



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Cr. Case 110 of 2003**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AGNES KASYOKA IBRAHIM.....ACCUSED**

**JUDGMENT OF THE COURT**

The enactment and operationalisation of the Statute Law (Miscellaneous Amendments) Act 2007 abolished the role of assessors in murder trials with effect from 15.10.2007.

As a result thereof, I have decided that there will be no summing up in this case hence this judgment. I believe that no prejudice will be occasioned to the accused by this decision. The assessors who have sat with me during the trial are forthwith discharged. They are however entitled to payment of attendance allowances incurred todate.

The accused person herein, Agnes Kasyoka Ibrahim is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that:-

“On the 2<sup>nd</sup> day of April, 2003 at Gitu village, Mikinduri Location in Meru North District within Eastern Province, murdered Egnesium Mugambi.”

The accused pleaded not guilty to the charge and went through a full trial during which the prosecution called five witnesses in support of the charge. The accused gave unsworn testimony in her defence but called no witnesses.

In his opening remarks, the learned principal state counsel, Mr. A. Oluoch contended that the accused person murdered the deceased through poisoning and that what the accused did was a well-planned and orchestrated act that caused the death of the deceased. Mr. Oluoch further contended that the accused's act was unprovoked and that the said act, the accused displayed malice aforethought to cause the deceased's death.

PW1 Lucy Kawira Peter (Kawira) told the court that the deceased herein was one of her children while the accused was married to her (Kawira's) husband's bother. She stated that on 2.4.2003, she rose early at about 6.00 am and prepared tea for the family and other people from without the home she was expecting to come and assist her with farm work. She said she fed her assistants with the tea and left some of it in the thermos flask and then went to the shamba. She said she left the thermos flask on the table in her house and that the accused was left behind to look after the deceased. Kawira's house and that of the accused were according to Kawira located in the same compound though often times the two

families shared meals. On that fateful day, Kawira says she left the accused behind making food in Kawira's kitchen.

Later that morning about 11.30 am, Kawira said she went back to the home to fetch water and more tea for Ntongai the accused's husband. She said she served some of the tea that she had left in the thermos flask to her child's friend, one Fridah and took the balance of the tea to the shamba for Ntongai. Kawira stated that on tasting the tea she found it had a bitter taste and she immediately started feeling bad. She also stated that when Ntongai took some of the tea he too started complaining of dizziness and stomachache and fell to the ground. Kawira said she then ran home on seeing what was happening to Ntongai and at home she also found Fridah writhing in pain. That the deceased was also complaining of extreme pain in the stomach. Kawira said she raised an alarm before they were all taken to hospital, but that the deceased died on the same day. On cross-examination, Kawira denied that she was the one who put poison in the tea that she served to Ntongai and Fridah and of which the deceased partook. She also denied that there was bad blood between her and the accused person because the accused had come in as a second wife to Kawira's brother-in-law and because the accused was a Mkamba.

PW2 was Fridah Kendi (Fridah) a 12 year old girl attending Rurie Primary School in class four. She stated that on Wednesday 2.4.2003, at about 11.30 am, she was at Kawira's home in the company of one Lillian Gacheri (PW3) where they found the accused washing some clothes. She stated that as the two of them minded the accused's baby, the accused excused herself and went to Kawira's house on the pretext that she (accused) was going to get some tea for her child.

Fridah stated that before the accused left for Kawira's house, she (accused) entered her own house, took some flour-like substance in a cup, stirred it and mixed it with a spoon before carrying the cup to Kawira's house. Fridah stated that the accused covered the cup with her hand as she went to Kawira's house. Fridah went on to explain that the accused took only a few minutes in Kawira's house and then returned with an empty cup. That soon thereafter, Kawira came home from the shamba and that she went to Kawira's house where she (Fridah) was served with some food left over from the previous night and also some tea in a glass. Fridah said she shared the tea with Mugambi (the deceased), but soon thereafter she started feeling dizzy and had a bad feeling in the stomach. She said she was unable to talk and later she was taken to hospital.

On being examined by the court, Fridah stated that she could not tell whether the accused entered Kawira's house because she could not see that way from the accused's house. She also stated that on the material day, she had gone to visit Kawira as she had done many times before and that she often eaten at Kawira's house. Fridah said she was a sister-in-law to both Kawira and the accused. During the cross-examination, Fridah stated that she did not see the accused put something in the cup, though she said she was certain that the accused told her with her own mouth that she (accused) was going to Kawira's house to get tea for her child.

