



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL CASE 73 OF 2007

REPUBLIC..... PROSECUTOR

VERSUS

JOYCE NJERI WAMBURU.....ACCUSED

J U D G M E N T

The accused, **JOYCE NJERI WAMBURU**, is on trial for the murder of her daughter **TERESIA NDUTA WAMBURU**. She is said to have committed the offence on 26th September 2007, at Makwa village in Thika District.

PW 1, TERESIA NDUTA KAMAU, is the mother to the husband of the accused. She testified that on the material day, at about 4.00p.m, the accused left home in the company of the deceased.

At that time, the deceased was about 3 years old. And the accused left with the child, whilst also carrying a jerry-can, which the accused was going to use to fetch water.

Later, the accused returned home without the child. When **PW 1** asked her where the child was, the accused told her that the child would return on her own.

Shortly thereafter, **PW 1** heard screams. At that moment, the accused had left the home, and had run towards the river. **PW 1** also went in that direction.

When **PW 1** reached near the cattle-dip, she found the child lying dead, on the grass. **PW 1** learnt that the child had been removed from the cattle-dip.

It was the evidence of **PW 1** that the accused and her husband used to have many quarrels. Finally, after the sub-chief had addressed the issues between the accused and the husband, it was resolved that the accused should return to her parents' home.

However, **PW 1** welcomed the accused to live with her in her (**PW 1's**) compound. **PW 1** lived with the accused and the deceased in one house.

During cross-examination **PW 1** said that as soon as she asked the accused about where the child was, the accused left immediately. The accused ran out of the compound.

And by the time **PW 2** reached the scene, the police had already arrested he accused, and were holding her in their vehicle.

PW 2, PETER MAINA NJOROGE, was an uncle to the deceased. He was one of the 2 people who identified the body of the deceased at the mortuary, for purposes of post-mortem.

PW 3, MICHAEL NGUGI WAMBURU testified that on the material day, the accused was with the deceased when she went to fetch water from a well at **PW 3's** home. The time was about 4.30p.m.

PW 3 testified that after the accused had fetched the water, she left with her daughter (the deceased).

According to **PW 3**, the accused did return to fetch water a second time. On that occasion the accused was alone. **PW 3** then heard screams from the direction of the cattle-dip, which was about 150 metres from their home.

PW 3 rushed to the cattle-dip where he found the child inside the water in the cattle-dip. The child was already dead.

PW 3 retrieved the body.

During cross-examination **PW 3** said that the accused was carrying 2 jerry-cans; one in each hand. **PW 3** added that the deceased was walking behind the mother.

When **PW 3** reached the cattle-dip he found the accused shouting that her child had got into the cattle-dip. The witness went on to say;

“The child could walk into the cattle dip. There are walls on both sides with a cover on top. But to access the water you don’t climb anything.”

PW 4, ALICE NJERI NGUGI, lived in the neighbourhood of the home at which the accused was staying

On the material day, she met the accused when she (the accused) was carrying one big jerry-can and one small jerry-can in one hand; whilst holding the hand of the deceased by the other hand.

Later, she heard the accused screaming. But by the time **PW 4** reached the place where the accused was, she found the accused crying, next to the body of her daughter.

According to **PW 4**, the cattle-dip was near their home, and the public path passed about 1 metre away from the cattle-dip.

PW 4 testified that there was nothing that could prevent anybody from getting into the dip.

PW 5, CPL GEOFFREY MBOYA, escorted the father of the deceased to the Gatundu District Hospital Mortuary, where the post-mortem was performed. The child’s father identified the body.

PW 6, SGT MAINA MWANGI, was at this home in Makwa, on the material day, when he heard screams at about 5.00p.m. He rushed to the scene, where he found members of the public, who were saying that a child had been thrown into the dip.

The members of the public were holding the accused, whom they said had thrown the child into the cattle-dip. By the time **PW 5** reached the dip, the body had been retrieved.

PW 5 said that he arrested he accused and escorted her to the AP Post. Earlier, the accused is alleged to have escaped from the members of the public, and to have run to her home. When he got to that home, the members of the public had already dragged out the accused from her house. He arrested her, and

escorted her to Makwa AP Camp, where he locked her up in the cells.

According to the witness (**PW 5**), the accused was placed into the police vehicle from the cells.

When describing the scene **PW 5** stated as follows;

“There is no fencing of the cattle dip. The water is about 2 ft. from the top. The cattle dip is thus open. If a ball is rolled backwards to the cattle dip, it would roll into the water.”

PW 7 STEPHEN WAMBURU KAMAU, was the father of the deceased.

He said that on 25th September 2007, the accused told the chief that she wanted **PW 7** to divorce her. By that date, the child of that couple was too young to go with **PW 7**. Therefore, the chief, the headman and the father of the accused decided that the child should go with the mother.

