



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CRIMINAL CASE NO. 35 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN MUTHINI MWENGA.....ACCUSED

JUDGEMENT

1. The accused in this case is charged with one count of murder c/s 203 as read with section 204 of the *Penal Code*. The particulars of the information are that on the 17th Day of April, 2015 at about 12.20 pm at Kitunduni Village, Kathiani sub location within Machakos County he murdered **Mitchelle Mbula Muthini** (hereinafter referred to as the deceased).

2. The prosecution called 10 (ten) witnesses in support of its case.

3. **PW1 Pauline Mwenga** testified that the accused is her grandson and who had married a certain lady with whom they had a daughter (the deceased herein) and that on 17.4.2015 the accused had been left at home with the deceased. She stated that she later received a call that there was a problem at home and that she rushed home only to find that the deceased had died whose body lay on a bed facing upwards. She added that she had left the deceased in good health. On cross-examination, she stated that she did not know what had happened while she had been travelled to the market.

4. **PW2 Alloys Mwenga Wambua** who testified that the accused is his grandson and that the deceased had been the accused's child. He stated that he witnessed the post mortem examination in respect of the body of the deceased.

5. **PW3 Patrick Mutuku Mbithi** and **PW4 Francis Kikoma Mutula** testified that on 17.4.2015 they received a call that the deceased had died and they both went to the scene and found the deceased's body lying on a bed and with foam on the mouth. They added that they found a small bottle of diazonal which is a form of poison.

6. **PW5 Anastacia Nduku John** a mother in law to the accused testified that on 17.4.2015 she received a call that the accused had given the deceased poison and that she rushed to the scene and found the deceased had died. She stated that at the scene, she saw the accused who had also taken poison was lying next to the body of the deceased. On cross-examination, she stated that she found the accused vomiting. She also indicated that she did not witness the incident.

7. **PW6 PC Josephat Kiprono** told the court that on 17.4.2015 he received instructions to rush to the crime scene and on arrival, he found the deceased, an infant already dead and lying on a bed while the accused lay on the floor unconscious and next to him was a sharp panga. He stated that he also recovered a small bottle containing poison. He also added that the scene was photographed and the body escorted to the mortuary while the accused was taken to hospital for treatment and later charged upon discharge. On cross-examination, he stated that there had been a disagreement between the accused and his wife prior to the incident. He also stated that the bottle recovered was one containing diazonal fluid and that he found the door locked from outside and learnt that it was accused's grandmother who had locked the door.

8. **PW7 James Michael Welimo** told court that he was a government analyst and that on 23.4.2015 he received exhibits as well as an exhibit memo and he prepared a report in respect of the same. He stated that the exhibits comprised of a 25 mls amber bottle labelled "diazonal", liver and kidney samples as well as stomach and its contents. Upon carrying out the analysis, he stated that he established the presence of a pesticide in both the stomach contents and the 25mls bottle of diazonal. He testified that if the pesticide is ingested then it stops the body operations may lead to death. On cross-examination, he stated that any amount of poison ingestion leads to death if no antidote is prescribed immediately. He stated that diazonal is a common pesticide in several homes.

9. **PW8 IP Joseph Kariuki** testified that on 17.4.2015 he received a call that the deceased had been killed and he went to the scene and found the deceased's body as well as a bottle of pesticide and a panga. He organized for the bottle to be forwarded to the government chemist for analysis. He also found the accused lying unconscious and vomiting and that there was a diazonal bottle containing pesticide near the

body of the deceased. He organized for the removal of the body as well as escorting the accused to hospital for treatment.

10. **PW.9 Dr Jackline Moraa Mirera** told the court that she conducted a post mortem on the deceased and made her findings as per the post mortem report produced as exhibit No.3. She found a wound on the anterior chest that looked like it had been inflicted with a sharp object. She stated that the gastric contents had a smell of organo phosphate poison which she opined must have been a pesticide. She established that the victim had been stabbed and fed with the poison. She formed the opinion that the cause of death was internal bleeding secondary to trauma, stab wound and organophosphate poisoning.

11. **PW.10** was **Cecilia Kavesu Kioko**. It was her testimony that the accused was her husband and that on 17.4.2015 she was with the accused and she left him at home with the deceased whom she had taken to his grandmother. She recalled that a few days prior to the incident, the accused had threatened to kill himself and the deceased after it had been agreed that he would be taking care of the child and to cater for school fees. She added that the accused had earlier threatened to kill her as well as the baby and himself. She told the court that on 17.4.2015 she received information that the accused had killed the deceased and she rushed to the scene at the accused's grandmothers house and found the body of the deceased.

