



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CRIMINAL CASE NO.7 OF 2018**

**REPUBLIC.....PROSECUTOR**

**- V E R S U S -**

**JANE WANJIRU KAMAU.....ACCUSED**

**J U D G M E N T**

By the information dated 14/3/2018, Jane Wanjiru Kamau, hereafter referred to as the accused, was 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 unknown date between 24/1/2018 and 24/2/2018 at unknown place, within Laikipia and Nyandarua Countries, murdered LN.

In support of their case, the prosecution called a total of seven witnesses PW1, Dr. Boniface Miringu, performed Postmortem on the deceased on 9/3/2018. On examining the body of the deceased found a fractured cricoid cartilage which is part of the larynx with discontinuation of the wind pipe, both lungs were collapsed and no fluid in the lungs. He also found that the child's penis was elongated like it had been pulled. Parts of the body were decomposed. He forwarded the opinion that the cause of death was strangulation. He said that by the time the deceased was put in the water, he was already dead and that is why there was no water in the stomach or lungs.

On 27/2/2018, PW2 Sarah Njeri who had employed the accused at her salon learnt from a customer while at work in the Salon that the body of a boy had been found in Ngare Naro River. She recalled sometime in January, 2018, when at work, the accused's sister, her son N (the deceased) and a man who defends children's rights had gone to the salon and alleged that the accused had thrown the deceased at Mairo Inya and that the people left with accused. When PW2 learnt that a child had been found in a river, she enquired from accused where her son N was and she left claiming to be going to get him from school.

PW2 said that she knew the deceased well because the accused used to bring the deceased along to work but when she got another child, she only came to work with the baby. PW2 said she was disturbed, called the accused's neighbor to enquire whether accused had her two children at her home but the neighbor told her accused had only one child. Next day, PW2 again enquired from accused where N was and she still maintained he was in school and it is then she called neighbours to interrogate accused about the deceased's whereabouts, it is then accused changed her story and said N was in Nyeri with her mother in law and it is then they took her to the police station.

PW3 Nelson Wahiu Muhari is the accused's husband. He recalled that on 10/1/2018 he left Kshs.1,000/= with the accused to enable her to take N (deceased) to the grandmother in Nakuru. In the evening, when he returned home, he called the accused on phone and she confirmed to have arrived at home safely. He called accused next day to ask when she would be back and on the third day, he found accused and their baby T were back home and he thought the deceased had been left in Nakuru with the grandmother. On 24/2/2018 he heard that a child had been found in Ngare Naro river but never bothered to find out about it. He denied having seen L's body because he believes he is still with the grandmother. Later, he was arrested together with accused when shown the body recovered, he was not able to identify it as that of LN. He said that though LN was not his biological child, they lived happily as a family. He denied having had any problem with the deceased whom he had adopted as his own child. He also denied that the accused had any problem with the deceased after the birth of the baby T.

PW4 Simon Kibaki Mwangi is the biological father of the deceased. He had met the accused in 2009, they became lovers and in 2010, he went back to university and because of the distance between them, their relationship faded away though they were in touch between 2010 and 2013. PW4's cousin and accused later called to inform him that accused had given birth to a baby boy and he visited accused and accepted the child as his. He used to visit and assist accused and the deceased (LN) between 2014 – 2015 when accused called to tell him that she was married and PW4 stopped communicating with her; that accused called her in 2018 to inform him that the child had died. Later, he was called by DCIO Ol Jororok and informed that accused had alleged that he killed the child; that in February, 2018, the accused had called to ask for fare so that she could take the child to him but she never took the child to his house at Ol Kalou.

PW5 CPL Edward Esanya, a gazetted scene of crime officer was on 24/2/2018 requested to go and document a scene at Riverside in a matter where there was a body of a juvenile which was held between two rocks in a river.

He took photographs of the scene and on 9/3/2018, took photographs of the body before post mortem was done. He produced the photographs in evidence. P.Ex.2 and 3.

Sgt. Peter Mukangai (PW6) of DCI office Ol Jororok received a report of a body of juvenile being in Ngare Naro River on 24/2/2018. He proceeded to the scene with other officers and PW5 who took photographs of the scene. The members of public at the river could not identify the body and it was taken to the mortuary. On 28/2/2018, he was informed that two suspects had been arrested and the two were husband and wife identified the body of the deceased; that accused claimed to have left the child with her parents in Nakuru. PW6 escorted accused to Nakuru Moronyo Estate but when they reached there, she was not able to show the police her mother's house and she was returned to Nyahururu.

