



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Case 42 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

SUSAN MUTONGORI MWITA.....ACCUSED

JUDGMENT

The accused, Susan Mutongori Mwita was charged with **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that between the 30th May, 2006 and the 6th of June 2006 at Naivasha Township, the accused murdered Jeska Salome (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, she pleaded not guilty to the charge. During the trial the prosecution called five witnesses in its bid to establish its case against the accused. When the accused was put on his defence, she offered sworn testimony. She denied that she had killed the deceased and stated that the deceased had died due to natural causes. She stated that she had dumped the body of the deceased in the bush because she could not afford the cost of burial.

The facts of this case as narrated by the prosecution witnesses are as follows; on the 30th of May, 2006 at about 8.00 p.m., the accused went to the house of PW3 Gaudencia Magaiwa. PW3 worked in a flower farm at Naivasha. She resided at Naivasha together with her husband and children. The accused went to her house and requested to be allowed to sleep at PW3's house because her house had been locked up. PW3 accommodated the accused with the deceased. The deceased was a child of the accused and was aged about one year at the time. PW3 testified that the accused slept with the child until the following day in the morning when she left her house. PW3 went to work.

On the following day i.e. on the 1st June, 2006, at about 5.00 p.m., PW3 saw the accused minus the deceased. PW3 inquired from the accused where the deceased was. The accused answered PW3 that the deceased was in a house of a lady called Makena. PW3 saw the accused return from the house of Makena. She did not see the deceased with the accused. On the 6th of June 2006 at about 8.30 a.m., as she was walking to her place of work, PW3 saw a body of a dead child which had been dumped near the flyover on the road leading to the Naivasha Prisons. PW3 saw the body of the child and identified it to belong to the deceased. When she went back home in the evening, she met with the accused and asked her where her child was. The accused denied that she had killed the child but later admitted that the child was dead when she was interrogated by the police who had been called to the scene.

PW2 William Nchama Nyange testified that on the 6th of June, 2006 at 7.30 p.m. as he was walking home from his place of work, he saw the accused squatting in an incomplete construction site. When the accused saw him, she followed him and requested him to escort her to her place of residence. At the house of the accused, PW2 found many people in the house. The accused was interrogated by the people who inquired from her where she had left her child. According to PW2, the accused gave conflicting explanation of the whereabouts of the deceased. At first the accused said that she had left the deceased in the house of her brother in-law. Later she said that the child had been taken by her mother. When the people persisted in asking her where her child was, the accused lost temper and told the people that they should not bother her because even if the child was dead it belonged to her.

It is then that PW2 made a decision to inform the police. PW2 went to the Highway Patrol Base at Naivasha and made a report to PW4 CPL Simon Mbogo. PW4 accompanied PW2 to the house where the accused had been detained. PW4 interrogated the accused. At first the accused told PW4 that her mother had taken the child to Kuria. PW4 was not however convinced by the explanation given by the accused. He prodded her further and was finally able to elicit information from the accused that the child was dead and had been dumped at a place near the flyover of the road leading to Naivasha Prisons. The accused then led the police and some of her neighbours to the scene where she had indicated that she had left the child. The child was not found at the scene. PW4 later learnt that the body of the deceased had been recovered by the police and taken to the mortuary.

PW5 PC Antony Mwangi is the investigating officer in this case. He testified that on the 6th of June, 2006 at about 10.00 a.m. he was instructed by the officer in charge of the Crime Branch, Naivasha to go to a scene where a body of a child had been discovered. PW5 accompanied by another police officer went to the scene which was near the G.K Prisons, Naivasha and retrieved the body of the deceased. He testified that the body recovered was that of a girl who was about one year old. The body of the deceased had been wrapped in many clothes. It was also wrapped with a polythene paper. PW5 observed the body of the deceased and saw bruises and a swelling around the neck. He took the body of the deceased to the mortuary. On the following day, he learnt that the accused had been arrested. He was assigned

the case.

On the 8th of June, 2006, PW5 interviewed the accused with a view of establishing how the deceased met her death. The accused told PW5 that the deceased had died due to natural causes. The accused told him that she had dumped the body of the deceased because she could not be able to afford the funeral expenses. The accused further told PW5 that the deceased had been sickly and had been attended to doctors at the Mt. Longonot Hospital. PW5 made a decision to take the accused to Mt. Longonot Hospital. He perused the records of the hospital to confirm if the accused had indeed taken the deceased to the said hospital. PW5 however established that the accused had not taken the deceased to the said hospital for treatment. After concluding investigations, PW5 made the decision to charge the accused with the present offence. He produced the P.3 form which had been filled by Dr. Kaneny of the Provincial General Hospital, Nakuru who confirmed that the accused was mentally fit to stand trial. The P.3 form was produced as prosecution exhibit No.2.

The post mortem on the body of the deceased was performed by PW1 Dr. David Kuria. The body of the deceased was identified by the accused. Dr. Kuria testified that he saw an impression (*constriction*) around the neck of the deceased. There was an injury to the vagina. The vagina was bruised, the hymen broken and dilated. There was a marked swelling of the head. The anus and the vagina were torn. The top and the left side of the head was bleeding. There was a depressed frontal fracture of the skull. After concluding his examination, Dr. Kuria was of the opinion that the cause of death of the deceased was head injury and strangulation. He was also of the view that the injuries on the vagina on the perineal region could have contributed to her death.

When the accused was put on her defence, she testified that the deceased had died due to natural causes. She stated that she had dumped her body because she was not able to afford her burial expenses. She denied that she had killed the deceased. She testified that after the death of the deceased, she informed her neighbours whom she referred to as Mr. George Kamau and Lilian Wamboi. However when this court instructed the police to avail the said George Kamau and Lilian Wamboi to court to testify on behalf of the accused, as requested by the accused, it was discovered that such people did not exist.

