

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 15 of 2007

REPUBLIC PROSECUTOR

versus

MARY WAMUYU MURIUKI ACCUSED

RULING

The accused was charged herein with *Murder contrary to section 203 as read with section 204 of the Penal Code*. The prosecutions case against the accused is that she poisoned the deceased Catherine Mukami Muriuki with Diazinon a pesticide used in spraying coffee plantation. At the close of the prosecutions case the accused counsel submitted that the prosecution had failed to make out a prima facie case against the accused. He further submitted that the accused constitutional rights as embodied in section 72(3) (b) had been violated. PW 1 was a government analyst working in the forensic division of Toxicology section of the government chemists. She presented to court a report dated 27th November 2006. That report indicated that Diazinon was detected in an empty cup that had been presented for testing and also in the food particles of the deceased which in her report she called gastric contents. PW 3 presented the postmortem and indicated that the cause of death was found to be Diazinon and piriton. PW 4 is the husband of the accused. He said that he had married a second wife in the year 2000. The second wife was called Susan Wamaitha. The two wives used to quarrel but he said not too much. On marrying the second wife he rented for her a house in town away from the first wife's matrimonial home. On 19th January 2006 the deceased child who was the child of the second wife was left at home in the company of the accused person. This witness left home at between 10 -11 am. Later whilst he was at the town his daughter with the first wife came carrying the deceased child. This was about 2 pm. He noticed that the deceased child was looking dead. The two took the child first to the police and then to hospital where the child was pronounced dead. On being cross examined this witness confirmed that at one time he had been summoned by the Children's Department in respect of the deceased child. When he was summoned the deceased child was one year and five months. When he left the deceased child in the company of the accused he did accept under cross examination that there were other children from the neighbourhood in that homestead. On leaving the homestead he left the accused preparing beans in the shamba. On being questioned about bottles of medicine he said that ordinarily they were put on a cupboard at a height at which a child could not reach. In respect of empty medicine bottle they used to be thrown into the pit latrine. However in respect of empty bottles of the spray he used on crops he said that he used to bury them in the shamba. The reason he did not throw them into the pit latrine was because they emitted a bad smell. On re-examination however, he stated that he had not used Diazinon for a period of four years prior to the death of his child. PW 5 was a child of the accused and PW 4 was her father. On 19th January 2006 she had been at the homestead up to 10 am. At 10 a.m. she went to see the chief and returned to the home at 1 p.m. On arriving at the homestead in the company of her own child she called out to the deceased who was seated inside the house. The deceased did not respond. She took her outside the house. She called out to her aunt PW 6 and asked her to give a change of clothing for the child the deceased who had wet herself. It was then that this witness and the neighbours that congregated realized that the child was unwell. Since this witness did not have money to take the child to hospital she decided to take the child to her father's business place. On reaching there PW 4 asked her if she had bewitched his child. The two decided to take the child to hospital but before going there they passed by the police station in order to get a P3. On reaching the hospital the child was found to be dead and was retained at the mortuary. This witness said that when she had earlier left the homestead she had left her father PW 4, the accused, Susan Wamaitha and the deceased child at the home. She had left her mother