PW7, Assistant Supt. of Police Steven Ambani was one of the investigation officers in this case. On 24/2/2018 he received a report that a body of a juvenile had been seen in a river. He instructed PW6 to proceed to the scene. The body was not immediately identified but information was circulated and on 28/2/2018, he learned from the OCS Nyahururu Police Station that two persons had been arrested by members of public in relation to the death.

When the two suspects were taken to Ol Jororok, he interrogated them and accused claimed to have taken the child to his father, PW4. When PW7 interrogated PW4, he denied that accused took the child to him; PW7 took the accused to the mortuary where she identified the deceased as her son as he was still in clothes and had a missing teeth.

He found that the deceased was dressed in several sets of clothing which were produced in court. PW7 also lead accused to her house where she had documents confirming that the deceased was her son and attending [Particulars Withheld] School Nyahururu 2015 – 2017.

PW7 confirmed that the scene where the body was found was about 300 – 350 from accused's house. PW7 also learned that on 24/1/2018, the deceased had been taken to Nyahururu Police Station as a child in need of care and protection but that the child was given back to accused without a file being opened for the child and the release back to accused was not recorded in the O.B.; that the deceased must have therefore died between 24/1/2018 and 24/2/2018 when the body was recovered when partially decomposed.

PW7 also admitted that one Rebecca had recorded a statement that she had found the deceased in her compound on 10/1/2018 where he remained till 24/1/2018 when she reported to the police station and returned the child to the police but that Rebecca denied being related to the accused.

When called upon to defend herself, the accused opted to give a sworn statement. She said that she got the child, (deceased) with PW4 – Simon Kibaki in 2010 and she later got married to PW3 and so with whom she got a child T in 2017; that the deceased used to go to school at [Particulars Withheld] from 2013 and was in class 3; that Nelson gave her Kshs.1500/= on 7/2/2018 to take the child home in Nakuru to change the school but she did not take him to Nakuru. Instead, she took the child to Simon (PW4) who said he wanted his son. Accused denied having had a dispute with Nelson (PW3) over the deceased; that she called Kibaki (PW4) who told her not to take L to Nakuru but that she should take him to Ol Kalou. She proceeded to Ol Kalou with both children, PW4 took them to his house where they found another woman. They slept there and stayed on till evening next day and she left at 6.00 p.m.; that PW4 told her to leave the deceased behind which she did; that PW4 told her not to tell Nelson (PW3) where she had been. She never called back to enquire about L till the next week. She talked to L who said he was fine. When accused called the next week, PW4 said the child was fine and he did not want to be disturbed and that she should not call again. She did not call again and he changed his phone number. She was arrested on 28/2/2018 and told police that he left the child with the father. In cross examination, she denied having identified the body found in Ngare Naro as that of Land she believes her child is still alive.

After the close of the defence, both counsel filed written submissions.

Mr. Nderitu Komu, counsel for the accused submitted that the prosecution need to prove that the death of the deceased occurred; that the accused committed the unlawful act which caused the deceased's death and that the accused had malice aforethought. Counsel relied on the decision of:

1. Republic v Henry Obisa Auko (2018) eKLR
2. Republic v Andrew Muecha Omwenga (2009) eKLR

Counsel submitted that PW3 told the court that he witnessed the postmortem of a child who was bigger than LN and that the body was not that of LN. Counsel urged that having lived with the deceased, PW3 would have been in a position to identify him; that PW6 who was one of the first police officers to arrive at the scene stated that the members of the public present were not able to identify the body; that since PW7 stated that the accused used to reside near the scene where the body was found, it would have been possible for them to identify the body; that PW2 who had interacted with the deceased and knew the deceased well was not involved in the identification; that although PW7 said that the accused identified the deceased's body by the missing tooth, the postmortem did not make any such finding and that in her sworn evidence, the accused denied having been called to identify the recovered body. It was counsel's submissions that the prosecution failed to prove that the body that was recovered was that of LN. For that submission counsel relied on the following decisions:

1. Republic v Geoffrey Njoroge Matheri (2016) eKLR
2. Republic v Nyali Nyawa Mwachiti (2006) eKLR

3. Republic v Erick Immbwanga Ekesa (2017) eKLR

4. Reuben Ombura Muma v Republic (2018) eKLR

In the above decisions, the prosecution were not able to prove that the deceased was a person allegedly murdered.

