouth of the baby with her hand. The baby then suffocated. The child having died they decided to dump the body inside the pit-latrine in the compound of Joseph Ndungu Kamau (PW 5). Muthoni tried to force the baby down the pit latrine but the head was bigger than the hole. She (Muthoni) then hit the head of child with her shoes and the child slid easily inside the pit latrine.

Having disposed off the baby, Waithera Mary (A1) then went to the house of her boyfriend, one Kariuki, while Muthoni (A2) went to her house. Subsequently investigations disclosed that they were behind the death of the baby, Alexander Kungu Wangui. They were accordingly arrested and charged with murder. She denied the offence.

A confession is a statement which admits in terms either an offence or substantially all the facts which constitute an offence. Section 25 of the Evidence Act (Cap 80) Laws of Kenya provides;

“ A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may be reasonably drawn that the person making it committed

the offence”.

In my considered view the statement made before PW 11 by the first accused constitutes, in law, a confession.

Having found as a matter of law that the same is a confession, the next legal issue to establish is whether the same is admissible.

Section 25(A)2 of the Evidence Act Provides as follows;

“ A confession or any admission of a fact tendering to the proof of guilt made by an accused person is not admissible and shall not be proved as a against such person unless it is

made in Court before a Judge, or Magistrate or before a Police Officer (other than the investigating officer) not below the rank of a Chief Inspector of Police, and a third party of the persons choice”.

Given the provision of Section 25(A)2 of the Evidence Act, the confession was made before a Magistrate, Mary Jerop Kiptoo (PW 11), hence admissible in evidence.

On the available evidence on record there is no reason or indication to suggest that the confession of the first accused was obtained by an inducement, threat or promise of any kind or money. Hence the said confession meets the requirements of Section 25 and 25(A)2 of the Evidence Act [Cap 80] Laws of Kenya. Accordingly, the said confession is admissible in evidence courtesy of section 27 of the Evidence Act (Cap 80) Laws of Kenya. I am persuaded that the same was made in accordance with the Judges Rules.

As against the second accused, the confession of first accused implicated her. In terms of Section 32(1) of the Evidence Act the Court ought to take into consideration the confession as against the second accused too.

In her defence the first accused retracted and /or repudiated her statement.

The basic difference between retracted and repudiated Confession is of course:

“That a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to recant, to take back what she said , generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one. On the other hand a repudiated statement is one which the accused person avers he never made.”

In this regard I call in aid ***TUWAMOI VS UGANDA (1967) EA 84,87.***

The legal position of a retracted or repudiated confession is that a trial Court should accept any confession which has been retracted or repudiated with caution and must before finding conviction or such confession be fully satisfied in all the circumstances of the case that the confession is true. ***That is the standard of proof.***

In this case the Court will act on the confession if corroborated in some material particulars by an independent evidence accepted by the Court. However, corroboration is not necessary in law and the Court may act on a confession alone if fully satisfied after considering all the material points and surrounding circumstances that the confession cannot be but true.

With regard to this case, so far as material, the surrounding circumstances of the case in whose context admissibility of the confession should be seen are as follows;

- The first accused does not deny having been employed by PW 1.

- She acknowledges that two children of PW 1 were left in her custody on 21st February, 2004.
- That she received communication to go and visit Njeri. She decided to leave the older child and took along the deceased who started crying when she wanted to leave.
- She took the deceased to Njeri's house and went with her boyfriend Kariuki.
- The following day Kariuki told him that Njeri had taken the child to the parents, a fact which subsequent findings disclosed was a lie.
- It came to pass that this child was later on retrieved from a pit-latrine in the compound of PW 5. The cause of death was established by the doctor [PW12] as asphyxia due to drowning.
- The body was found in the pit-latrine and must have, therefore, drowned inside the said pit-latrine.

Given the surrounding circumstances under which the confession was taken, I take the view that the confession cannot be but true because the same was so detailed and consistent with the cause of death.

In addition thereto there is no reason or evidence to suggest that there was any inducement thereat or promise by Mary Cherop (PW 11). Hence the requirement of Section 25 of the Evidence Act (Cap 80 Laws of Kenya) was met.

In the premises there is sufficient evidence to warrant the conviction of both accused persons based on the confession alone.

But even without confession, there is still enough evidence to convict both accused persons based on circumstantial evidence. In my view these are the circumstances that this Court ought to take into account.

