



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 6 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

MN.....ACCUSED PERSON

JUDGMENT

1. The only question for determination before me is whether MN is guilty of the offence of Murder as defined by section 203 as read with section 204 of the Penal Code.

203. Murder Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Punishment of murder Any person convicted of murder shall be sentenced to death.

2. Malice aforethought is defined by section 206 of the same code:

206. Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of 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, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

3. In the information dated 14th June 2006 it is alleged that on the 27th April 2016 within Nyeri County, jointly with another not before court they murdered LWM, an infant.

4. The case for the prosecution is that the accused person gave birth a baby girl on the 22nd April 2016 at Kianyaga Sub County hospital and named her LWM. She was discharged and went to her mother's house PW2 JWK. She stayed there until 27th April 2016 when her husband one MM came for her. They left for Karatina where their matrimonial home was. On 30th April 2016 the accused came back to her mother's home having told her she was unwell. Her mother was away at work and she obtained the house key from a neighbour.

5. Her return without the now one-week baby drew the attention of some people who informed the village elder that she was back without the baby. On 1st May 2016 the village elder PW1 Jerusha Wairimu Njoka, rang PW2 Aurelia Wanjiku Munene the area assistant chief and on the morning of 2nd May 2016 they arrived at PW2's home to find out what was going on. They found when the accused's mother had just arrived and the accused was sleeping in the bedroom. Her mother did not know she had not come with the baby so when she was questioned about the whereabouts of her baby it was also shocking information for the mother.

6. PW1 asked the accused person where her baby was, she told them that the baby had died while she was on the way to Karatina, was taken to the hospital mortuary. Asked for the burial permit she said the husband had bought a grave at the cemetery and the baby was buried there. That it was the grandmother who had the burial permit. The assistant chief escorted her to Kianyaga police station for further investigations.

7. While at the police station PW4 no. 99543 PC Benjamin Wangila was detailed to investigate the matter. Upon interrogation the accused person stuck with her story that the baby had died a natural death while undergoing treatment at Karatina District Hospital and was buried in the cemetery.

8. It is only on 10th May 2016 that she revealed what had happened. She told the police that after giving birth on 22nd April while at her mother's she stayed there till 27th April when her husband MM came for her. Before they reached their house, they had alighted from a Matatu and she left the husband with the baby while she went into some bushes to change her pads because she was still bleeding. It was between 7 and 8:00pm. When she came out, the husband had killed the baby. He put it in a plastic bag and dumped it in the bushes. She took the police to the bushes where the body was recovered and taken to Karatina Hospital Mortuary.

9. When the postmortem was done by Dr. Stephen Wang'ombe Nderi on 18th May 2016 he found a tight ligature around the neck which caused the complete strangulation of the airways, causing the lungs to collapse. Cause of death was strangulation.

10. In her defence MN told the court in a sworn statement that she got married to MM in 2010. They had two children one in October 2010, another on August 2013. However, her husband did not want any children after the 1st child. That when she got the 2nd one he was very upset with her and they fought severally about it as he was not supporting her.

11. When she became pregnant with the 3rd one in November 2015 and told him about it he just left. When he came back in the evening he told her he did not want the baby. She fell sick in December 2015, was admitted at Karatina District Hospital. Upon discharge he was very harsh with her and told her to find where to take her baby. That is how she ended at her mother's home on 31st January 2016, when she was 6 months pregnant and remained there till she gave birth to the 3rd baby on 22nd April 2016.

12. She testified that her husband somehow found out she had a baby girl and directed that the baby own be named after his mother, and she complied.

13. On 27th April he came for her and the baby. Her mother had no objection and even escorted them to the stage. From Kerogoya he took a taxi. When they reached a place called Gaturo they had to alight as a motor vehicle cannot go beyond that place.