PW3 was 14-year-old Lillian Gacheri (Gacheri) who stated that on the morning of 2.4.2003, she accompanied Fridah to the house of Kawira to visit Kimathi, who was sick. She stated that on finding no one in the home of Kawira, the two of them proceeded to the accused's house where they found the accused washing clothes and that the accused asked Gacheri to mind the child for her. It was Gacheri's testimony that after a few minutes (maybe three minutes) the accused entered her house and later emerged therefrom carrying something flour-like on a table spoon in one hand and a cup in the other. Gacheri also stated that the accused put the contents of the spoon into a cup, stirred it and then covered the cup with the hand as she went to Kawira's house. The accused is said to have told Gacheri that she (accused) was going to get tea for the child from Kawira's house. Gacheri further stated that the accused stayed at Kawira's house for about 10 minutes before returning to her house and that when Gacheri asked if the accused given the children the tea, the accused did not respond. At the time too, Gacheri said she was carrying the accused's child on the back.

It was Gacheri's further testimony that after Kawira came back home from the shamba through the accused's gate, Fridah went to Kawira's home while she remained at the accused's home. Gacheri testified further that when she indicated to the accused that she too wanted to go to Kawira's house with

Fridah, the accused asked Gacheri to leave the baby behind if she was to go to Kawira's. A few minutes later, Gacheri said she heard Fridah crying and saying she had stomachache. That the deceased in this case was also crying.

During cross-examination, Gacheri stated that the accused was her father's young brother's wife and that she had known her since the year 2000. She also told the court that Kawira's and the accused's houses were in the same compound, with a distance of about 50 metres between them, but without any fence separating them. She stated further that from where she was standing carrying the accused's child, she could not see the goings on at Kawira's house because of the other houses in between, but that she saw the accused enter Kawira's house before with the cup, and the accused opened the door to Kawira's house before she entered. According to Gacheri too, the accused remained inside Kawira's house for some 10 minutes before coming out still carrying the white thermos flask cup.

PW4 was No.56869 Police Constable Peter Ngala of Tigania Police Station. He testified that on 4.4.2003 while he was on duty at the police station, he received a report from the father of the deceased that the deceased's family had been poisoned on 2.4.2003. Upon receipt of this information, PW4 said he accompanied the deceased's father by the name Peter to the Meru District Hospital Mortuary and identified the body of the deceased to Dr. Kimulu for post-mortem. PW4 also testified that after the post-mortem examination, some specimens were taken to the Government Chemist for analysis. PW4 identified both the post-mortem report and the Government Analyst report as MFI 1 and 2 respectively.

PW5 was Leonard Waweru Kariuki, a Government analyst who said he received from one police constable Patrick Muthama some three exhibits for analysis namely (i) the stomach (ii) intestines and (iii) liquid in thermos flask. PW5 stated that after carrying out the analysis he detected the presence of methomyl, a Government pesticide in the deceased's stomach as well as in the liquid contained in the thermos flask. According to PW5 Government pesticides are harmful to humans when indigested. He detected no other chemicals in the exhibits. No questions were put to this witness in cross-examination. Mr. Kariuki produced the government analysis report dated 6.11.2000 as P exhibit 2.

PW6 was Dr. Isaac Mwangi Macharia who produced the post-mortem report on the body of the deceased. According to the post-mortem report produced as P exhibit 2, there were no external injuries on the body of the 7 year old deceased child but that the inside of the stomach had a brownish discolouration consistent with burns due to indigestion of poison. The doctor opined that the cause of death was organophosphate poisoning.

The accused gave unsworn testimony in her defence. She stated that on the morning of 2.4.2003, she woke up early and after bathing her child, she went to Mulika town, where she arrived at about 9.00 am. After making her purchases, she said she went back home and arrived at about 1.30 pm. She said she then made food for herself and her child and thereafter she started preparing the evening meal after which she went to sleep at about 9.00 pm. At about 2.00 am, she said she was woken up by the women of the home and told to carry her baby and accompany them to some undisclosed destination. As they walked along, she said they encountered a police car and she was ordered to enter the car and was driven to Mikinduri Police Station. The accused stated that though she was booked in the Occurrence Book (O.B.) she was not told why she had been taken to the police station in the first place. That it was only later in the morning that she was informed she had poisoned some people. The accused denied those allegations and maintained her innocence throughout the trial. The accused stated that the case against her was a frame-up, though she did not say who had framed her and why.

At the close of the hearing, Mr. C. Mokuu who appeared for the accused submitted that the prosecution had failed to prove its case beyond any reasonable doubt against the accused person. It was contended on behalf of the accused that:-

- a. The only available evidence on record, being circumstantial evidence, was not sufficient to sustain a conviction against the accused.
- b. The accused's defence of alibi has not been displaced by the prosecution's case.

- c. The prosecution's case is based on contradictory and inconsistent evidence and especially that there are sharp contradictions between the evidence of PW4 and PW5 as to whether there was any liquid left in the thermos flask.
- d. There was no evidence as to the source of the liquid that was taken to the Government Chemist for analysis.

