



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Case 36 of 2005**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**MIRIAM MUTHONI KARIUKI ..... ACCUSED**

**J U D G M E N T**

Miriam Muthoni Kariuki (hereinafter referred to as the Accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 17<sup>th</sup> day of September 2005 at Githunguri Sub-location in Murang'a District within the Central Province she murdered Michael Muchiri Muthoni (hereinafter referred to as deceased). This being a criminal case, the burden is entirely upon the prosecution to prove beyond reasonable doubt that the Accused did commit the offence. If there is any doubt the benefit must go to the Accused who must then be acquitted.

A total of 11 witnesses testified for the prosecution whilst the Accused person gave sworn evidence in her defence. Briefly the prosecution evidence was as follows:

At the material time, the Accused was residing at her father's home with the deceased who was her 1 year old son. Her father Kariuki Muchiri Kagucia (P.W.1) is paralysed and cannot walk. On the night of 16<sup>th</sup> September 2005 the Accused and the deceased slept in a room in P.W.1's house whilst P.W.1's slept in another room in the same house. On the morning of 17<sup>th</sup> September 2005 at about 5.00 a.m., P.W.1 heard the Accused going out. He thought the Accused had gone to the toilet but by the time he got out of bed about an hour later the Accused had not come back. The Accused came back around 7.00 a.m. She prepared breakfast for P.W.1. She then went into her room. P.W.1 asked Accused how the deceased had slept since he had not heard him that morning. The accused informed P.W.1 that the deceased was still asleep. The Accused then left. Sometimes later P.W.1 decided to check on the deceased. He opened the window to the bedroom used by Accused but was surprised to find that there was no baby in the room.

In the meantime on the same day at around 7.30 a.m. Judy Wangare Mwangi (P.W.4) was on her way to school accompanied by two school mates Hellena Wangui Mwangi and Lucy Wairimu Muiruri. Upon reaching the Mathioya bridge she saw something in the River looking like clothing. She alerted her friends and they moved near to see what it was and noticed the head of a child. They proceeded to their school where they reported the matter to their school Principal Joseph Kamau Muturi (P.W.5) who took the girls to Kiamara police post where they reported the matter to P.C. Joram Gichuhi (P.W.11). P.C. Gichuhi and Corporal Nyagah (P.W.8) who was the officer in charge of the post accompanied the reportees to the scene where they retrieved the body of the deceased from the River and escorted it to Murang'a Hospital Mortuary .

In the meantime P.W.1 alerted her daughter in law Florence Wangui Muchiri (P.W.3) who came at 2.30 p.m. that the deceased child was missing and that the Accused had not come back home since she left in the morning. On 18<sup>th</sup> September 2005, P.W.3 having received news of the recovery of the body and being suspicious, reported the matter to the area assistant chief Harrison Mwangi Muchoki (P.W.7). The assistant Chief referred her to Kiamara police post from where she was referred to Murang'a Hospital mortuary where she saw the body which was recovered from the river and identified it as that of the deceased child.

P.W.7 carried out further investigations as a result of which he proceeded to Yego Chiefs office where he got the assistance of A.P., Cpl. Joseph Bundi (P.W.10) who accompanied him to Gikui village to a home where they found the Accused working. They arrested the Accused and took her to Kangema police station.

On 28<sup>th</sup> September 2005 at Murang'a District Hospital Dr. Kanyi – Gitau carried out a post mortem examination on the body of the deceased which was identified to him by Hosea Muchiri Kariuki (P.W.6) a brother to the Accused. He did not note any external injuries but noted blueness on the nail bed and mouth cavity indicative of lack of oxygen. Internally he noted that both lungs were congested with a foamy blood coloured fluid coming from the lungs. He formed the opinion that the deceased died as a result of drowning.

On 21<sup>st</sup> September 2005, Dr. Patrick Nganga Mburu (P.W.9) examined the Accused person and observed that she was in good health and was well oriented in time, space and person, and had normal memory cognition and perception. He formed the opinion that the Accused's mental status was normal. The Accused was subsequently charged with this offence.

