



**REPUBLIC OF KENYA**

**IN HIGH COURT OF KENYA AT MACHAKOS**

Coram: Hon. D. K. Kemei - J

**CRIMINAL CASE NO. 40 OF 2016**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**OLIVIA MUNYIVA NZAU.....ACCUSED**

**JUDGEMENT**

1. The accused herein, **OLIVIA MUNYIVA NZAU** was charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It is alleged that on the **17<sup>th</sup> Day of April, 2016**, at Sabaki Estate, Athi River Sub-location within Machakos County she murdered **BRUNO MWENDWA**.

2. The prosecution marshalled 9 (Nine) witnesses in support of its case.

3. **Pw1 Muthama Mbithi** testified that on **20<sup>th</sup> September, 2016** he was informed that a child's throat had been slit by his mother. He testified that he was led by one Stella to a bush where the body of the deceased was recovered. On cross examination, he stated that he did not witness the incident.

4. **Pw2 Florence Kiio**, the assistant chief of Mlolongo sub location testified that on **20<sup>th</sup> September, 2016** she received information that a lady had killed her child. She stated that she rushed to the scene where the headless body of a child was recovered stashed under some cactus trees. She added that a lady by the name Stella was claimed to have given the information regarding the alleged murder and who was promptly picked up by the police.

5. **Pw3 Joan Wayua** testified that on **20<sup>th</sup> September, 2016** she was informed that the accused had murdered her child. She added that she had known the accused and her friend Stella Maris and that she received the tip off from the said Stella Maris that the accused had killed her child. On cross examination, she stated that she did not witness the incident.

6. **Pw4 Josephine Nyambura Karuga** told the court that **21<sup>st</sup> September, 2016** she was informed that there had been a murder on her premises. She testified that she learnt that the accused had murdered the deceased. She added that she had rented one of her premises namely room number 7 to one Benson Ndunda who paid rent for the month of May and June 2016 but however the accused herein paid the rent for July that year. On cross examination, she stated that she had closed the premises for non -payment of rent and that she did not witness the murder.

7. **PW5 Anne Wangechi**, who works at the Government Chemist, testified that she received items being nail clippings from the deceased, nail clippings from the accused as well as a buccal swab from the accused so as to determine the maternity of the deceased. She told the court that the DNA analysis revealed that there are 99.99 chances that the accused was the biological mother of the deceased. The government analyst report was tendered in evidence and marked Exh2. On cross examination, she stated that she couldn't tell why DNA samples from one of the suspects named Stella Maris were not availed for analysis.

8. **Pw6, Pc Gisiri** testified that on **20<sup>th</sup> September, 2016** he received a call to rush to Kyangombe slums as it had been alleged that a lady had killed her child. He told the court that he went to the scene and in the company of the village elder found the accused outside her house whereupon she was arrested and escorted to the CID Athi River.

9. **Pw7 Stella Maris Muthoki** testified that the accused had been her neighbour. She told the court that on **17<sup>th</sup> September, 2019** she and the accused went to watch movies and on returning back they noticed that the deceased was unwell. She stated that she accompanied the accused and the deceased to hospital but however while enroute, the accused entered a thicket with the child and later emerged out of the thicket without the child. She testified that the accused admitted to killing the child and on the following day, Pw7 informed another neighbour about the incident and the information was relayed to a clan elder. She admitted leading the search party to the thicket where the deceased

had been abandoned by the accused and she was able to identify the body as that of the deceased. On cross examination, she admitted having been arrested as a suspect but was later released and made a prosecution witness as she knew the details of the incident. On re-examination, she stated that the accused used to complain that the child was a bother due to lack of food.

10. **Pw8 Dr Waithera Githendu** testified in respect of an autopsy that was carried out on the body of the deceased which revealed that the deceased had no head and that she formed the opinion that the deceased died due to decapitation. She told the court that the body had no other injuries and that the weapon must have been a sharp object. She also stated that some nail samples were collected from the body for DNA analysis. The report was produced as Exh 3. On cross-examination, she stated that she could not rule out the fact that wild animals could have taken out the head of the deceased.

