



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL CASE 14 OF 2004**

**REPUBLIC ..... PROSECUTOR**

**VS**

**MARY FELESA OGENDA ALIAS (MAMA CHARITY) ..... ACCUSED**

**RULING**

The accused Mary Felesa Ogenda alias Mama Charity is charged with murder contrary to section 203 as read with section 204 of the penal code.

It is alleged that on the nights of 9<sup>th</sup> and 10<sup>th</sup> July 2004 at Savanna Medical clinic in Mtwapa, Kilifi, the accused murdered Betty Kaluva. Evidence was led by ten(10) prosecution witnesses to the effect that on 8<sup>th</sup> July 2004 the deceased was taken to Savanna Medical Clinic where she was attended by George Makau, a clinical officer at the clinic. On examination he found that the deceased had attempted to procure an abortion.

From the vaginal canal he retrieved a piece of stick the size of a pen. The uterus was enlarged and there was a post abortion infection. Due to her condition PW1 recommended her transfer to the Coast General Hospital. This was not done. Instead she was returned to Savanna medical clinic the following day where she was put on a stronger anti-biotic. She unfortunately succumbed to death. The treatment notes and other details were produced as exhibits. PW1 also told the court that as he attended to the deceased she told him that a certain lady, a traditional herbalist, at Shanzu, by the name, Mama Charity. The deceased was taken to the clinic by her friend and neighbour, Berita Ndunda Muneo, who was constantly with her. The boyfriend James Mwisu Muteti (PW4) to the deceased confirmed that the deceased was expecting his baby and that they had discussed and agreed that the deceased keeps the baby. He undertook to take care of the deceased and the baby, once born. On the 7<sup>th</sup> July 2004 the deceased informed him that she had stomachache and headache. He went to her house and arranged for her to be taken to the clinic Cosmas Muthama Mutiso, a taxi driver, (PW5) who, on 9<sup>th</sup> July 2004 took the deceased from the clinic to her house. While with the deceased she told him that a certain lady called Mary or Mama Charity had tried to procure an abortion on her. The police, IP Samuel Mwendwa Mutunga (PW7), Cpl. Daniel Mwandao (PW8) and I.P Jacob Wafula (PW9) conducted investigations. They went to Shanzu and arrested the accused.

Dr. K.N. Mandalya who conducted the post-mortem examination on the deceased concluded that the deceased died as a result of bacterial infection in the blood stream due to Septic incomplete abortion. I have considered the evidence as well as submissions by both the defence and state. At this stage the prosecution is only required to make out a prima facie case – i.e. to produce such evidence that is capable

of forming a basis of a conviction if the accused does not rebut the same in his defence. The deceased was in the process of procuring an abortion using a crude method. A piece of stick was found in her vaginal canal – although the same was not produced. The main issue for determination is whether the accused is the person who inserted that stick in the deceased person's vaginal canal in an attempt to procure abortion. There was no direct evidence on this. What there is, is a statement made to PW1 and PW5 by the deceased as to who had tried to procure the abortion. Is the statement admissible under Section 33(a) of the Evidence Act? Under the provisions of Section 33 of the Evidence Act, statements, whether written or oral made by a person who is dead is admissible in evidence if the statement is made by a person as to the cause of his/her death or as to any of the circumstances of the transaction resulting in his/her death. It does not matter, under section 33 whether or not the person, who made the statement, was under expectation of death. This is what is generally referred to as dying declaration. The law on dying declaration in Kenya was laid down in the case of **Akumu V. Republic** (1954) 21 EACA 331 and followed in the case of **Okale V Republic** (1965) EA 556. The case of Okale (Supra) was in turn followed in **Aluta V Republic** (1985) KLR 543. All these cases were cited with approval in the latest case of **Achira V Republic** (2003) KLR 707.

In the case of Aluta (Supra) the Court of Appeal delivered itself thus;

***“A trial judge should approach the evidence of a dying declaration with necessary circumstances. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration”.***

This of course, is not a rule of any law. It is only a rule of practice. According to the investigating officer in the case before me I.P. Jacob Wafula, he decided to charge the accused person after recording statements from PW1 and PW5 to the effect that the deceased told them that it was a certain lady who assisted her in attempting to abort. PW1 in his testimony in court told the court that the deceased described this lady as a traditional herbalist by the name Mama Charity or Mary that she was a Luo lady. According to PW1 when the deceased told him this she was alert. The evidence of PW5 on the other hand, was to the effect that when he drove the deceased to her house on the 9<sup>th</sup> July 2004 and as he was waiting for payments, he noticed a lot of blood and strong smell in the deceased person's house – on the floor and bed sheets. He asked the deceased the source of the blood. The deceased told him she had gone to a certain lady called Mama Charity, who lived opposite Shanzu Medical Clinic in a Swahili – type house, who attempted to terminate her (deceased's) pregnancy. It is on the basis of the above statements that investigating team zeroed in the accused. What the two main witnesses told the court in their testimony was fundamentally at variance with their statements recorded with the police when the matters in question were still fresh in their memory. In cross-examination, PW1 admitted that he did not give the police the name of Mama Charity. That he only told the police that the lady was a Luo by tribe.

