



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 109 OF 2007

REPUBLIC.....PROSECUTOR
VERSUS
E.N.G.....ACCUSED

JUDGMENT

E.N.G is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The allegation against the accused is that on 24/10/07, in Nyandarua North, murdered M.M.N.

The prosecution called a total of 6 witnesses in support of the charge. The accused then tendered unsworn evidence in her defence.

PW1, James Waweru Wairungu testified that the accused is her neighbour. He recalled that on 24/10/07 he found the deceased, M.M with her sister G.N at Cucu Kagotho's house at about 8.00 p.m. He was asked to escort the girls to their home that is accused's house. A daughter of PW1 opened for them. It is then he learnt that the two girls had been missing from home. He left the children in their house and on the next day, heard that M had died. He denied that he ever injured the children before taking them to the house.

PW4, Paul Karanja Muthua was with PW1, Waweru on the evening of 24/10/2007. He returned a cell phone to the home of one Kagotho where he found the owner of the home and the two children, M and N whom he knew well as children of the accused. PW1 in company of PW4 were asked to return the children to their home. They obliged and they knocked on accused's door, and PW3 opened for them and they left the children behind. PW4 denied knowing how the children got to be at Kagotho's house. Next day, he learned that M had died but he denied that M was injured when they parted with the children the previous night.

PW2 is Dr. Jackson Macharia who produced the Post Mortem Report in respect of the deceased on behalf of Dr. Biribwa who was said to have left Government Service. The doctor had observed that the deceased had suffered multiple soft injuries to the body but the serious injuries were on the head. He found blood between the brain and skull, a linear fracture of the bone of the left parietal area which extended to the forehead and he formed an opinion that the cause of death was severe head injury subject to a blunt object.

The accused's 1st born daughter, N.W.N testified as PW3. She recalled that her two sisters, one now deceased (M) and G disappeared from home when they did not do the work their mother had given them i.e. to work in the garden. They were brought back home in the night by Karanja and Waweru, PW1 and PW4. She said that her mother had slept by then and she is the one who opened the door and they also slept. PW3 was declared a hostile witness for not telling the court what she recorded with police. She was

then cross examined on her statement by the learned State Counsel.

Cpl Paul Locho, PW5, was the Investigating Officer in this matter. A report was made to him on 25/10/07 by P.I (PW6) and one N, accused's brother and brother in law that M, accused's daughter who was then about 8 years old had been murdered. He found a report made earlier by accused that her daughter, Margaret had been taken ill and had died before she was treated. PW5 interrogated the witnesses. He noted that on the same night, G was injured on the elbow and her hand was put in a sling. He found accused at Ol Kalou District Hospital, interrogated her and arrested her. He witnessed the post mortem when he observed that the deceased had a cracked skull. He visited accused's home and recovered a dress allegedly worn by the deceased which was blood stained, a panga and club that were allegedly used to assault the deceased. The green dress was not taken to the Government analyst because no blood was drawn from the deceased, having been injected with formaline.

PW6, P.I.N, is a brother to the accused. On 25/10/2007 he got a report that accused's daughter was sick and he should visit her but before he could go, he was informed that she had died. He proceeded to accused's home, found accused's child, G who was crying and had a swollen hand and he took her to hospital. The child informed him that the mother beat them. PW6 was aware that the two children, G and M, had disappeared from home for about a week and he was involved in looking for them. He reported to police. He confirmed that he led police to the arrest of the accused and a panga allegedly used in assaulting the children was recovered.

Accused made an unsworn defence in which he stated that she parted with the children on 24/10/07 morning as they went to school, that is N.W, M.M, G.N and J.M while she remained with the younger children. She went to work with the two younger ones and returned home at 5.00 p.m. She found N and J at home but G and M were nowhere. She went in search for them from the relatives but did not find them. She went home and slept but after a short while, there was a knock, two men entered with the children. She denied knowing the men that brought the children. One child complained of stomachache, looked scared and could not explain their whereabouts well. She called her brother to interrogate the girls and when M insisted she had stomachache and headache they decided to take them to hospital. At hospital M too claimed to have a headache and stomachache. The doctor decided to admit M but her condition deteriorated and she died. The accused testified that she had disagreed with her brother, P who called police to arrest her.

