

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
Criminal Case 22 of 2004

REPUBLIC PROSECUTOR

VERSUS

VERONICAH MWIKALI ACCUSED

R U L I N G

Veronicah Mwikali is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 16.9.2001 at Majengo area in Kajiado District within the Rift Valley Province, murdered one Jamila Wangare. She denied the offence.

The prosecution called a total of five witnesses. The most important of the 5 is P.W.1 and P.W.5.

P.W. 1 a sister to the deceased recalled that the accused called her sister from their house on the night of 15.9.2001 at about 10.00 p.m. She denied knowing why the accused was calling the sister though she had never seen accused at their house. Accused later called her at midnight, she went to accused's house whereby she found the deceased lying outside unconscious. She was not able to talk to the deceased to find out what had happened. P.W.1 and the accused hired P.W.2 Joseph Ngige who operates a taxi in the area. They took the deceased to hospital but were first referred to make a report to the police. P.W.1 never divulged the news to anybody as she claimed the Doctor told them not to until he did so.

P.W.3 and 4 merely identified the body of the deceased for purposes of post mortem.

P.W.4 Dr. Titus Ndeti who performed a post mortem on the deceased found that the deceased was pregnant, was foaming from the mouth and nostrils, lungs were congested with fluid, stomach congested with bleeding spots around the intestines and he extracted a female foetus from the uterus which was intact, and so was the cervix. He took parts of the liver, intestines, stomach and uterus for chemical analysis to find out if there was poisoning. He formed opinion that deceased died of cardio pulmonary arrest and he could not confirm if it was due to poisoning or not as he had not yet received results of the extracted parts from the Government Analyst.

It is the duty of the prosecution to prove the actus reus as well as mens rea in a case such as this. In the present case there is no evidence that the accused tried to carry out an abortion on the deceased which resulted in her death as the prosecution set out to prove. The only key witness P.W.1 was totally unreliable. She was shifty in her evidence trying to exonerate herself from any blame. Though she told court that she had never seen the accused in her house before but only saw her around the village, yet the accused came to their house, took away her younger sister at 10.00 p.m. without questioning where accused was taking the sister. That is unbelievable. When called later by accused, she claims that accused told her nothing and it seems she did not question. She totally denies knowing that her sister was pregnant but that she noticed it when she found her sister lying unconscious at accused's house. P.W.1 however denies that she ever knew of the pregnancy till the Doctor told her of it. P.W.1's conduct after this incident speaks loudly. She never told any of her siblings or neighbours. She even tried to claim that the Doctor told them not to say any thing yet P.W.2 says the nurse and Doctor pronounced the deceased dead on arrival at the hospital and that is why they referred them to the police. P.W.1 was aware of what was going on and was protecting herself and somebody else. The sum of it is that apart from accused taking the deceased to her house, nobody knows what happened to the deceased. We can only speculate.

Besides, P.W.4 who carried out the post mortem did not tell court the cause of death. He said that he could not tell what the cause of death was until he received the results from Government Chemist. The results were never produced in this court as evidence. There is no evidence as to the cause of death as it is

not even proved that it was an attempted abortion. It is mere suspicion and speculation.

The prosecution has totally failed to prove that the accused had the intention to murder the deceased and that she went ahead with her intention to execute it. Even if put on her defence the court would be expecting her to explain what happened to the deceased. If she opted to be quiet the court would be in a dilemma as to what to do. A prima facie case which is one upon which a court or tribunal applying the law can return a verdict of guilty if accused said nothing in his defence has not been established by the prosecution. As earlier noted the accused is only a prime suspect and suspicion is not sufficient to call upon her to defend herself. She is found not guilty. The accused is hereby acquitted of the offence under Section 306 (1) of the Penal Code.

Dated, read and delivered at Machakos this 19th day of October 2004.

R. V. WENDOH

JUDGE