



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 43 OF 2016**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**REGINA WAMBUI NJOROGE.....ACCUSED**

**JUDGMENT**

1. The accused **REGINA WAMBUI NJOROGE** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on the 18<sup>th</sup> day of May, 2016 at Umoja II Estate Embakasi District within Nairobi County murdered **STEPHANIE NZISA WAMBUA**.

2. She pleaded not guilty to the charges and to prove its case against her, the State called and examined a total of nine (9) witnesses. When put on her defence, the accused gave unsworn statement of defence without calling any witnesses.

**PROSECUTION CASE**

3. The accused had been employed by **PW1 ALPHONSE WAMBUA** and his wife **PW2 BANCY WIARIMU KABIRU** as a house help, having been introduced to them by her sister **PW4 ANN WANJIRU NJERI** who was their friend. She commenced her duties on 13<sup>th</sup> day of May, 2016. It was PW1's evidence that on 14<sup>th</sup> day of May, 2016 when he asked the accused for his shoes, she did not answer him well. On 16<sup>th</sup> when he got to the house, the deceased who was eight (8) months old ran to him and refused to let go of him. He later on informed PW2 and they made a decision to get another house help, but without informing the accused. The following day which was the 17<sup>th</sup>, when he returned back home from work, he found his house in darkness and when he wanted to go for the electricity token the deceased once again refused to let him go.

4. It was his further evidence that on the morning of 18<sup>th</sup> the deceased went to their bed, they played with her, took photographs and then made a decision that the same should not be left with the accused. When he left the house, PW2 later on sent him a text message, indicating that the deceased did not want to let her leave her. They then agreed to let **PW3 EVERLINE MUTHONI KABIRA** go with her to her place of work. He was later on called at 11 and informed that the deceased was sick, only to find out that she had died.

5. In cross examination he stated that he was not usually at home, so did not see the accused handle the deceased. He stated that he could detect that the child was scared of the accused. When he looked at the body of the deceased he noticed hand marks bruises and she was foaming from the mouth.

6. PW2 stated that on the material day, she left for work at 10.00 a.m. having given instructions to PW3 to carry the child with her to her place of work at Kayole, having noticed that the child was not getting on well with the accused. When she called her sister (PW3) at 11.30 a.m. she told her that since it was raining and the child was asleep, she did not carry her along. At 12.30 p.m. she received a call from PW3, who told her that the child had fallen down and was unconscious at Emmaus Hospital. She rushed there and noticed that she had dark marks on her cheek.

7. **PW3 EVERLINE MUTHONI KABIRA** testified that she had lived with PW1 and 2 since the deceased was born. On 18<sup>th</sup> she left the child with the accused while carrying her on her back while asleep. She found her place of work had black-out, so she came back home and found the accused at the entrance with a basin holding clothes which had not been washed. When she asked her where the deceased was, she told her that she was on the chair sleeping. When she checked on her, she found her foaming from the nose and unresponsive. The accused had changed her clothes. When she asked her what had happened, the accused said that the child had fallen onto the chair.

8. It was her testimony that at that time the sister of the accused came and took the child to the hospital, where the doctor advised that they take her to Mama Lucy, where she was pronounced dead. In cross examination she confirmed that PW2 had told her to cook for the child

and carry her with her to Kayole and that there was no issue between the accused and the deceased, who could stand while holding something. She further stated that the relationship between the accused, herself and the parents of the deceased was good.

**9. PW4 HANNAH WANJIRU NJERI** stated that on the material day at 10.00 a.m. the accused called her to hurry to where she was when she got there, she told her that the child had fallen down. she rushed her to Victory hospital and on the advice of the doctor called PW1 whom he told that the deceased was at the hospital, but he asked her instead what she was doing in his house and disconnected. When she called him again, he told her to call PW2. She was later on told that PW1 had advised that the child be taken to Emmaus hospital, where the accused was detained by the Doctor. The following day he met PW1 at the gate of Buruburu police station, where they attacked her, on allegation that she had killed their child. She was then locked at the police cell before being taken to Makadara Law Courts and was later on released leaving the accused who was her sister behind.