14. According to her testimony Gaturo was walking distance to their home, she was bleeding and needed to change her pads. She went into a nearby bush, leaving baby with daddy. She came back and asked to breast feed the baby so that they could start the journey home. This is what she said

“...when I brought the baby to the breast she did not open her mouth. The baby was not breathing. I asked what had happened. He told me it was none of my business. He hit me. I fainted. I found myself in his house. I did not know my whereabouts. I do not know how I got to his house. When I woke up, I asked where is my baby? He told me I was playing with him and he was going to kill me. I kept quiet. I asked again where is my baby? He told me he would kill me. He held my throat and told me he would kill me. On 30th April he told my mother he was sending me home because I was sick. On 1st May I left for my mother's house. ...I rang her ...she told me to get the keys from a neighbour. I got keys. I went in and slept...Mother came. She called to me. I told her I was in pain. I asked for painkillers. She sent for medicine. She began to make breakfast. It was then that three women came.... the sub area asked me where my baby was. I looked at my mother. She also asked me where the baby was. ...I told (the sub area) my baby had died and she could call my husband who would tell her where the baby was...I was taken to Kianyaga Police station. I was there for three days. An officer asked me where my baby was. I told him everything. I gave him my husband's number to ask him where the baby was. Then one Benjamin a police officer asked for the child. I gave him my husband's number to ask him. On 10th May 2016 the officer came with others and they told me to show them where the bay was. I told them I could only show them the last place I had seen my baby. We went...they began a search. 10-15m where we were they brought a yellow polythene bag...at Karatina Mortuary the bag was opened and I identified the baby...I did not kill my child. I recorded a statement with the police. I told them it was my husband who killed the baby...”

15. On cross examination she conceded that she never reported to any one that her husband had killed the baby before her arrest because she was afraid her husband would harm her because he had threatened to do so. That he hit her and she fainted.

16. In the final submissions the accused person through counsel relied on her statement to the police where she gave details of her version of the events. She denied pointing out where the body was but police searched the place where she last held her child. That her husband dealt in bhong and abused it in addition to alcohol. That she never mentioned the killing to anyone because she was under the spell of fear. That she had no motive for killing the baby, she had no intention to kill her baby. That all her actions prior to this were of loving mother. She gave birth to baby, that fateful morning she had been in hospital for BCG and treatment for the baby who was unwell. That the husband is the one who did not want the baby. He collected her from her mother's home, killed and dumped the baby and disappeared. That prosecution had not established either *mens rea* or *actus reus*. I was referred to **Joseph Kimani Njau v R [2014] eKLR**.

17. Mr. S.K Njuguna, Counsel argued that the accused ought to have never been charged with murder taking into consideration the period of time between the birth and death of the child. That the charge ought to have been infanticide c/s 210 of the Penal Code as read with s. 205 of the same code. He relied on **E.H v R [2017] eKLR**, **PAO v R [2016] eKLR** **Elizabeth Mwelu Mwau v R [2015]eKLR**, where the accused persons were charged with infanticide. That the accused here should have been subjected to a psychiatrist assessment to establish her state of mind at the time of commission of the offence. Section 210 of the Penal Code states

Infanticide

Where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide, and may for that offence be dealt with and punished as if she had been guilty of manslaughter of the child.

18. The state on its part submitted through Mr. Magoma that the charged was proved: the offence was committed by the accused and her husband. That she never reported anywhere. That under s. 111 of the Evidence Act she had the burden to establish the allegations that she made in her defence. She alleged to have been assaulted by her husband. No such evidence was produced by the defence.

19. The fact of death of the infant herein was established beyond reasonable doubt. It was also established that the baby did not die a natural death but was strangled. Hence death was by unlawful means.

20. The last person to be seen by any witness with the child alive were the accused person and her husband. This was the testimony of PW3 the mother to the accused. That the accused and MM left with the baby on 27th April 2016.

21. The accused kept silent about the death of her child from 27th April 2016 to 2nd May 2016. Her story is that she was afraid of the accused. When she got away from his house she never told her mother anything. She never reported the alleged beating even to her mother or the village elder or the assistant chief. They never noticed anything otherwise it would have come up. Even on getting to the police station she never mentioned that the husband had assaulted her. She lied to all these persons. Why?

22. When she was asked about it she lied. To her mother, to the assistant chief and to the police. Why did the accused person lie? There was no threat of harm to her at that time. Her lies create the impression that she was not telling the whole truth.

23. She testified that she only took the police to the last place where she held her child. If that was the truth, why did she not tell the police this on 2nd May 2016. Why wait until on 10th May 2016? Was she hoping that the longer she withheld that information the body would not be found?