In her defence the Accused gave a sworn statement and called no witness she swore that she left the deceased child asleep in her father's house and that she did inform P.W.3 that she had left the child sleeping and was going to look for a job. She went and got some casual employment. At about 11.00 a.m. she got permission to check on her child. She did not find P.W.3 at home and upon asking her father about the child, he told her that P.W.3 had taken the child because he was crying. The Accused tried to look for P.W.3 but did not find her. At about 1.30 p.m. P.W.3 came back but when asked about the child she also claimed she had left him at home when she went to work. However the Accused's father insisted that P.W.3 was the one who had taken the child and that no one else had come into that home. When confronted with this P.W.3 started shouting at the Accused and left. She came back at around 3.00 p.m. and claimed she was hearing noises coming from the River. The Accused asked P.W.3 to go and check but P.W.3 went and did not come back. The Accused wanted to go and check about her son but her father who is paralysed pleaded with her not to leave him alone. While they were still arguing the village Headman came and informed them that the body of a child had been found and it was being alleged it was her child whom she had thrown away. The Headman who was in the company of some other persons asked the Accused to accompany him and he took her to Kangema police station where she was later charged with this offence.

From the evidence of Dr. Kanyi Gitau who carried out a post mortem examination on the body of the deceased it is apparent that the deceased child died as a result of drowning. This is consistent with the evidence of Judy Wangare Mwangi (P.W.4) who saw the body of the deceased in the River and the evidence of P.W.5, P.W.8 and P.W.11 who retrieved the body from the river. The question is how did the child end up in the River?

The deceased child was only 1 year old. Although the Accused claimed she left the deceased child asleep in her father's house when she went to look for a job, her evidence was controverted by that of her father who was all along within the home and believed the child to be asleep as He was told by Accused but only discovered later on checking that there was no child asleep in the room. The Accused has attempted to shift the blame onto P.W.3, however the evidence of her father completely absolved P.W.3 and laid the blame squarely on the Accused. I believe the evidence of Accused's father as He had no reason to lie. The fact that the Accused was heard by her father going out of the house at 5.00 a.m. and that she came back around 7.00 am, and the fact that the body of the child was discovered shortly

thereafter at 7.30 a.m. confirms that the deceased child was not in the house at 7.00 a.m. when the Accused came back to the house and that she lied to her father when she told him that the child was asleep in the house.

Moreover both P.W.3 and the Accused's father testified that the Accused did not go back home on the day the child disappeared but was found two days later by P.W.7 and P.W.10 working about 20 Kilometres away from her home. This is not conduct which was consistent with that of a distraught mother concerned with the disappearance of her 1 year old child, rather, the disappearance of the child freed her so that she could go to work.

I note that the evidence of P.W.7 and P.W.10 regarding the Accused's response on being asked about her child, amounted to a confession and is therefore inadmissible evidence. I have therefore disabused my mind of that evidence and completely disregard it.

I find that although no one saw the Accused throw the child in the River, the evidence regarding the deceased leaving her home at 5.00 a.m. and coming back at 7.00 a.m. shortly before the body of the child was discovered. The fact that the Accused lied that the child was asleep in the house, the fact that the Accused disappeared from her home and went to work 20 Kilometres away all lead me to the inescapable conclusion that the drowning of the deceased child was no accident but a deliberate act of the Accused who wanted to free herself of the child so that she could go to work.

I reject the defence of the Accused person and find that she threw the child in the River when she left the house early in the morning. Although the 3 Assessors returned a unanimous opinion of not guilty on the grounds that no one saw the Accused person throw the child in the River, the Assessors apparently ignored this court's direction on the law regarding circumstantial evidence and therefore did not consider the other circumstances leading to the inference of guilt on the part of the Accused. I do therefore reject the opinion of the Assessors and find that the deceased child died as a result of the Accused's action. I am satisfied that the Accused had malice aforethought as she wanted the child out of the way so that she could go to work. Accordingly I find the Accused person guilty of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. I convict her of the same under **Section 322 (2)** of the Criminal Procedure Code.

***Dated, signed and delivered this 13<sup>th</sup> day of February 2007.***

**H. M. OKWENGU**

**JUDGE**