**10. PW5 NICHOLAS OTIENO OKAYO** a Clinical Officer then at Victory Hospital located at Umoja, testified that he attended to the deceased, whom he certified dead at 12.30 p.m. On examination of the child he did not see signs of physical injuries on her. He confirmed that she was brought to the clinic at 12.15 p.m. dead. **PW6 INSP. PETERSON KUNGA** re-arrested the accused at Umoja Ap. Camp and went with her to the scene, where she showed them the seat, where she alleged that the child had fallen down from to the tiled floor. He went to the hospital where the deceased was and did not see any physical injury on the body, save for a black spot which looked like a birth mark. He later recorded the statement of the accused, who stated that the deceased had slipped from her hand and fell on the floor unintentionally.

**11. PW7 DR. J. ODUOR** examined the body of the deceased, which had thumb print bruises on the cheeks, peripheral cyanosis, occipital scalp hematoma, frontal scalp hematoma, occipital acute subdural hematoma and as a results of examination formed an opinion that the cause of death was head injury due to blunt trauma. On cross examination he confirmed that the finger impressions on the cheeks could have been caused when the same is held using fingers and that since there were injuries on both sides of the head, that ruled out the same being caused by a fall unless she fell down twice.

**12. PW8 CAROLINE NKATHA** received the report of the death from PW1, looked at the body of the deceased and noticed two marks on both side of the cheeks. She saw the accused at Emmaus clinic, where she was being held. **PW9 INSP. MICHAEL NJENGA** was a scene of crime officer who took a total of eight photographs of the body of the deceased and the house of her parents. He stated that PW8 told him that the deceased had allegedly died after being assaulted by the accused.

**13. PW10 CORP MOSES OUMA** was on 23<sup>rd</sup> instructed to take over the investigations of the cause. He established that the accused was left with the child to take care of, and fell down while she was cleaning the house. He confirmed that the accused took the child to the hospital.

#### **DEFENCE CASE**

**14.** The accused stated that the deceased was playing when she fell down. It was her evidence that she checked on her and she was ok. She then put her on her shoulder and through bad luck she fell down. She then called her sister who came, and they took her to the hospital where she was pronounced dead.

#### **SUBMISSIONS**

**15.** It was submitted by Ms. Chepkorir for the accused that there was contradiction between the evidence of PW1 and PW2 on the relationship between the accused and the deceased. Whereas PW1 stated that the accused was not relating well with the deceased PW2 stated that they were relating well. It was submitted that the prosecution did not prove that the accused had the necessary motive to kill the deceased and that her account is corroborated by the evidence of the Doctor. It was further stated that the conduct of the accused showed that she was innocent, as she immediately called her sister after the child fell down, using a borrowed phone, whom she informed of what had happened.

**16.** Mr. Okeyo for the prosecution submitted that though PW7 confirmed that the injuries could be caused by a fall, he raised a doubt since there were two injuries and that the accused defence of the child falling from a sofa was an afterthought. It was submitted that when PW3 came to the house, the accused told her that the deceased was asleep, while she had died and that it was only the accused and the deceased who were at the scene.

#### **ANALYSIS AND DETERMINATION**

**17.** To sustain a conviction on a charge of murder, the prosecution is required to prove beyond reasonable doubt the following elements of the offence:-

*a) The fact and cause of death.*

*b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.*

*c) That it was caused with malice aforethought as defined under Section 206 of the Penal Code.*

**18.** The fact and the cause of death of the deceased is not in dispute. The same was proved beyond any reasonable doubt through the evidence of all the witnesses who testified in court including the accused. The cause of death was established by the evidence of **PW7 DR. J. ODUOR** as excessive bleeding in the brain due to blunt trauma.

**19.** The fact that the death of the deceased was caused by an act of omission on the part of the accused is further not in dispute. The evidence

tendered by the prosecution, proved that the accused was left with the deceased to take care of by PW2 and PW3 who was supposed to go with the same to her place of work on the material day but did not. It was in the course of the accused duties aforesaid, when the deceased sustained the injuries from which she died. The accused was under a duty to take care of the same and since she failed to do so, it is clear that the death was caused by an act of omission on her part. The accused in her defence stated that the deceased accidentally fell down.

20. The only issue in controversy is whether the same was caused by malice aforethought as defined in **Section 206** of the **Penal Code** as follows:-

*“Malice aforethought shall be deemed to be established by evidence proving one or more of the following circumstances:-*

*(a) An intention to cause death or to do grievous harm to any person, whether that person is the person actually killed or not.*

*(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be caused.*

*(c) Intention to commit a felony.”*

21. Put differently the issue for the court to determine is whether the accused had the necessary motive to cause the death of the deceased. Save for the evidence of PW1 and PW2, that they had seen a change on the behavior of the deceased, upon the accused being employed, there was no evidence tendered before the court to show that the accused had any ill will towards the deceased. The prosecution failed to prove any motive on the part of the accused to cause the death of the deceased. She had only worked for the family of the deceased for a period of five days and according to the evidence of PW2 and PW3 they were living in harmony during the said period of time.

22. Whereas it is not mandatory for the prosecution to prove motive, in a case like this where the prosecution case is wholly based on circumstantial evidence, proof of motive is required so as to join the chain of circumstances relied upon by the prosecution.

23. I have noted that there was a remarkable contradiction between the evidence of PW3 and PW4 who were the first people at the scene whereas PW4's testimony was that she found the accused and PW3 crying while holding the deceased, PW3 was silent on this having stated that PW4 came to the house and took the deceased from the chair. I have also noted that there was a remarkable contradiction on the evidence of PW1 and PW2 as regards the deceased attitude towards the accused.

24. The accused in her defence stated that the child had earlier fallen down from the chair and that when she put her on her back she once again fell down onto the tiled floor. Her evidence is corroborated by that of the Doctor who confirmed that the deceased had two injuries. It is clear that the prosecution case was solely based on circumstantial evidence since it was the accused who was last with the deceased when she met her death.

25. Whereas the death of the deceased occurred in the presence of the accused and as a result of an act of omission on her part, it is clear that the prosecution failed to prove *mens rea* on her part as was stated by the court in the case of **PETER KIAMBI MURIUKI v REPUBLIC (2013)** where they quoted with approval **NZUKI v REPUBLIC (1993) KLR 171** while substituting the charge of murder with manslaughter as follows:-

*“There was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant has any one of the intentions outlined for malice aforethought.....*

*In the absence of proof of malice aforethought to the required standard, the appellants conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”*

26. I have also looked at the conduct of the accused who immediately upon the deceased falling down called her sister **PW4 ANN WANJIRU NJERI** who had introduced her to the family of the deceased and informed her of what had happened which was consistent with her statement to the police. Her conduct was inconsistent with a guilty mind and shall therefore grant her the benefit of doubt.

27. Based on the evidence tendered before the court as analyzed herein, the accused defence, her conduct and the circumstantial evidence, the age of the deceased and the Doctor's account, I am satisfied that whereas the death of the same was caused by an act of omission or commission on the part of the accused, the prosecution failed to prove malice aforethought to the required standard and in the absence of malice aforethought. The only offence which the prosecution succeeded to prove is the lesser charge of manslaughter Contrary to **Section 202** as read with **Section 205** of the Penal Code.

28. Consequently by virtue of the provisions of Section 179 (2) of the Criminal Procedure Code, I hereby acquit the accused person of the charge of murder and find her guilty and convict her of the offence of manslaughter contrary to **Section 202** of the **Penal Code**. It is so ordered.

Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of February, 2020

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Okeyo for the state*

*Mr. Chepkorir for Kinyori for the accused*

*Karwitha court assistant*

*Accused person present*