



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**(CORAM: D.S. MAJANJA J.)**

**CRIMINAL CASE NO. 41 OF 2018**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**NANCY MORAA ONYIEGO.....ACCUSED**

**JUDGMENT**

1. On 4<sup>th</sup> December 2018, this court was informed that **NANCY MORAA ONYIEGO** (“the accused”) had committed the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It is alleged that she murdered **AON** (“the deceased”) on 5<sup>th</sup> November 2018 at Boitangare Village, Rise Sub-location in Sameta Sub-County within Kisii County.

2. It was not in dispute that the deceased, who was aged 1 year 7 months, was the son of Dennis Nyamwange Ayuma (PW 2) and his first wife, Brenda Cherotich Bett (PW 6). The accused was PW 2’s second wife and was cohabiting with him at the time material to this case. The prosecution marshalled 8 witnesses to prove that the accused strangled the deceased. The accused gave sworn testimony in her own defence.

3. The deceased’s grandmother and mother to PW 2, Rebecca Moraa Matoke (PW 1), recalled that on the evening of 5<sup>th</sup> November 2018 at about 6.00pm, PW 2 and PW 6 left for Itumbe to do some shopping. They left behind with four children; JO (PW 5), E, M and the deceased while the accused was in her house alone. PW 2 sent one child to get milk and another to the posho mill while she remained with the deceased. After a while, the accused came to her home and told her she was taking away the deceased to stay with him. The children she had sent returned and so did her husband, Pascal Ayuma Obure. He called PW 5 and told him to go and fetch a bucket with water. PW 5 came back and told her that he had found the deceased had drowned in a bucket. PW 1 rushed there removed the deceased from the bucket while raising alarm. She told the court that she found the child’s face in the water. When she asked the accused what happened, the accused denied that she had drowned the child. In response to the alarm, police officers arrived and took away the deceased’s body.

4. After a voire dire, PW 5, gave unsworn testimony. He recalled that on the material day, PW 1 sent him and M to fetch milk from a neighbour while his cousin, E was sent to the posho mill. He told the court that the deceased was left home with the accused and PW 1. When he returned home, his grandfather who had also returned asked him to fetch a basin. PW 1 told him to get it from his uncle’s place and when he went there, he found the deceased in a bucket of water. He reported to PW 1 what he had seen. He testified that he found the accused washing clothes close to where the deceased was.

5. Both PW 2 and PW 6 testified that they had been with the accused and the children on the material day. In the evening, at about 6.00pm, PW 2 decided to go with PW 6 to Itumbe do some shopping as the accused was heavily pregnant at the time. They left together and were there for about an hour and a half. As they were returning home, they could hear people screaming from their homestead. When PW 2 reached home, he found the deceased had been laid down. He had foam from his nose and mouth. He did not see the any injuries on the child except a scratch on the chest. PW 2 testified that because of hostility, he told the accused to go to her home until the situation calmed down. After a few days, he was told to ensure that the accused attended the child’s funeral. However, when the accused returned she faced hostility and was rescued by the area chief, Charles Nyakundi Nyantabiga (PW 3) who took her to Itumbe Police Station. PW 6 told the court when she saw the deceased, she fainted and could not recall what happened.

6. The Commanding Officer, Itumbe Police Station, Chief Inspector George Wangombe (PW 4) recalled that PW 3 called him at about 8.00pm on 5<sup>th</sup> November 2018 and informed him that a child had drowned in a bucket of water. He proceeded to the scene with his officers and on arrival he met PW 1, PW 2 and PW 6 who led him to where the deceased had been placed on the floor wrapped in a blanket. He was also shown a quarter filled bucket of water. He organized for the scene to be photographed and took the body to Christamarriane Hospital for post mortem.