On the next day, **PW 7** bought a cake for the deceased after the deceased had run up to him and greeted him warmly. Apparently, the accused was not happy about the actions of **PW 7**.

It was the testimony of **PW 7** that on the day after he had bought the cake for the deceased, he learnt that the young girl had fallen into the cattle dip.

As at the time when the child drowned, **PW 7** believed that the accused had returned to her parent's home.

PW 7 said that 3 months before the incident, the accused had threatened to kill the child; However, the alleged threat was never reported to the police. According to **PW 7**, that incident was resolved domestically.

PW 8, PC JOSEPHAT MACHARIA is the police officer who re-arrested the accused from the Administration Police Officers at the Makwa AP Camp. He escorted the accused and the body of the deceased to the Gatundu Police Station. After the accused was booked in at the station, the body of the deceased was escorted to the Gatundu Hospital Mortuary.

PW 8 made it clear that the dip is not surrounded by any barrier.

PW 9, SAMUEL GACHIRI NJOROGE, works at the Government Chemist. He analyzed the samples of blood, liver, lungs, kidney and brain of the deceased. He had been asked to ascertain if the samples contained any poison.

PW 9 found no poison in the said samples.

He also analysed some water which was in a bottle. The said water was found to contain a poison called chlorophrifas, whose marked name is “Dursban”. The said substance was a pesticide, and it is harmful to human beings, when ingested.

PW 10, DR, KAGIA SARAH conducted the post-mortem on the body of the deceased. The doctor found no external injuries.

However, there were fluids in the trachea and in lungs. The fluids were watery.

Other systems were normal, save that the brain was swollen.

Consequently, the doctor formed the opinion that the cause of death was cardio-pulmonary arrest secondary to drowning.

PW 10 queried himself about the possibility of poisoning. He therefore removed specimens of the

liver, brain, fluid from the lungs, kidney and the lungs of the deceased. It is those that were taken to **PW 9** for analysis.

The reason why the doctor thought it necessary to find out if there had been poisoning is that in the history provided by the police on the post-mortem form, it had been indicated that the body of the deceased was retrieved from a cattle-dip.

PW 11, PC GEORGE NDEGWA WACHIRA, investigated the case.

When **PW 11** talked to **PW 1**, the latter told him that the accused simply threw up her hands when **PW 1** asked her where the child was.

PW 11 said that the cattle dip had its entrance and exit fenced-off by off-cuts. Therefore, **PW 11** concluded that the accused had thrown the child into the dip.

It was the evidence of **PW 11** that the accused was blaming her husband (**PW 7**) for having an affair.

The conclusion of **PW 11** was based on circumstantial evidence as there was no eye-witness.

PW 12, SGT JESTMORE MALIT was attached to the Scenes-of-Crime Department. He took photographs at the cattle-dip.

He testified that a child aged 3, such as the deceased was, could not jump over the wall that is on the sides of the cattle-dip.

But **PW 12** also conceded, during cross-examination, that;

“However, a child of that age could walk through the entrance, and into the basin of the dip.”

After **PW 12** testified, the prosecution closed its case.

The accused then gave an unsworn defence. She said that it is **PW 1** who had sent her to fetch water on the material day.

Whilst the accused was out fetching water, the deceased was left with **PW 1**.

When the accused got back, she found that **PW 1** had gone to the shops, in the company of the deceased.

Whilst still waiting for **PW 1** to return with the deceased, the accused heard screams from the direction of the cattle-dip. The accused rushed to the scene, in the company of her brother-in-law's wife. They found that the child had fallen into the dip.

The accused insisted that she did not know what had happened to her child, as she had left the child with **PW 1**.

When the body was retrieved, and the accused saw the child, the accused lost consciousness.

That is the sum total of the evidence.

As **PW 11** correctly described it, the prosecution case was founded solely on circumstantial evidence. There were no eye-witnesses.

It is trite law that for circumstantial evidence to form a solid foundation upon which a conviction can be based, it must point exclusively to the accused person as the one who committed the offence in

issue. There should be nothing that weakens such circumstantial evidence.

In this case, several prosecution witnesses readily conceded that the cattle-dip was not fenced-off, so that a child could not accidentally walk into the dip. Indeed, it was even graphically demonstrated that if a ball had been rolled towards the dip, the ball would have ended-up inside the water.

In effect, there was nothing to stop the child in this case from walking into the dip.

The prosecution has failed to show that it is only through the alleged “throwing in” by the accused that the deceased could have landed inside the cattle dip.

The prosecution have also failed to demonstrate any malice aforethought.

In the circumstances, the prosecution has not proved the case against the accused person, to the standards required by law. Therefore, the charges against the accused are dismissed. I find the accused “Not Guilty”. She is accordingly acquitted.

I order that she be set at liberty forthwith unless she is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 21st day of June, 2012.

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FRED A. OCHIENG
JUDGE