



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

Criminal Case 51 of 2001

REPUBLIC PROSECUTOR

VERSUS

PHERIS MUTHONI KUNGUACCUSED

J U D G M E N T

Pheris Muthoni Kungu (hereinafter referred to as the Accused) is facing a charge of murder contrary to section 203 as read with section 204 of the Penal code. It is alleged that on the 23rd day of January 2001 at Gakoigo village in Maragwa District within Central Province she murdered her son Thomas Njoroge Muthoni.

Six witnesses have testified for the prosecution. Briefly their evidence was as follows:

On 22nd January 2001, the Accused asked Fredrick Mbugua Mwirigi (P.W.3) whether he had some chemical which she could use to kill squirrels which were destroying her farm produce. P.W.3 confirmed to Accused that he had some furadan chemical which he could bring to her the next day.

The next day P.W.3 gave the Accused some little furadan in a plastic bag. At about 8.00 p.m., Alice Njeri Charagu (P.W.5) an aunt to the Accused, was in her house when the Accused went and reported to her that her son was sick. P.W.5 accompanied the Accused back to the house and noted that the child was shivering and sweating at the same time. The child told P.W.5 that his mother had given him some "githeri" which had made him ill. P.W.5 went back to her house. At around 9.00 p.m., the Accused went and informed P.W.5 that the child's condition had deteriorated. P.W.5 went back to the house of the Accused where she found the child unconscious.

They carried the child to Maragwa District Hospital where the child was attended. Shortly thereafter the child was pronounced dead. The matter was reported at Kiawara police station to Cpl. Geoffrey Mboya (P.W.4) who commenced investigation and arrested the Accused on 28th January 2001.

On 30th January 2001, the Accused's father Simon Kungu (P.W.2) identified the body of the deceased to Dr. George Waiganjo Muiru (P.W.6) who carried out a postmortem examination on the body. Dr. Waiganjo Muiru noted that there was no visible injury on the body and that all internal systems were normal except for the digestive system where there was a fluid mixed with food which smelt of furadan. He suspected the cause of death to be poisoning and therefore took the stomach and its contents, specimen of the liver and blood samples which he handed over to one P.C. Kiprop for onward transmission to the government analyst. On 9th February 2001 the specimen were escorted to the Government analyst by P.W.4.

On 6th March 2001, the Accused took P.W.4 to a bush at Gakoigo Trading Centre where she showed P.W.4 a small polythene bag as the bag wherein she had put the poison which P.W.3 had given to her.

She also took the officer to P.W.3 and P.W.3 recorded a statement. P.W.4 also forwarded the polythene bag to the Government analyst for examination.

Eunice Wamuyu Njogu (P.W.1) a Senior Government analyst examined the samples forwarded to the government analyst and detected in the stomach lining carbofuran (Furadan) a carbonate pesticide. She did not detect any poisonous substance in the liver, blood or the small polythene paper.

In her defence the Accused gave a sworn statement and called no witness she testified that the deceased who was her son was 9 years old and was in a special school because he was mentally incapacitated. She testified that on the material day at about 5.30 p.m. she served the child with Githeri which she had cooked on the same day. She left the child eating as she went out to serve a customer. The child complained that the food had no salt and she told him to get some from the table. She took about 15 minutes then went back to her house. The child complained to her that he was having a stomachache. The accused called a neighbour who gave the child tumbocid tablet. The Accused then went to call P.W.5 who came but claimed the child did not have any problem and left. The child's condition however deteriorated and the Accused called P.W.5 again. With the assistance of some neighbours they took the child to Maragwa District Hospital. She was later told that the child had died from poisoning. The Accused denied having administered any poison to the child. She conceded that she had obtained some furadan from P.W.3 which she wanted to use to spray her maize. She had kept the furadan on a table inside the house and forgot it there on the same day that her son died. She denied poisoning her son so as to marry John Ngugi.

Mr. Mahinda who appeared for the Accused urged the court to find that the prosecution had not proved the case against the Accused, as no intention to kill or harm the child had been proved, and the evidence regarding the cause of death as poisoning was questionable given that no poison was detected in the blood or liver. He further submitted that there was a doubt as to the samples examined by the government analyst given that there was contradiction regarding the movement of the samples.

Mr. Orinda Senior State Counsel submitted that the Accused was the only person who had the opportunity to administer the poison to the deceased. He submitted that the circumstantial evidence against the Accused was strong and that medical evidence pointed to cause of death as poisoning. He urged the court to reject the defence of the Accused and find her guilty.

It is evident from the above that there is no direct evidence against the Accused as no eye-witness actually saw her administer poison to the deceased. The prosecution case is therefore essentially based on circumstantial evidence.

From the evidence that was adduced the following facts are not in dispute:-

- That the Accused obtained from P.W.3 some furadan chemical which is poisonous when ingested.
- That on the same day the deceased started complaining of stomachache immediately after eating Githeri which was cooked by the accused.
- That the deceased died a few hours later.
- That the postmortem examination carried out on the body of the deceased revealed signs of poisoning.
- That analysis carried out on the stomach contents of the deceased revealed that there was carbofuran (furadan) pesticide in the stomach, though no poison was detected in the liver and blood sample.

The classic authority on circumstantial evidence is the case of **Republic v/s Kipkering arap Koske (1949) EACA 135** wherein it was stated as follows:

“In order to justify 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.”

In the case of **Mkendeswho v/s Republic [2002] 1 KLR** the court of appeal reiterated the above position as follows:

“In order to justify a conviction based wholly on circumstantial evidence, the inculpatory facts must not only be incompatible with the innocence of the Accused and be incapable of explanation upon any other reasonable hypothesis than that of his guilt but also that the said facts must exclude Coexisting circumstantial which may tend to weaken or destroy the inference of guilt.”

In this case the Accused has put forward a defence that she obtained the furadan pesticide from P.W.3 to use to spray her maize to protect it against squirrels. The Accused has also explained how she forgot the pesticide on the table. Implicit in her defence is the fact that the deceased having complained about the inadequacy of salt in his food, and being a mentally challenged person may have mistaken the furadan for salt and therefore added it to his food. This defence has not been completely ruled out and therefore provides co-existing circumstances which tends to weaken or destroy the inference that the Accused was the only person who had the opportunity to administer the poison on the deceased. Indeed all the three Assessors accepted the fact that the deceased died as a result of the negligence of the Accused in leaving the pesticide on the table where the salt was. The circumstantial evidence was therefore capable of an explanation which weaken the inference of guilt. I further reject the insinuations that the Accused person deliberately caused the death of her son so as to get married to one John Ngugi. These were mere unsubstantiated allegations. I find that there was no evidence of any malice aforethought on the part of the Accused.

I disagree with the unanimous finding of the Assessors that the Accused person is guilty of manslaughter as the Accused person has not been proved to have been guilty of an unlawful act or omission which caused the death of the deceased. The accused’s negligence in leaving the pesticide on the table with foodstuffs was not an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health as described in section 202(2) of the Penal Code.

I do therefore give the Accused person the benefit of doubt and find her not guilty of the offence charged. I acquit her of the same and order that she be forthwith released unless otherwise lawfully detained.

Dated signed and delivered this 25th day of May 2005.

H. M. OKWENGU

JUDGE