Another discrepancy is found in the evidence of PW5 who also alleged that the deceased told him who was responsible for the state she was in. According to PW5 in his testimony in chief the deceased told him that a lady called Mama Charity, who lived opposite Shanzu Medical Clinic in a Swahili-type house and who is a Luo by tribe was responsible for her condition. In cross-examination, however, PW5 confirmed that he recorded his statement with the police on 11<sup>th</sup> July 2004 two days after the alleged conversation with the deceased. He further confirmed that he did not tell the police that he had been told by the deceased that Mama Charity lived opposite Shanzu Medical Clinic. These are fundamental discrepancies. They cannot be said to satisfactorily corroborate each other.

As stated in the case of **John Nyanga Njuki & 4 Others V Republic** – Criminal Appeal (Nakuru) No. 160 of 2000

***“... discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt”.***

I am alive to the fact that the prosecution is only supposed to show a prima facie case at this stage. But given the discrepancies in the evidence of PW1 and PW5 as to the description of the person the deceased told them attempted to procure an abortion for her, it is doubtful that a conviction may result if the accused did not say anything in her defence. Leaving aside these discrepancies, it is noted that the deceased did not describe to either PW1 or PW5 the appearance or other features of this Mama Charity. PW7 testified that PW5 gave a description of Mama Charity as a “ a huge Luo lady”. PW5 himself did not tell the court this, neither did he include it in his statement to the police.

Secondly the first limb of description did not fit the accused. The court noted that the accused is short cannot be described as “huge”. Secondly the prosecution has not adduced any evidence that the accused is a Luo by tribe. These are things that cannot be assumed or left to court to draw inference. They are not obvious and cannot be judicially noticed.

In addition to this no evidence was led that the accused is also known as Mama Charity. The investigating team went to Shanzu village after being directed by an informer. They were shown the accused who they greeted as Mama Charity and responded after being pointed out by some young boys. The boys or neighbors to accused ought to have been called to confirm that the accused was also known to the general neighborhood as Mama Charity on account of her daughter. If they had been told that Mama Charity lived in Swahili-type house opposite Shanzu Medical Clinic, then the accused did not meet that description. She was not found in that Swahili-type house. That house where she was found was not opposite the clinic. It once again said that the two boys informed the investigating team that the person they were looking for had moved house. It is not clear when she moved house. Was it before or after the deceased had consulted her? These are pertinent questions? The investigating team comprising PW7, PW8 and PW9 confirmed that Shanzu is a large populous area. It was therefore necessary to eliminate all other possibilities before settling for the accused as the person the deceased referred to in her declaration as “a huge Luo lady, living opposite Shanzu Medical Clinic in a Swahili-type house, known by the name Mary and also known as Mama Charity”. This was not satisfactory and conclusively done. Another strange thing about this dying declaration is that it was made to people one would least expect – the deceased went to PW1 and on the first day supposedly made the declaration. A taxi driver, PW5, who went to pick her up at the clinic, also received the declaration. Yet the persons who were close to the deceased were in total darkness as to the background of her condition.

Benta Ndunda (PW2) spent most of her time with the deceased. They were neighbours yet when PW2 inquired from her what the problems was it is said that the deceased kept promising that she would tell PW2 everything after getting well. She did not because she did not get well. Her boyfriend who was responsible for the pregnancy (PW4) – James Mwiswa Muteti, saw her many times both in her house and at savanna Clinic. She did not mention about this Mama Charity – or the fact that she had attempted an abortion. Her aunt – Rachael Mwenda (PW6) visited her at Savannah Clinic but she only told her that she had stomachache, vomiting and pain on the feet. The evidence adduced in support of the deceased person’s dying declaration is not corroborative and contradictory. One last matter, in the particulars of the offence as contained in the information is that between the nights of 9<sup>th</sup> and 10<sup>th</sup> July 2004 at **Savannah Medical Clinic in Mtwapa** , the accused murdered Betty Kaluva. There was no evidence that the accused was at Savannah Medical Clinic in Mtwapa. It is not where death occurs but where the act causing death was committed that should form be the particulars in the charge.

To hold otherwise would mean that hospital is where the deceased in a murder case dies becomes the place where the act causing murder was committed. For all these reasons I find it unsafe to require the accused to make her defence. I find that she has no case to answer and acquit her under section 306(1) of the Criminal Procedure Code and set her at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

[Dated and delivered this 12<sup>th</sup> day of September 2005]

**W. OUKO**

## **JUDGE**

Before

W. Ouko – Judge

Mr. ogoti – for the state

Mr. Shujaa – for the accused.

Gladys – CC

Accused – present