11. **Pw9, Pc Joseph Chesaro** who testified that on **20<sup>th</sup> September, 2016**, he was informed that there was a lady at Kyangombe who had killed her child. He told the court that he rushed to the scene and was led to the accused whom he arrested. On cross-examination, he stated that he did not recover anything from the accused and that he had been led to the accused by the area clan elder.

12. The prosecution closed their case. The court on **20<sup>th</sup> day of January, 2021** found that a prima facie case had been made out against the accused who was placed on her defence. The defence hearing was duly conducted on **24<sup>th</sup> May, 2021**.

13. The accused testified that the charges were false. She told the court that she used to leave her child with Pw7 whenever she goes to work and that Pw7 was her roommate and who works at a club and that on **17<sup>th</sup> April, 2016** she left her child and came home the following day at around 8.00 am. She inquired about the whereabouts of her child but Pw7 did not talk to her. She testified that after five minutes the police came to her house to arrest her and was taken to Sabaki Police post and later transferred to Athi River Police Station. She added that her roommate was also arrested but later released. She testified that she has another child who stays with her sister. She denied committing any offence of murder. On cross examination, she testified that life was hard for her to feed her child and that her child fell sick all the time. On re-examination, she told the court that Pw7 knows best about the death of her child and that she does not understand why Pw7 was not charged with the offence.

14. Learned counsels filed final submissions. Counsel for the defence submitted that the prosecution has not made out its case against the accused since it has failed to prove beyond reasonable doubt that the accused is responsible for the murder. Reliance was placed on the case of **Woolmington V. DPP (1935) ALL ER 1 AC 462(HL)**. It was submitted that the accused was not at the scene of the crime at the time of murder and that her identity is important in that she ought to be placed at the scene armed with motive, means and opportunity and which has not been done in this case. It was further pointed out that there was no evidence that connected the accused with the death of the deceased and that the prosecution was simply relying on circumstantial evidence. Reliance was placed on the case of **Sawe Vs Republic (2003) KLR 364**. It was submitted that the knife that was used to commit the offence was not produced in court. The court was urged to find that Pw7 was an accomplice and that her evidence was accomplice evidence that was not safe to act upon hence there was no required corroboration. Learned counsel prayed that the court finds the accused not guilty pursuant to section 306(1) of the Criminal Procedure Code.

15. The State in response submitted that as per the evidence of Pw7, the accused was the last person seen with the deceased. It was submitted that the accused person had malice aforethought and that the accused was identified by Pw7. It was submitted that the cause of death was proven vide the evidence of Pw9. In placing reliance on the case of **Ramanlal Trambakal Bhatt V R (1957) EA 332** and the case of **R VS Jagjiwan M. Patel And Others (1) T.L.R.(R) 85** it was submitted that the accused failed to avail witnesses to corroborate her testimony and therefore her assertions are false and not valuable.

16. Having considered the evidence on record and the submissions of the parties, the issue for determination is whether the prosecution proved its case to the required standard.

17. The burden to prove all ingredients of the offence of murder 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 she does not have the burden to prove her innocence or to justify her 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.

18. The prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. As per the elements provided for under section 203 as read with section 204 of the Penal Code, prosecution must prove beyond reasonable doubt 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.

19. As regards the aspect of death, the undisputed post mortem report (Pexh 3) indicate that there is no dispute that the deceased indeed died. Dr Waithera Githendu observed the body of the deceased and noted that the deceased had no head, and formed the opinion that the cause of death was due to decapitation. She also noted that the body had no other injuries and she stated that some nail samples were collected from the body of the deceased for DNA analysis.

20. On the issue of the unlawful nature of the death, and identity of the accused, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. The evidence of Pw7 was that she and the accused went to watch movies and on return they found that the deceased was unwell. She stated that she accompanied the accused and the deceased to hospital but however while enroute, the accused entered a thicket with the child and later emerged out of the thicket without the child. She testified that the accused admitted to killing the child and on the following day, she informed another neighbour about the incident and that the information was relayed to a clan elder. She admitted leading the search party to the thicket where the deceased had been abandoned by the accused and she was able to identify the body as that of the deceased. The DNA analysis conducted by Pw5 confirmed that the accused was the biological mother of the deceased. That the results revealed that there was a 99.99% chance that the accused is the biological mother of the deceased. Such a finding ruled out any other person as the mother of the deceased. She was the last person with the deceased prior to the incident as