Mr. Oluoch, Principal State Counsel submitted that the prosecution had proved its case beyond any reasonable doubt against the accused person. He contended that:-

- a. The unsworn statement by the accused did not displace the prosecution's evidence against her.
- b. The accused's defence of alibi could not and has not been tested through cross-examination and that the same has been displaced by the prosecution evidence on record.
- c. No questions were put to the prosecution witnesses to suggest that the accused could have been anywhere else by the scene of the crime.
- d. There is ample evidence by PW1, PW2 and PW3 about the suspicious movement of the accused person on the day of the crime.
- e. There is no evidence by the accused, either from her unsworn testimony or through cross-examination suggesting that the prosecution's case against her was a frame-up.
- f. The Government Chemist's report clearly showed that the deceased had been poisoned and that this expert evidence was not contested by the defence by way of cross-examination.

Having heard all the evidence and listened to submissions, and also having observed the demeanor of the prosecution witnesses as well as the accused person, the issue that now arises for determination is whether the prosecution has proved its case against the accused person as contended by the state or whether the prosecution's case is so inconsistent and weak that the accused person must be acquitted. The burden of proof is always on the prosecution and the accused is not required to prove her innocence.

The evidence that tends to directly link the accused to the offence is that given by Fridah (PW2) and Gatheri (PW3), both of whom are children of tender years and whose evidence must be treated with caution. Both of them testified that they could not see what the accused may have done at Kawira's house after she entered, but each said that they saw the accused enter her house, come out with a flour-like substance on a spoon, which she put it in the cup, mixed it with water and stirred it. Each one of them also testified that they saw the accused go with that cup to Kawira's house, while covering the cup with her hand, and that the accused stayed at Kawira's house for about 10 minutes (according to Gacheri) but 3 minutes according to Fridah before returning to her own house with an empty cup.

Gacheri also testified that after the accused returned from Kawira's house and when Gacheri indicated she wanted to go to Kawira's with the accused's baby, the accused told her not to go with her child. Was such a caution by the accused an indication of what she had done fearing perhaps that her own child might partake of the poisoned tea? Kawira testified that she had left some tea in a flask on the table for the deceased who was being minded by the accused as the latter also cooked food for the people working in the shamba with Kawira. The expert evidence by PW5 shows that both the stomach and intestines of the deceased were poisoned with a substance similar to the one in the liquid recovered from the thermos flask. Was the powder that Fridah and Gacheri said they saw the accused carrying into Kawira's house the poison?

After carefully considering all the evidence that is on record and the submissions made to both for and against the accused person, I am satisfied that the prosecution has proved its case beyond any reasonable doubt against the accused person. Though there is no direct evidence to show that the accused put the poison in the tea that was left behind by Kawira, there is other sufficient evidence to show that the

accused did so. In the first place, I believe the testimony of both Fridah and Gacheri who both said they saw the accused put a substance in a cup and go with it to Kawira's house where she stayed for about 10 minutes before returning to her own house. These two young witnesses were candid in what they said and each one of them impressed me as a truthful witness. None of them wavered under the strenuous cross-examination that they were taken through.

Further, I believe Gacheri's testimony that when Gacheri wanted to go along with the accused's baby to Kawira's house after Kawira returned from the shamba at about 11.30 am, the accused stopped her from taking the baby with her. The only inference I have drawn from this piece of evidence is that the accused did not want her child to partake of the poisoned tea. In my view, that conduct on the part of the accused was not consistent with innocence but with guilt. From what Fridah said that she had eaten at Kawira's house many times in the past, the accused knew that once Fridah, Gacheri and the accused's baby got to Kawira's house, they would be fed with the tea by Kawira.

Mr. Mokuia submitted that the evidence of PW4 and PW5 does not show that there was any liquid left in the flask after Kawira had taken some of the tea to Ntongai in the shamba, but a close look at the said testimonies does not reveal any inconsistencies that Mr. Mokuia says exist. PW5 stated clearly that among the items that were taken to him for analysis was liquid in a thermos flask and he went on to state that the methomyl liquid that was detected in the deceased's stomach was also detected in the liquid that was in the thermos flask. The contention by the defence that the source of the liquid that was found in the thermos flask could not be ascertained is incorrect. I therefore rejected that contention.

I have also considered the accused's defence of alibi but I find the same unbelievable. The accused contended that the case against her was a frame-up, but she has not laid a basis for such contention. If anything, I am persuaded that the accused's motive for her dastardly act was the sense of rejection, which she perceived to be coming from her husband's family. Further, there were no questions put to the prosecution witnesses to suggest that it was Kawira who had poisoned the tea. I do not agree with that suggestion either. I find and hold that all through the evidence the accused was at the scene of crime and that she had the opportunity to commit the offence.

In the result, I find that the prosecution has proved its case beyond any reasonable doubt against the accused person and I accordingly find her guilty of murder as charged and convict her of the same. It is so ordered.

It is ordered.

Dated and delivered at Meru this 18<sup>th</sup> day of January 2008.

**RUTH N. SITATI**

**JUDGE**