



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Criminal Case 5 of 2002**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**M M ..... ACCUSED**

**RULING**

Muema Mutui is charged with the offence of Murder Contrary to Section 203 and 204 of the Penal Code. It is alleged that on 19.2.2001 at [particulars withheld], Matinyani Location in Kitui District, Eastern Province, murdered M M. The plea was taken on 22.7.2002 when the accused denied the offence. The hearing commenced on 27.1.2004 and the prosecution called a total of five witnesses commencing with P.W.1 K M , a daughter of the accused person. She is a minor born in 1991. At the time of alleged offence this witnesses was about 10 years old. She recalled that one day in February 2001 she was with her other siblings including the deceased when the deceased wanted to be taken out for a call but the accused stopped P.W.1 from doing so. Instead accused gave the deceased child Omo to drink. The next day when the deceased wanted to relieve himself the accused beat him thoroughly till he could not talk or walk. And then took the deceased outside, lifted him and threw him on the ground about 5 times. The child started to bleed from the nose and started to kick his legs and accused ordered P.W.1 to go and put the child to bed. The accused left. She tried to call the deceased who did not answer. Later she checked on him and found he was cold and stiff. She ran to inform her grandmother R K P.W.2. P.W.2 came checked on the child and found that he was dead. The father (accused) was informed upon his return, he started to cry, called somebody help keep the body in the sand to preserve the body. Later P.W.1 was requested by police to record a statement which she did.

P.W.2 R K a sister to P.W.1's grandmother M N P.W.4, recalled that on 19.2.2001 she was in her house when P.W.1 went there screaming and informed her that the accused had killed M the deceased. P.W.2 went back to P.W.1's home which was about 1½ kilometres away. P.W.2 found the child lying in bed and confirmed that indeed the child was dead. P.W.2 sent somebody to inform Mbutha P.W.4 about what had happened. P.W.4 in her evidence confirmed that one N , a daughter of P.W.2 came to inform her of the child's death. P.w.4 went to her sister's home (P.W.2) and they proceeded to report the death of the child at Assistant Chief's office who in turn referred them to the District Officer's officer Matinyani. They were given a letter to go and report at Kitui Police station which they did. They were accompanied by police to the scene, they removed the body from the sand where it had been preserved to the mortuary. P.W.4 was not able to see the body well as it had been covered in sand. P.W.4 is the mother of Koki who was wife of accused and mother to P.W.1. P.W.4 did admit that at one time Koki had left accused to live with another man Mboya. Both Mboya and Koki are now deceased.

P.W.3 Dr. John Mulinge of Machakos District Hospital was on 14.6.2001 requested to carry out a post mortem on the body of M M to ascertain the cause of death. He found it to be a decomposed skeleton and was beyond recognition. He was unable to see any injury to the internal organs. He said that if the child had been banged on the wall as alleged, he would have expected a fracture of the skull or any of the other bones but none was fractured. He was not able to ascertain the cause of death due to the state of the body.

P.W.5 Acting Inspector Justus Mutuku received the report of death from P.W.2 and 4, proceeded to the scene, took possession of the body and arrested accused on the same day.

The only evidence linking the death of the deceased to the accused is that of P.W.1 K. She informed the court that she was born in 1991 and so by 27.1.2004 when she gave her testimony, she may have been

about 13 years old. After the court examined her as to her intelligence and whether she understand what it is to tell the truth and lies, the court was satisfied that she was intelligent enough and she did understand the meaning of oath and she therefore gave evidence on oath. The other witnesses called found the deceased already dead.

P.W.3 Dr. Mutunga conducted a post mortem on the deceased on 14.6.2001. The deceased died on 19.2.2001. The post mortem was done 4 months after the death. There has been no explanation from the prosecution why it took so long to have the post mortem done. P.W.3 said he found a decomposed body and a mere skeleton that he was unable to ascertain the cause of death. Though P.W.1 had said in her evidence that the deceased was thrown against the wall and made to fall, there was no evidence of any fracture of the skull or the skeleton to corroborate P.W.1's testimony.

At the time the offence was allegedly committed in 2001 P.W.1 was about 10 years old. She was of a more tender age than at the time of her testimony. The testimony of P.W.1 is that of a child of tender age. If it was unsworn it would automatically require corroboration. For a sworn statement herein corroboration is not necessary in law but the assessors must be directed that it would be unsafe to convict unless there is corroboration. This is one of the holdings in the case of **JOHNSON MUIRURI V. REPUBLIC – 1983 KLR 445** where the Court of Appeal in considering whether or not the court could rely on sworn evidence of a minor it held as above that it is prudent in such a case to look for corroboration even if the minor's statement was sworn. I have considered above that P.W.1 was about 10 years at the time of the alleged offence. There is totally no evidence corroborating her testimony. In my view it would be futile putting the accused on his defence because the court would be looking at his testimony to see if it can corroborate P.W.1's testimony. And if the accused opts to say nothing in his defence then the court would be in a dilemma. This is a serious charge of murder punishable by only one type of sentence, that is death. For the above reasons, I find that the prosecution has not established a prima facie case to warrant the accused to be called upon to defend himself. He is acquitted at this stage under Section 306 (1) Criminal Procedure Code.

Dated at Machakos this 20th day of April 2005.

**R. V. WENDOH**

**JUDGE**