24. On 25th May 2016 she made a confession statement to Chief Inspector Magut the in the presence of her aunt JWK. While in her defence she said a lot about her husband not wanting the children from her 2nd born, there is nothing in the statement about this crucial factor of her defence. According to her after the 2nd child was born, he was named after her father in law, her husband's father, and her mother in law, an uncle and her husband visited her home to officially ask for her hand in marriage, and she left with them as their daughter in law. She said: *'I went back to my husband's place. We continued staying but life was not smooth because he is a drug dealer/user'*

25. It is only when she got pregnant that third time that he said he did not want the children and she reported to her mother in law, who said she would talk to him. The statement also indicates that she went to stay with her aunt/ mother PW3 because she was unwell. She had just been discharged from hospital in Karatina, was 6 months pregnant and was still not well. That her aunt asked her to go back home for further treatment. She went and stayed there until she gave birth and her husband came for her. There is nothing here about the husband not wanting the baby.

26. In the statement, she told the police that it was upon alighting from the matatu at Kiangararu near Karatina District Hospital that she went aside to breast feed the baby but her husband demanded for the baby. When she asked him to wait he insisted telling her to hand over the baby or he would beat her up. She surrendered the baby and went to change her pads. When she came back he handed the child back to her she looked at the child and saw that the child was dead. That he warned her not to say anything or make any noise, or report anything. He then went to the nearby kiosk and bought a yellow paper bag, called a boda boda, which ferried them and dropped them at Gataro village. This is where he took the baby, put it in the yellow paper bag and hid it in some nearby bushes. He then called another boda boda which dropped them home. She told the officer;

'...since I was still bleeding I stayed in the house for three days then I called my auntie JWK and reported that I was still bleeding. She told me to come back to Kianyaga for treatment. I came ...before I could narrate to her I saw the assistant chief... I told them the child had died...'

27. What is evident from the confession and the statement made in the accused's defence is that the scenarios on how the child died are not the same. In her statement of defence she told the court on oath that the child was killed at Gataro and dumped there. In the confession the child was killed Kiangararu, the husband bought the paper bag, and dumped it at Gataro. In the statement in court the husband assaulted her and she did not know how she got home. In the statement to the police after he dumped the baby he called a boda boda which took them home. In the statement she is the one who called her aunt and told her she was still unwell, in the testimony in court and by her mother it is her husband who called and said she was sick.

28. That the accused may have been suffering from post-partum mental complications as submitted by counsel while a possibility, it needed to be established by evidence. I have perused the medical records supplied by the accused person. Nothing abnormal was noted at discharge or even when she took her baby to the hospital the day they killed the baby. She was later examined by a psychiatrist who found that she was capable of standing trial. He found nothing peculiar about her state of mind to raise any concern.

29. The inconsistencies in her testimony have not shaken the case for the prosecution or created any doubt in the mind of the court. What is the accused person trying to hide if indeed it is the husband who killed the child and disappeared.? The circumstantial evidence set out by the

prosecution that it is the accused and her husband who had the child, who were last seen with the child and who killed the child, as the next thing was that the child was dead.

30. In my view the accused person's evidence that it is her husband who killed the child is the evidence of an accomplice and must be treated with the care it deserves. It is her word against her word. For it to be believed it requires corroboration, which is not available. She conducted herself in such a manner that her conduct screams guilty.

31. The evidence before me though circumstantial points at the accused before me as the person who caused the death of the baby LWM. I am fortified in my position by words of the learned judges in **Joan Chebichii Sawe v Republic [2003] eKLR** where the Court of Appeal lay down the applicable principles when relying on circumstantial evidence;

In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused

32. I only have her word that her husband did it. Why would the accused's husband follow up, find out the sex of the child and ask that a child he intended to kill be named after his mother? These two may have quarreled over their relationship as they went home together, after the long separation. It was not uncommon for them to disagree and the accused person to go to her mother's place.

33. The baby was strangled. The strangulation of a five-day old baby can only have one outcome, death. So whoever put their hand or a piece of cloth around the baby's neck and pressed could only have intended one thing, death of the baby.

34. In the upshot I find that the prosecution has established vide the evidence before me points to the guilt of the accused person beyond a reasonable doubt. I make a finding of guilt under s. 322(2) of the CPC for the offence of murder/s 203 as read with 204 of the Penal Code.

Dated, delivered and signed in open court at Nyeri this 7th Day of February 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Ms. Jebet for state

Mr. Njuguna for accused

Accused present:

Pre-sentence Report on 14th February 2019.

Mumbua T Matheka

Judge

7/2/19