harvesting beans. When she returned she found her mother still in the shamba and it was when her aunt gave her the trousers to change the child that the mother left the shamba to join them. On being cross examined this witness stated that the accused had vacated her matrimonial home and had only returned the day before the death of the child. In respect of Susan Wamaitha she used to drop the deceased child at the accused homestead. Sometimes Susan Wamaitha would leave the child with PW 6. Later when the child would cry PW 4 would collect the child. The deceased child would sometimes sleep with the accused in the same bed. The witness accepted that PW 4 had been summoned by the Children's Department and had been ordered to take care of the deceased child and in the alternative had been told he would be ordered to make payment for the care of the child. On that decision being reached PW 4 brought the child to the accused homestead. This witness said that used medicine bottles were not thrown because they were returned to the hospital on return visits. Before being taken back to the hospital such bottles were kept at the cupboard while others in the store. This witness said that they did not have a rubbish pit in the homestead. In respect of bottles containing Diazinon after PW 4 had used the content to spray the plants, he would leave the bottles where he was doing the mixing. If the bottles had any content in them they were kept in a store which was not kept locked. Later this witness accepted that some bottles would be thrown in the rubbish pit. She stated that on going to PW 4 when she was carrying the deceased child even before he saw the child she was carrying PW 4 asked her whether they had bewitched the child. He said so as this witness was crossing the road to where he was. PW 6 recalled that on 19th January 2006 in the morning after she prepared her child to go to school, she noted that the deceased child was taken by PW 4 and also by Susan Wamaitha and they all went into the coffee plantation. Susan Wamaitha had spent the night in her house. After dropping her own child at school, she noted that the deceased child was still in the coffee plantation in the company of PW 4. PW 4 eventually left the plantation but the deceased child remained there playing. After PW 4 left the accused homestead she noted that the only person in that homestead was the accused and the deceased child. The accused was preparing some things outside the house. The deceased child was playing about 10 steps away from the accused. This witness noted that the two were in that position for about an hour. Later she did not see the child playing outside. Thereafter PW 5 called her out asking her for change of clothing for the child. On being cross examined about the relationship between PW 4 and the deceased child this witness said that PW 4 only accepted the deceased child after pressure being put on him by the children's department. PW 7 stated in cross examination that he had been informed that the deceased child was playing in the company of other children with bottles. He finally stated that the children must have taken the bottles containing poison from the rubbish pit. PW 9 police officer stated that the accused was first arrested on 20th March 2006 and was detained in custody for 2 months. She was released after those two months because the government chemist report was not available. After that release the accused was rearrested on 23rd March 2007. She was not arraigned in court until 23rd April 2007. She was therefore detained in custody for 1 month. The reason given by the investigating officer for the second delay in presenting the accused before court was due to of the procedures that needed to be followed before the accused could be arraigned in court. PW 10 stated that he was shown the table room in which the deceased was first found. In that table room he recovered a plastic cup which cup PW 1 the government analyst found to contain Diazinon. The cup had the remains of porridge. The witness also found a small bottle there which was used to preserve medicine at home. The bottle was empty but was wet inside. The witness was shown two more bottles which he was informed was being used by children to play with. That was the evidence that was tendered by the prosecution. The prosecution essentially relied on circumstantial evidence against the accused. As it becomes clear in going through that evidence as analyzed herein before there were various contradictions amongst the different witnesses. PW 4 denied that there was a rubbish pit where bottles would be thrown. He stated that in that rubbish pit they would only throw items that were swept in the compound. PW 6 however confirmed seeing the deceased child playing with others with bottles. The police officer who went to the homestead recovered some bottles from the rubbish pit. The police recovered a sufuria from the home which had content in it but that sufuria was not subjected to testing whether it contained any chemical. The only item that was tested was the plastic cup. The plastic cup was found to contain Diazinon. The stomach content of the deceased also had traces of Diazinon. The prosecution did not prove that the accused was responsible for that drug being in the cup or being consumed by the deceased. It should also be considered that the deceased had been seen by PW 6 to be in the coffee plantation at first in the company of PW 4 and Susan Wamaitha and later on her own. PW 5 stated that when bottles containing Diazinon were used by PW 4 they were left at the farm where the mixing was done. One therefore cannot say with certainty that the drug

Diazinon was put in the plastic cup and consumed by the deceased either at the farm or in the home. The prosecution had a responsibility to tender evidence to show whether the amount of Diazinon consumed by the deceased would have caused death immediately or whether it would have taken time for its effect to be seen on the deceased. This would have assisted the court to determine whether the consumption was at the time when the child was in the company of PW 4 and Susan Wamaitha or when she was in the company of the accused alone. I am in agreement with the submissions made by the accused counsel that the prosecution failed to show a prima facie case that could lead the court to put the accused on her defence. I therefore find that the accused has no case to answer and I make a finding of not guilty under Section 306 of the Criminal Procedure Code. Over and above that I do find as correctly submitted that the accused constitutional rights were violated in that she was detained on two separate occasions, firstly for two months then released and later for a month before being brought before court. There is a wealth of court of appeal decisions which show that when ones constitutional rights particularly to do with the period of detentions as provided by section 72(3) (b) of the constitution are violated such violation would lead to an acquittal. The cases in point are;-

1. *ALBANUS MWASIA MUTUA Vs. REPUBLIC CRIMINAL APPEAL NO. 120 of 2004,*
2. *GERALD MACHARIA GITHUKU vs. REPUBLIC CRIMINAL APPEAL NO. 119 OF 2004,*

On that basis again the accused person is hereby acquitted of the charge of Murder. I order the accused to be set free unless otherwise held.

Dated and delivered at Nyeri this 25th day of September 2008.

MARY KASANGO

JUDGE