12. The court found that the prosecution had made out a prima facie case and the accused was subsequently placed on his defence. The defence called two witnesses. **Dw1** (accused) admitted that the deceased was his 8-month-old child. He recalled how on 17.4.2015 he left the deceased with his wife (**PW 10**) to take milk to the market and on return from the market at about 9.00 am he found that the deceased and Pw10 were nowhere to be found. He told the court of how he traced his wife at her mother's home but however the deceased was not there and his enquiry about the whereabouts of the deceased were futile and so he left for his home and upon arrival was met by a crowd of people baying for his blood. He told the court that he was beaten unconscious and when he regained consciousness, he was accused of killing the deceased to which he denied as well as denied threatening Pw10. He asserted that the charges he was facing were false and sought to be acquitted. On cross examination, he denied having any squabbles with his wife and further denied threatening to kill his wife, child and then kill himself. He also denied attempting to kill himself by ingesting poison.

13. Dw2, Anastasia Mbithe Mwenga told the court that on 17.4.2015 she was at home with her parents and she saw the accused taking milk to the market at about 8.00 am without the company of the deceased. She recounted how she saw mother t accused's wife coming out of the accused's house with the deceased and screaming for help. On cross examination, she told the court that she saw the accused leave the deceased and Pw10 in the house as he went to the market. She denied that the accused took poison.

14. The defence closed its case and learned counsels filed final submissions.

15. Mr Mwongera for the prosecution vide submissions filed on 26th May, 2021 submitted that as per the evidence of Pw10, the accused was the last person to be seen with the deceased. It was submitted that the evidence of Pw10, Pw1, Pw3 and Pw5 point towards the accused as the suspect in the death of the deceased. In placing reliance on section 206 of the Penal Code, it was submitted that because the accused inflicted harm on the deceased, he had malice aforethought. It was submitted that the accused was identified by Pw3, Pw4 and Pw5. On the cause of death, counsel relied on the post mortem report and urged the court to convict the accused.

16. Mr Muema for the accused on the other hand took issue with the failure to tender exhibits of the panga and bottle with pesticide. Counsel submitted that the prosecution is attempting to rely on circumstantial evidence and that the circumstances did not establish the guilt of the accused. Reliance was placed on the case of **Isaac Kimanthi Kamuachobi v R (2013) eKLR**. The learned counsel submitted that the court should proceed and acquit the accused after finding that the prosecution failed to prove its case beyond reasonable doubt.

17. The issue for determination is whether the prosecution has discharged its burden of proof beyond the requisite threshold of proof which is that of beyond any reasonable doubt.

18. The burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

19. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

20. The post-mortem report on the examination of the body of the deceased prepared by Dr Jackline Moraa Mirera (Pw9) has not been objected to nor controverted. The said doctor formed the opinion that the cause of death was internal bleeding secondary to trauma due to stab wound and organophosphate poisoning. This ingredient of the offence namely the fact and cause of death was duly proved by the prosecution.

21. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

22. The deceased in this case was found to have died from internal bleeding secondary to trauma from a stab wound due to a sharp object and

organophosphate poisoning. There was a suggestion by counsel for the accused that the deceased had been left with her mother (Pw10) and therefore it was not the accused who committed the unlawful act. It was upon the prosecution to ensure that the allegation that the accused stabbed and poisoned the deceased was backed by supporting evidence and hence I find it safe to presume that the death was unlawful.

23. Malice aforethought is the intention to cause death. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack.

24. None of the prosecution witnesses did testify to witnessing the attack on the deceased. However, it can be inferred from what was used as the murder weapon. Given the presumed force used on such a sensitive part of the body being the upper left lung, it can safely be inferred that death was the desired outcome of whoever the assailant was. Further, the use of organophosphate poison which was ingested by the deceased pointed to an intention that death of the deceased was the desired outcome.