Counsel therefore submitted that the death of LN was not proved or that it is the accused who caused the death; if at all that the above ingredients not having been proved, it follows that malice aforethought was not proved.

On behalf of the State, it was submitted that PW7 testified that the accused positively identified the deceased as her son L; that the postmortem report also indicates that accused identified the body of the deceased and it was noted that the left incisor and molar teeth were missing and that therefore the fact of death of the deceased was proved.

As to whether it is the accused who caused the death, Ms. Rugut submitted that PW3 gave accused money to take the deceased to the grandmother in Nakuru on 10/1/2018 but that she instead she allegedly took the child to Ol Kalou to PW4, that PW4 denied that the child was ever taken to him and it confirms that accused was the last to be seen with the child.

Counsel also submitted that PW2 testified to the accused being sought by police for abandoning the child LN and this was confirmed by PW6 and PW7. Counsel submitted that all the evidence is circumstantial but it points to accused as the perpetrator.

On malice aforethought, counsel argued that the Doctor found that the deceased died of strangulation and that the accused gave various explanations as to the whereabouts of the deceased before the deceased's body was recovered which clearly demonstrates that she intentionally ended the deceased's life and tried to conceal the whereabouts.

I have considered the evidence on record, the submissions by counsel and the authorities relied upon. The accused is charged with the offence of murder under Section 203 of the Penal Code. To prove a charge of murder, the prosecution has to prove beyond any reasonable doubt, the following ingredients:

1. That the death of the deceased occurred;
2. That the accused committed the unlawful act or omission that caused the death of the deceased;
3. That the accused had malice aforethought.

The first issue for consideration is whether the body that was recovered from the Ngare Naro River on 24/2/2018 is that of LN.

The prosecution evidence is all circumstantial because no one witnessed the death of LN and the defence's submission is that the recovered body was never identified; what constitutes circumstantial evidence has been discussed in many cases. In the case of *Abang'a alias Ornyango v Republic Cr.A.32/1990*, the Court of Appeal stated as follows in regard to circumstantial evidence:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii. These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- iii. The circumstances taken cumulatively should form a complete chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”

PW2, the accused's employer recalled that she had enquired from the accused severally about the whereabouts of the L and accused told her he was at school and she left work early claiming to go and get L from School.

PW2 made this enquiry after the body of a child had been found in the river on 24/2/2018. PW2 did not stop there but went on to find out from accused's neighbours if the accused was with all her children at her home and on finding that she was not with both her children, PW2 called neighbours to interrogate accused and she changed her narration that L was in fact in Nyeri with her mother in law. It is at that point that they took the accused to the police station. Apart from the varying explanations given to PW2, PW3, accused's husband told the court that he gave accused money to take L to the grandmother in Nakuru and she did not come back with the L. Upon arrest, when first interrogated by PW6, the accused alleged to have taken L to her parents in Nakuru and PW6 accompanied her to Nakuru but accused was not able to show her parent's home. On further interrogation by PW7, the accused changed her story and claimed to have taken the deceased to his father PW4 but PW4 testified and denied that fact. That is what the accused maintained in her defence. Interestingly, the accused had not revealed to PW2 that she took the child to PW4. With all these conflicting narratives of where the child was, this court is satisfied that the accused was not at all truthful as where she took L. Accused was the last person seen with L and under Section 111 of the Evidence Act, the onus rests on her to explain the whereabouts of the deceased or what happened to him. If she does not give a plausible explanation, then the court need presume under Section 111 of the Evidence Act that she is the murderer. When considering Sections 111 and 119 of the Evidence Act, in Wilson *Wanjala Mkendeshwo v Republic NKU CRA.97/2002 (2002) eKLR*, the Court of Appeal stated as follows:

“As a general Rule, the accused assumes no legal burden of establishing his innocence. However, in certain limited cases, the law

places a burden on the accused to explain matters which are peculiarly within his own knowledge. For instance, Section 111 of the Evidence Act Cap 50 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 of facts which are peculiarly within his own knowledge. The said Section is silent on what would happen if he fails to do so. But Section 119 of the same Act deals with presumption of fact. A court is entitled under the Section to raise a presumption of fact from the circumstances of the case, that the appellant knew how the deceased died. The presumption being one of fact, is rebuttable.”

As observed earlier, accused left her home with L. She has given so varying explanations as to where she took him. All these explanations cannot be correct. She did not give the court a plausible explanation as to where she took the child.

A body of a child was found in Ngare Naro River on 24/2/2018. PW7 said that, after the arrest of the accused, he escorted her to the mortuary where she identified the deceased by the missing tooth and the clothes that were on the deceased’s body which were produced in court as exhibits.

Several sets of clothing – P.Exh.6-9.

PW7’s evidence was corroborated by PW1 Dr. Miringu who confirmed that the deceased’s body was identified by the accused Jane Wanjiru and he recorded in the postmortem form. The doctor also made a finding that there were missing lower left incisor and molar teeth just as PW7 said accused told him was one of the reasons she identified the deceased as her son.

I have no doubt that the accused was able to identify the body recovered in Ngare Naro as that of LN, her son. The defence questioned why the accused’s neighbours could not identify the body. However the court was not told whether they carefully observed the body and the fact that a body was partially decomposing may have changed and not easily identifiable, unless by a person close to them like a parent.

I have earlier found that it is the accused who left her home with L. Although PW3 told the court that he lived peacefully with the deceased as his son, from his own testimony, the accused was supposed to take away the child to Nakuru to go to school there. Accused told the court that deceased had been going to school at [Particulars Withheld] Schools but that Nelson (PW3) told him to take the child to Nakuru to school there. No explanation was given for that move. If indeed PW3 had no problem with the child, why would he tell accused to take the deceased to Nakuru to her parent’s home. But what does not make sense is that after accused told the court that it is PW3 who told her to take the child to Nakuru, coincidentally, PW4 then called her and told her to take the child to him. These varying narratives just go to show that the accused was not truthful.

PW2 told the court that since the accused gave birth to her child with PW3, she started treating L differently. That was confirmed by the incident where the deceased is said to have been abandoned by accused with some lady which caused accused to be picked up from the work place in the presence of PW2. PW7 confirmed that indeed the accused had been at the police station on 24/1/2018 when L was handed to the accused after he was found at a residence of one Rebecca where accused had left him. PW7 therefore corroborated PW2’s evidence that indeed before the child had gone missing, a case of child neglect had been reported at Nyahururu Police Station and that L was a child in need of care and protection. Even though accused denied that she had neglected or mistreated L before his death, the evidence of PW2 and 7 goes to confirm that fact. Maybe, had the accused been charged with neglect of the child this death may have been avoided.

Earlier in this judgment, I found that accused is the last person to have been seen with L. She failed to give a plausible explanation as to how he came to be found in the river. Her defence is not believable bearing in mind the varying narrations she gave to different people about the deceased’s whereabouts. I prefer PW4’s evidence that accused never took the child to him. She neither took him to her parent’s home in Nakuru as per evidence of PW2 and 6. The deceased was found in Ngare Naro a month after accused was with the child at the police station. Since she knew how he died and this court will presume under Section 119 of the Evidence Act that she is the one who caused L’s death.

Whether malice aforethought was proved; malice aforethought is defined in Section 206 of the Penal Code. Malice aforethought describes the intention or mens reas or mental element of an accused.

It is deemed to be established by evidence proving any of the following:

1. An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;
2. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not;
3. An intention to commit a felony.

In *Republic v Tubere s/o Ochen (1945) 12 EACA 63*, the East African Court of Appeal held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used or the conduct of the accused before and after the attack.

In the instant case, PW1 found that the deceased was strangled and that he must have been dead by the time he was thrown in the river, because the cricoid cartilage was found fractured with discontinuation of the wind pipe, collapsed lungs and there was no fluid on compression of the lungs. The fact of strangulation is an intentional act to cause a death and I am satisfied that malice aforethought has been proved, that the accused set out to end the child’s life and went ahead to conceal his death by throwing the body in the river. As earlier noted, the accused’s defence is a sham in light of the conflicting narrations that she gave to different witnesses. The accused’s defence is dismissed as untrue.

I find that the prosecution has proved beyond any reasonable doubt that the accused took away her own child from her home, strangled him to death and to conceal the death, threw him in Ngare Naro river. I find her guilty of the offence of murder under Section 203 of the Penal Code and convict her under Section 322(2) of the Penal Code.

**Dated, Signed and Delivered at NYAHURURU this 16th day of July, 2020.**

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**R.P.V. Wendoh**

**JUDGE**

PRESENT:

Mr. Rugut State Counsel

Mr. Nderitu – for accused

Eric – Court Assistant