1. Elizabeth Waithera acknowledged having been employed by PW 1 and entrusted with the care of two children, one of whom is the deceased.
2. She was found with the child outside a shop at Kabati by PW 4 on 21st February 2004. She explained to PW 3 that her mother had sent her away with the child after disagreement.
3. PW 4, out of pity for the small child, gave them accommodation for 3 days. On the third day PW 4 sent away the first accused and the baby because she (A 1) appeared not to have the welfare of the child at heart – negligent.
4. She then acknowledge taking the child to the house of Njeri, a friend of hers, and further acknowledge going to her boy-friend's (Kariuki) house.
5. The child was later on found dead, on the 27th day of February 2004, in a pit-latrine in the compound of PW 5.
6. On the evidence, the hole of the pit-latrine was smaller than the head of the baby.
7. Hence the child could only have managed to slid down the toilet if forced through the latrine hole.
8. The child was about 2 ½ years old. It could not have gone to the toilet on his own. Someone must have taken the baby to the toilet. That person, on the evidence, must be either the first or the second accused or both.

I am aware that in law, in order to justify circumstantial evidence, the inference of guilt, the incapulatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any

other reasonable hypothesis other than that of his guilt. That there must be no other co-existing circumstances weakening the chain of circumstances relied on. That the burden of proving facts that justify drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. That is a burden which never shifts to the party accused. In this regard, I call in aid the authority of ***SAWE VS REPUBLIC (2005) KLR 364, 373.***

On the totality of the circumstantial evidence, and direct evidence, adduced by the prosecution, it is quite clear to me that the first accused had the custody of the deceased at all material times. In deed she acknowledge in her defence that she went along with the deceased to Kabati and slept in the house of PW 4. The following morning the brother to Njeri., by the name Kariuki, collected her (first accused) and the deceased ostensibly to take them to Njeri's. However it turned out that Kariuki wanted the first accused to spend at his house. The deceased, under that arrangement, was left in Njeri's house. The following morning Kariuki left for work but detained the first accused in the house. Kariuki assured the first accused that Njeri would take back the child to the parents.

Having acknowledged that she had the child from 21st February, 2004, the story that the child was left at Njeri's and thereafter she did not know how the child died does not add up. I am persuaded that the defence of the first accused is not tenable on logic and facts. Even PW 4 who sheltered the first accused and the deceased, on the first night at Kabati, testified that the first accused could go for her usual frolic but came back to the house to check on the child. In the premises her leaving the child at Njeri's and subsequently failing to check on him, as she used to do, does not appear to have any ring of truth.

Against that backdrop, as to who killed or under what circumstances the deceased died was a fact especially within the accused's knowledge. Only she could explain specifically how the child left at Njeri's house happened to be found inside a pit latrine at the plot owned by Joseph Ndungu Kamau (PW 5).

The first accused sworn statement does not appear to me to discharge that burden put squarely on her under section 111 (1) of the Evidence Act(Cap 80) Laws of Kenya of proving circumstances which would exonerate her from blame. In doing so, I have not lost sight of the provision of section 111(1) of the Evidence Act which in effect provides that section 111(1) , does not diminish the obligation on the prosecution to establish by evidence the commission of the offence charged. It is with this in mind that I make a finding that the evidence against the first accused is wholly circumstantial. The incapulatory facts are inconsistent with the innocence of the accused and incapable of explanation on any other hypothesis other than that of guilt.

In respect of the 2nd accused, the only evidence connecting her with the offence is that of the first accused. I am aware that, in law, where an accused gives evidence which tells against a co-accused such evidence is on the same footing as that of any other witness but it requires that the warning regarding the evidence of accomplices should be given. In that regard, I call in aid the authority of ***AISA NALUENDA V REPUBLIC (1956) 23 EACA 445.***

I have warned myself of the dangers of relying on the evidence of first accused, being a co-accused, and hence to be treated as an accomplice. Although the general practice is not to convict without corroboration, there are however exceptional cases, in which the departure from the general practice is justified. ***This is one such case.*** I respectfully depart from the general practice because the evidence of the first accused against the second accused, as embodied in the confession, is so cogent as to satisfy the Court beyond any reasonable doubt. In this regard, I call in aid the authority of ***CANISIO c/o WALWA V REPUBLIC (1956) 23 EACA 453.*** On the available evidence of the first accused, I am convinced beyond any reasonable doubt that the second accused suffocated the deceased, then hit his [deceased] head with her shoes. The deceased body then slid easily into the pit-latrine where it was subsequently retrieved therefrom.

In the premises, I accordingly find and hold as a matter of law and fact that the first and the second accused with ***malice afore-thought*** jointly caused the death of the deceased between 21st of February,

2004 and 27th February, 2004 at Tukuyu village in Maragua District of the Central Province. This finding is based on direct evidence as well as circumstantial evidence.

Having taken into full consideration their mitigation, as presented by their counsel, I sentence the two accused as follows:

1. The first accused to be detained at the ***Presidents' pleasure***, courtesy of ***Section 166*** of the Criminal Procedure Code, since she was ***17*** at the time of the commission of the offence.
2. The second accused is sentenced to serve 30 years imprisonment since she was an adult at the time of the commission of the offence.

Right of Appeal 14 days.

Dated and delivered at Nairobi this **13th** day of **March**, 2011

N.R.O OMBIJA
JUDGE