25. There was no direct evidence linking the accused to the crime and what is available is circumstantial evidence such as that stained clothes that were found in the home of the deceased. The deceased was found lying on a bed while the accused lay on the floor vomiting and that there was a sharp panga and a small bottle of diazonal pesticide beside the deceased. It is the position of the law that for a court to base a conviction on circumstantial evidence, such evidence must irresistibly point to the guilt of the accused with no co-existing circumstances which would weaken or destroy that inference. For evidence to be capable of being corroborated it must:

(a) be relevant and admissible, **R v Scarrot, [1978] QB 1016;**

(b) be credible, **DPP v Kilbourne [1973] AC 729;**

(c) be independent, that is, emanating from a source other than the witness requiring to be corroborated, **R v Whitehead [1929] 1 KB 99,**

(d) implicate the accused. **Abanga alias Onyango v Republic Cr. Appeal 32 of 1990(UR).**

26. In another case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135**, regarding circumstantial evidence the court held that:-

“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 hypothesis than that of his guilt.”

27. The prosecution's case suggests that the accused was the one who had an opportunity to kill the deceased because he was left alone with the deceased. The accused testified that he left the deceased with his wife (Pw10). Section 111 of the Evidence Act, Cap. 80 of the laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. The assertion by the accused that he had gone to the market to deliver milk and which was backed by his younger sister (Dw2), is put into doubt by the evidence of Pw4, Pw5, Pw6, Pw8 and Pw10 whose testimonies confirmed that the accused was found at the scene of crime. Indeed, the accused was found vomiting and lying on the ground having ingested diazonal pesticide which was also recovered at the scene. The deceased was found dead and with foam on the mouth and with a wound on the chest. Specimens collected from the body of the deceased, according to the evidence the analyst (Pw7), revealed that organophosphate pesticide was detected in the stomach contents of the deceased and which tallied with the contents of the diazonal pesticide bottle recovered from the scene. The wife of the accused told the court that prior to the incident the accused had threatened to kill her and the baby due to some differences she had with him over the management of the baby as she attended college tuition. She stated that early on the material date the accused had threatened to kill her and she had to rush to her mother leaving the baby behind and that she briefed her mother(Pw5) and expressed her fears on the safety of the deceased. It only took a few minutes before they discovered that the accused had killed the deceased. I am satisfied that the accused was the last person in company of the deceased and must therefore be held responsible. His alibi that he had gone to deliver milk at the market is not believable in view of the evidence that he was found at the scene with the dead child and had ingested pesticide poison. The baby was then aged 8 months and could not have injured herself with a sharp panga and then ingest the poison. The fact that the accused was found to have ingested the poison is a clear indication that he had a hand in how the deceased ingested the poison and sustained the injury. The investigating officer (Pw8) told the court that on arrival at the scene he found the accused vomiting and lying next to the body of the deceased and he rushed him to Kathiani level 4 hospital for treatment and later had him charged with the offence herein. The said witness stated that he collected the exhibits which comprised of a sharp panga and a small bottle of diazonal pesticide. It is thus clear that the accused had the opportunity to kill the deceased as he was alone with her. I find that the accused had the requisite motive to kill the deceased as he had earlier on threatened to do and made it clear to his wife. The idea to kill both his wife and child had been conjured much earlier and was actualized on the material date. It seems his differences with his wife over her decision to enrol for college studies and leave him with the responsibility of taking care of the baby boiled over to the point of committing murder. Matters seem to have taken a head early on the material date when his wife threatened to end the marriage and go live with her parents and the altercation led her into leaving the deceased with him as she ran to her parents. It is at that juncture that the accused must have felt that his world was crumbling and decided to kill the baby and himself. As noted above, the accused had harboured an intention to kill his family and therefore the killing of the deceased was a premeditated action. It is unlikely that the deceased had provoked the accused in any way as she was just an innocent toddler to warrant the killing. I find that there were no other co-existing circumstances to interfere with an inference of guilt on the part of the accused. I find that malice aforethought was established by the prosecution and that the person who had murdered the deceased was none other than the accused herein who was squarely placed at the scene of crime. The defence evidence did not shake that of the prosecution which is overwhelming against him. The accused's claim that the deceased might have been killed by his wife or mother in law is not convincing since they were at their home and only came to the scene upon being alerted of the incident and their version of events is believable that it is the accused who had the opportunity to kill the deceased. Even though the treatment notes regarding accused's hospitalization were not produced, the evidence of the witnesses left no doubt that indeed he was the person responsible for the death of the deceased. The action of the accused in injuring the infant with a sharp panga and feeding her with a pesticide poison left no doubt that he intended to cause the victim to suffer grievous harm or death.

28. In light of the forgoing observations, it is my finding that the prosecution proved its case against the accused beyond any reasonable doubt for the charge of murder contrary to section 203 as read with section 204 of the Penal Code. I find the accused **Martin Muthini Mwenga** guilty as charged and is convicted accordingly.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 6TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE