



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 12 OF 2007

REPUBLIC PROSECUTOR

VERSUS

EMILY WANJIRU KATANA ACCUSED

JUDGMENT

The information dated 18th May 2007 contains a charge of murder contrary to S. 203 read with S. 204 of the Penal Code. It is alleged that on the 29th September 2006 at Hill School Estate Uasin Gishu District, the accused Emily Wanjiru Katana murdered Hilder Mbone.

The prosecution called eight (8) witnesses who testified to the effect that, the accused was married to and lived with **JOSEPHAT NDOLO ASENGI (PW 1)** as husband and wife. They lived together with their three children who included the deceased aged four (4) years. The deceased was however a step child of the accused. On the material date, Josephat (PW1) was away on duty when he received a telephone call from his landlord and told to return home directly. He responded by going home immediately. On reaching there, he found a crowd of people at the gate. His house was in darkness. He was then informed by a lady that a body had been found inside the house which had been closed. He entered the house when the police arrived there and saw the dead body of his daughter on the floor. He noticed that the body had bruises. He did not find the accused and the rest of the children even though he had left them behind when he went away on duty.

DR. JOSEPH EMBENZI (PW 2) of the Moi Teaching and Referral Hospital produced the post mortem report (P.Ex 1) compiled and signed by Prof. Koslova after carrying out an autopsy on the body of the deceased. The report indicated that the deceased died from traumatic shock due to injuries caused by blunt object, absence of food in gastrointestinal track and asphyxiated lungs.

The accused's sister **MARY WAMBOI (PW 3)** lived about fifty (50) metres from the accused. She was at her house on the material date at 8.00 p.m. when the accused's children Stephen and Kelvin went there and said that they had not seen their mother. She (PW 3) took the two children back to their house but found it locked. She and her husband including one Wanjohi opened the house and found the body of the deceased on the ground with foam on the mouth. They immediately called the landlord.

The landlord **JAMES MUTURI KINYANJUI (PW 4)**, was at the time in his house. He proceeded to the scene and saw the dead body of the deceased. The body had injuries and burns on the face. He knew the deceased. He contacted her father (PW 1) by phone. He did not see the accused at the scene but knew that she often assaulted the deceased such that at one time he raised the issue with the child's father leading to occasional quarrels and fights between the father and the accused.

The landlord noted that the deceased was very scared of the accused.

P.C PAUL CHEBII (PW 5) of Langas Police Station Eldoret received the necessary report and proceeded to the scene accompanied by his colleagues. They found the dead body of the deceased lying under a bed with fresh and old bruises and injuries all over the body. He (PW 5) drew a rough sketch of the scene and removed the body to Moi Teaching and Referral Hospital. He did not find the accused at the scene. He was informed of her arrest on the 15th April 2007.

AG. INSPECTOR JOSHUA EMUROT (PW 6), of Langas Police Station also visited the scene and saw the dead body of the deceased under a bed. The body was facing upwards and had injuries. He (PW 6) did not find the accused at the scene. The scene was photographed and the body removed to Moi Teaching and Referral Hospital.

IP Emurot (PW 6) was part of the investigating team. He was notified of the accused's arrest on the 15th April 2007. He learnt that she ran away without leaving her house and the two other children under the care of anybody.

CPL. THADEUS OMONDI (PW 7) of Eldoret Police Station received the accused at the said Station after her arrest at Kapsoya Estate Eldoret. Thereafter, he handed her over to Langas Police Station where this case had been reported.

DR. PAUL KIPKORIR RONO (PW 8) of Moi Teaching and Referral Hospital produced a medical report (P.Ex 2) prepared and signed by his colleague Dr. Omar Ali who had earlier examined the accused and confirmed that she was mentally fit to stand trial.

Dr. Rono's testimony concluded the prosecution case against the accused.

In her defence, the accused denied the offence and stated that on the material date she woke up at 6.00 a.m. and prepared her son Stephen for school. She escorted him to school and upon her return home found the other two children awake. These were the deceased and Kevin. She washed the two and served them tea. Thereafter, she went to wash clothes. Her mother-in-law who was in the house woke up. She served her with water and later with tea. After a while, her son Stephen returned home saying that he had been chased from school for non-payment of school fees. She left him behind together with the other two children and her mother in law as she proceeded to work. She returned home at about 4.00 p.m. and was confronted by two young men who informed her that there was a problem at her home. She rushed there and found a crowd of people. She saw the body of the deceased lying down near the door step. She was held and beaten up by James Muturi (PW 4). The crowd of people also wanted to beat her up. She feared for her safety and went to her parent's nearby home from where she was arrested and taken to the police station where she was charged. She denied killing the deceased and contended that she did not know what happened to her (deceased) as she was sickly and always in and out of hospital.