In criminal cases, the onus is on the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. It is the duty of the prosecution to adduce evidence that would establish the guilt of an accused person. The accused is under no obligation to prove his or her innocence. In the present case, no one saw the accused kill the deceased. The prosecution did not adduce direct evidence. The prosecution adduced circumstantial evidence to establish its case on a charge of murder against the accused. It has often been said that circumstantial evidence is the best evidence because it eliminates any other person other than the accused person as the one who committed the offence. As was held by the Court of Appeal in the case of Sawe vs Republic [2003] KLR 364 at page 372;

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

In the present case, it is the prosecution's case that the accused was last seen with the deceased when she was hale and hearty. The deceased was alive and in good health. PW3 testified that the accused requested her to accommodate her and the deceased on the night of 30th of May, 2006 because her (*the accused's*) house had been locked up. PW3 accommodated the accused and the deceased for the night. On the following day PW3 went to work. On the 1st of June 2006 at 5.00 p.m. PW3 saw the accused minus the deceased. When she inquired from the accused where the deceased was, the accused answered that the deceased was in a daycare centre. PW3 saw the accused return from the day care centre without the child.

On the 6th of June 2006, PW3 saw the body of the deceased lying in a bush near the flyover. She recognized the body of the dead child as that of the deceased. Later in the evening, she, in the company of her neighbours, interrogated the accused with a view of establishing the whereabouts of the deceased. PW3 was with PW2, among other neighbours. The accused gave contradictory answers as to the whereabouts of the deceased. At first, the accused said the deceased was with her brother-in-law. Later she changed her story and said that the deceased had been taken by her mother (*i.e. the mother of the accused*) to Kuria District. When the neighbours persisted in making further inquiries as to the whereabouts of the deceased, the accused lost her temper and told them that they should not bother her because even if the child was dead, it was her child.

It is at this point that PW2 decided to inform the police. PW4 a police officer attached to the highway police patrol interrogated the accused on the whereabouts of the deceased. The accused repeated the story that the child had been taken by her mother. However, after further interrogation, the accused told PW4 that the child was dead. She then escorted PW4 and some of her neighbours to the scene where she said she had dumped the child. They did not however find the body of the deceased. However on inquiry, PW4 learnt that the body of the deceased had been collected by the police earlier that day. PW4 took the accused to Naivasha Police Station where she was detained.

When she was interrogated on the following day by PW5, the accused told PW5 that the deceased had died due to natural causes. It is this same story that the accused told the court when he was put on her defence. PW5 inquired from her whether she had taken the deceased's to hospital when she became sick. The accused told PW5 that the deceased used to be a sickly child. She stated that she used to take the deceased to Mt. Longonot Hospital for treatment. PW5 took the accused to Mt. Longonot Hospital and checked the records of the hospital. He confirmed that at no time had the accused taken the deceased to the said hospital for treatment. It is then that PW5 made a decision to charge the accused with the offence of Murder.

As stated earlier in this judgment, PW1 Dr. David Kuria examined the body of the deceased when he performed the post-mortem. He found that the deceased had been strangled. The deceased had further sustained a depressed frontal fracture of the skull. Further, it appeared that the deceased had been subjected to sexual abuse before she died because her vagina and anus were torn. The hymen had been broken and was dilated. The doctor was of the opinion that the deceased had died due to the head injury and strangulation. He was of further opinion

that the injuries on her perineal region could have contributed to her death.

I have carefully evaluated the evidence that was adduced by the prosecution in this case. The deceased was a one year old child of the accused. She was under the care of the accused. It is apparent that the accused was a single mother. The prosecution adduced evidence which pointed to the fact that the deceased was a healthy child. There was no evidence to suggest that the deceased was a sickly child. The evidence adduced by the prosecution clearly established that it is the accused who caused the death of the deceased. Although the accused claimed that the deceased died due to natural causes, the testimony of the doctor clearly established that the deceased was killed. She was defiled before she was strangled and her skull fractured. It is only the accused who can explain the circumstances under which the deceased sustained the said fatal injuries. These are matters which are within her own personal knowledge because of the fact that she was the sole custodian of the deceased.

I examined the demeanour of the accused when she testified before court. It is clear that the accused is a pathological liar. Her testimony before court in her defence were pure and undiluted lies. The accused lied to her neighbours and the investigating officer of the cause of death of the deceased and her whereabouts before she was found dumped in the bush. It is clear to this court that the accused is the person who inflicted the fatal injuries on the deceased. Her motive appear to be extreme poverty that she was facing at the time. The accused could not pay the rent for the house she was living in. She was locked out of the house that she was forced to seek accommodation from one night to the other from sympathetic neighbours. In her convoluted thinking, she thought that her problems would be resolved if she took away the life of the deceased. She did this by strangling the deceased. What is however not clear to this court is what role the accused played in the defilement of the deceased before she was killed. What is clear is that as a pathological liar, whatever story that the accused would give would not be believed.

I considered the evidence adduced by the accused in her defence and I found the same to be pure lies. The prosecution has established, on circumstantial evidence, that the accused killed the deceased with malice aforethought. I therefore find the accused guilty as charged on the charge of Murder contrary to section 203 as read with Section 204 of the Penal Code. The three assessors who assisted this court during the hearing, all arrived at a similar verdict finding the accused guilty of murder. The accused is therefore convicted as charged of Murder.

DATED at NAKURU this 9th day of November, 2006

L. KIMARU

JUDGE