The only eye witness was PW3, L.W but her evidence is worthless because she was declared as a hostile witness.

PW1 and PW4 who were some of the last people to see the deceased alive denied that they ever injured the girl nor was she injured at the time they arrived at the accused's house. There is no reason to doubt them. If they had injured the children I doubt they would dare take them to their house.

Upon examination, the doctor observed multiple injuries on the upper and lower body of the deceased and a fractured skull which was the cause of death.

If PW1 and PW4 delivered the deceased safely in the accused's house, then the injuries that the deceased and Grace sustained must have been sustained after PW1 and PW4 left them in accused's house.

G who was said to have been with the deceased when they disappeared from home was interrogated by the Investigating Officer, PW5. The said G was not called as a witness. She was a child of tender age but it was upon the prosecution to call her and the court would ascertain whether or not she was able to testify. The prosecution did not explain why she could not be called as a witness. Failure by the prosecution to call a witness to the crime raises a presumption that the evidence that the witness would have tendered may have been adverse to the prosecution. In the case of **Bukenya & Others V. Uganda (1972) EA 548**, the Eastern Africa Court of Appeal said this:-

“The prosecution must make available all witnesses necessary to establish the truth, even if that evidence may be inconsistent. Where evidence called is barely adequate, the court may infer that

the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

Section 143 of the **Evidence Act** provides that no particular number of witnesses shall, in absence of any provision of law to the contrary, be required for proof of any fact. However, it is the duty of the prosecution to avail all witnesses who will assist the court arrive at the truth and a fair decision.

Although the accused told the court that the deceased and Grace had gone to school that morning and had come back late on the said date, PW5 and PW6 did confirm that the children had been missing for about a week and PW4 and PW6 said accused had looked for them in vain. PW6 helped search for the children. From the investigations, PW6 established that the two girls were allegedly defiled by a grandson of Kagotho, the home where PW1 and PW4 found the two young girls. The disappearance from home must have frustrated and infuriated the accused as a result of which she assaulted the children. A dress which the deceased wore and which was allegedly stained with blood and recovered from accused's house but it was never taken for further analysis as no blood was drawn from the deceased for purposes of comparison. It is common practice for the doctor performing the post mortem to draw blood from the deceased for further investigations. It seems this was not done which is a sign of poor investigations.

When PW1 and PW4 took the girls to accused's house, they found PW3. She must have witnessed what happened. She was declared a hostile witness. Whatever happened to the deceased in accused's house is within the peculiar knowledge of the accused. Apart from PW3 who was declared a hostile witness, there were only children of tender age in the house. I doubt that the young children in the house assaulted both G and M so seriously without the accused's intervention. **Section 111(1)** of the **Evidence Act** places the burden on a person accused of an offence to prove the existence of circumstances bringing the case within any exception or exemption from or qualification to the operation of the law creating the offence with which the person is charged. The burden of proving any fact especially within the knowledge of the accused is upon her. That burden can only be discharged if the court is satisfied by evidence tendered by the prosecution or in cross examination. In the instant case, PW1 and PW4 took the child back to accused's house on the night of 24/10/2007. The accused was alone with her children who include PW3. On the same night, the deceased and her sister, G were injured. It is only the accused who could explain what happened to the deceased and how both the deceased and G got injured but she has failed to do so. The only conclusion this court arrives at is that she was infuriated by two children's behaviour, they had disappeared for a week, they were brought back having been sexually abused and she acted under a fit of rage. The accused is a single parent of about six children. In my view, she was sufficiently provoked by the children's behaviour and assaulted them fatally injuring the deceased. There is no evidence to prove the accused had the intention to murder her own child. She took the deceased to hospital on the same night where she passed on. I am satisfied beyond any doubt that the accused caused the death of the deceased unintentionally and I hereby convict her of the offence of manslaughter under **Section 202** as read with **Section 205** of the **Penal Code**.

DATED and DELIVERED this 29th day of November, 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Nyakundi for the State.

Mr. Bosire for the accused.

Kennedy – Court Clerk.