Under S. 203 of the Penal Code, any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. From the evidence hereinabove, it is apparent that the deceased, a child aged four (4) years, was a victim of deliberate and unlawful incidences of child abuse. This is demonstrated by the frequent assaults she was subjected to and also by denial of basic necessity such as food. The post mortem report (P.Ex 1) showed that the child died of traumatic shock as a result of injuries occasioned on her over a period of time with the usage of blunt objects. She was in addition starved of food.

Undoubtedly, the person responsible for these heinous acts acted with profound cruelty with a clear intention to deprive the little girl of her God given right to life which life ended in a very tortuous and painful manner.

The basic issue for determination is whether the accused was responsible for the unlawful and malicious acts which eventually caused the death of the deceased. The defence raised was a denial and a suggestion that the deceased was killed by her grandmother and/or by her sickness. Sickness was however

overruled by the postmortem report.

The presence of the grandmother in that house was never established and was overruled by the prosecution's tangible evidence that the deceased and two other children were left under the care and custody of the accused on the material date and even prior to the material date.

At the time the deceased was found dead inside the house, the accused and her husband (PW 1) and the other two children were not therein. The husband was away on duty when he was given the disturbing information. The other two children had gone to the house of their aunty (PW 3) when they failed to locate their mother (accused) who was nowhere to be seen. The evidence by the accused indicating that she arrived at the scene from work when the body of the deceased was found was discredited by evidence from most of the prosecution witnesses (i.e. PW 1, 3, 4, 5 & 6) who were at the scene when the body was found or immediately after it was found.

Be that as it may, there was no evidence whatsoever showing that the accused or indeed any other person was on the material date seen assaulting the deceased or in any other manner endangering her life.

However, the circumstances under which the deceased died left no doubt that she was physically abused. The inference created is that this was done by her step-mother, the accused, in whose custody she had been left prior to her death.

The accused was the last person to have seen the deceased alive. She had been left behind with the deceased but was nowhere to be found after the deceased was found dead. Investigations by Ag. IP Emurot (PW 6) revealed that she had ran away and gone into hiding. This was confirmed by the fact that she was found and arrested on 15th April 2007, almost seven (7) months after the discovery of the body of the deceased in the family house.

There was evidence from the landlord (PW 4) that the accused was in the habit of frequently physically assaulting the deceased. All these factors provided a sufficient and credible circumstantial evidence which was more consistent with her guilt rather than innocence. The inculpatory facts were incompatible with her innocence and incapable of explanation upon any other hypothesis than the guilt (See, **SIMON MUSOKE VS. REPUBLIC [1958] EA 715, MUITA VS. REPUBLIC [2004] 2 KLR 60**).

In the old English decision of **R. VS. TAYLOR WEAVER & ANOTHER [1928] 21 CR. APP. R. 20**, the principle as regards the application of circumstantial evidence was enunciated in these words:-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

The Court, on the basis of the circumstantial evidence adduced herein against the accused is inclined to reject her defence and find that she was the person responsible for the death of the deceased. The prosecution's burden of proof has been established to the required standard. Consequently, the accused is found guilty as charged and is convicted accordingly.

[DELIVERED AND SIGNED THIS 3RD DAY OF NOVEMBER, 2011]

J.R. KARANJA
JUDGE

3/11/11

Before – J. R. Karanja – Judge

Court Clerk – Andrew

Mr. Oluoch for State

Mr. Miyianda holding brief for Nyambegera for accused

Accused present

J. R. KARANJA

JUDGE

Court:

Judgment delivered to accused. Mention on 10/11/11 for sentence. Remanded in custody.

J. R. KARANJA

JUDGE

3/11/11

10/11/1

Before J. R. Karanja – Judge

Court Clerk – Andrew

State Counsel – Mr. Kabaka

Mr. Chepkwony for accused

Accused present

J. R. KARANJA

JUDGE

10/11/11

State Counsel:

Accused is a first offender. We are told that the family is willing to accept her back. She has two children who are suffering a lot. Her family which is comprised of the victims have since forgiven her. Accused has been in remand for five (5) years.

J. R. KARANJA

JUDGE

10/11/11

Mitigation by Mr. Chepkwony:

I concur with the State. The accused is remorseful for what happened. She is aged 30 years old with two children. She is a first offender. May be allowed back to the society.

J. R. KARANJA

JUDGE

10/11/11

Court:

Accused is a first offender. What has been stated by the State and the defence Counsel has been noted. Offence must however be treated with seriousness deserved. Accused will be spared of the death sentence but will serve fifteen (15) years imprisonment.

SENTENCE:

To serve fifteen (15) years imprisonment.

J. R. KARANJA

JUDGE

10/11/11

Right of appeal.

J. R. KARANJA
JUDGE
10/11/11