confirmed by her neighbour Pw7. I find it safe to presume that the death was unlawful and I find the act of decapitation by the accused caused the death of the deceased who was her child. The accused admitted to killing the child to Pw7 and even complaining to Pw7 how her child was a bother due to lack of food. I am satisfied that she had malice aforethought and was placed at the scene of crime. She was the last person to be with the deceased as she entered a thicket as her friend waited by the roadside. She admitted on being cross-examined that the deceased had been her child and that life was hard for her to feed the child. I find that the hard knock of life must have pushed the accused to murder her child. The child was young, innocent and defenceless and did not deserve to die just because the accused faced hardships in life. The conduct of the accused in getting rid of her own child was callous in the extreme as she could even have given away the child for adoption by child welfare societies or children homes.

21. There is no direct evidence in this case but there exists circumstantial evidence. I have considered the evidence adduced by the accused who testified that on the material day she returned home and her son was not at home. She gave nothing that is of value that would absolve her from the dastardly act of decapitating her own child. She admitted to Pw7 about killing her own child and on informing another neighbour who in turn informing the village elder she admitted to leading a search party to the thicket where the deceased had been abandoned by the accused. She projected a don't care attitude regarding the issue of her missing child by merely asking about the whereabouts of her child. She did not even show any surprise upon the discovery of the child. What can be read from her evidence is that her reaction to the missing child was one of aloofness as to the whereabouts of the child and she did not strike me as one who was genuinely concerned about the child. It had also transpired that the accused would constantly complain about how the child was a bother and on the aspect of the child being sickly and that she had problems feeding the child. It seems this drove her to the point of getting rid of her own child.

22. In the case of **Wambua & 3 Others Vs Republic [2008] KLR 142** the court held: -

***1. In order to justify an inference of guilt from circumstantial evidence, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of this inference is always on the prosecution which is required to establish its case beyond reasonable doubt.***

***2. It is also necessary, before drawing the inference of the accused's guilt from circumstantial evidence, to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.***

23. In my view, the circumstantial evidence herein is so strong and reliable and sufficient to prove mens rea and actus reus on the part of the accused even in the absence of the confession. Her own friend and roommate (Pw7) could not hide what the accused had done to the child and thus gave her away.

24. In the case of **Nzuki Vs Republic [1993] KLR 171** where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

***a) Intention to cause death,***

***b) Intention to cause grievous bodily harm,***

***c) Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.***

25. On the issue of malice aforethought, 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. As it transpired from the evidence the state of the body of the deceased left no doubt that the accused intended to cause death. It can safely be inferred that death was the desired outcome of whoever the assailant was. The act of decapitating an infant leaves no doubt that the accused had the requisite mens rea. She must have clearly made a lay out plan before executing it and hence it was not a spontaneous reaction following the constant complaints and reference to the child as a bother. Reference made to the mental assessment report from Mathari National Hospital dated 11/5/2017 indicated that the accused reported to having discovered that she was pregnant with the 2<sup>nd</sup> child yet the man responsible declined responsibility and that she decided to poison her other first child and terminate the 2<sup>nd</sup> pregnancy but the latter was not successful. Her defence evidence did not shake that of the prosecution which I find quite overwhelming against her. The defence claim that Pw7 was an accomplice is not convincing for the reason that the said witness gave the true version of the incident and that the accused in her evidence did not implicate Pw7 as an accomplice so as to invite the court to decide whether or not the said evidence would be treated as coming from an accomplice. There was no such scenario and hence Pw7 cannot be treated as an accomplice and thus her evidence is untainted and did not require corroboration.

26. In the result, I find that the evidence adduced by the prosecution as well as the circumstantial evidence surrounding the death of the deceased points to the guilt of the accused. I find the prosecution has proved the offence of murder against the accused beyond any reasonable doubt. I find her guilty of the offence of murder contrary to sections 203 as read with 204 of the Penal Code and she is convicted accordingly.

It is so ordered.

Dated and delivered at **Machakos** this **22<sup>nd</sup>** day of **September, 2021**

**D. K Kemei**

**Judge**