7. The Investigating Officer, Sergeant Humphrey Osere (PW 7) recalled that after PW 4 had visited the scene and conducted preliminary investigations, he was instructed to investigate the matter after PW 3 had brought the accused to the police station. On 12<sup>th</sup> November 2018, he caused the accused to be charged at Ogembo Magistrates Court with the offence of manslaughter as a post mortem had not been done. He organized for the postmortem which was done on 14<sup>th</sup> November 2018 at Christamarriane Hospital. He observed the deceased's body and noted marks on the neck. After reviewing the evidence, he caused the accused to be charged.

8. In her sworn defence, the accused denied that charges against her. She told the court that she was married to PW 2 in April 2018. They initially resided at Kegati in Kisii County but moved to PW 2's home where she found his two children living with their grandmother, PW 1. She did not find her co-wife, PW 6. She recalled that PW 6 came home in August for a few days, left and returned in November 2018 during the period the deceased died. She stated that she was in good terms with her step children.

9. She recalled that on the material day, PW 2 and PW 6 went to do shopping as she was pregnant. They left the children going to PW 1's place while she remained at her place. She recalled that PW 1 was smearing her mud walls when she went to her place. PW 1 told her to go with the deceased. She held the deceased hand as they left but the deceased refused to go with her as he wanted to remain with PW 1 so she left the child to go back. She told the court that she watched the child go back to PW 1 while she went back to her home to wash clothes. At about 7.00pm, she heard PW 1 screaming that the deceased had drowned. She went where the child was and found him child laying on the ground. When she touched him, he was unresponsive so she also started screaming.

10. The accused recalled that PW 1 told the police that the child was playing and that he fell into water. At about 7.30pm, PW 2 and PW 6 arrived. She spoke with PW 6 and told her that PW 1 had told her that the child had drowned. She remained home on that night and on the next morning, people started accusing her of killing the child. PW 2 told her to go home as he suspected people would harm her as PW 1 was accusing her of killing the child. She left for her home but after 3 days, PW 2 came to pick her up to attend the deceased's funeral. When she reached home, she was beaten by the public but was rescued by the area chief. She told the court that she had a good relationship with PW 6, the deceased and other children.

11. At the close of the defence case, counsel for the appellant filed written submissions the thrust of which is that the prosecution failed to prove that the accused who killed the child. Since the case was based on circumstantial evidence, counsel cited various authorities, which I shall allude to, to submit that from the totality of the evidence, the prosecution did not prove that it is only the accused who could have murdered the deceased.

12. The offence of murder is defined in **section 203** of the **Penal Code** as follows, "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" The prosecution is therefore required to prove first, the fact of death of the deceased and the cause of that death; second, that the accused committed the unlawful act or omission that led to that death; and third, that the accused committed the unlawful act or omission with malice aforethought.

13. The fact of death was not in dispute while the cause was a matter of controversy. The evidence of PW 1 and PW 5, who saw the child initially, stated that he had drowned in a bucket of water and that he did not have any apparent injuries. When PW 4 went to the scene and saw the bucket of water in which the child was said to have drowned, he was suspicious as he did not think it was possible for a child to drown in a quarter bucket of water. Dr Benjamin Ndibile (PW 8), who conducted the post mortem on the deceased's body, observed that the deceased was in good health and that the deceased's body had a ligature mark around the neck which looked like it had been inflicted by rope. Internal examination of the neck revealed that the hyoid bone was fractured. He formed the opinion that the cause of death was asphyxia due to ligature strangulation. In cross-examination, PW 8 stated that the fact that the deceased's lungs were intact and did not have any fluid excluded the possibility of drowning. In his view, the deceased was placed in the bucket after he was already dead. I agree with these findings and I find and hold that the deceased died from suffocation due to strangulation.

14. The next issue is whether the accused is the person who strangled the deceased. The prosecution case was founded on circumstantial evidence since no one saw the deceased being strangled. The law in this regard to circumstantial evidence has been restated many times by our courts and it is that in order to justify a conviction based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. The circumstantial evidence can be a basis of a conviction only if there are no other existing circumstances weakening the chain of circumstances relied on and that the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. (See **R v Kipkering Arap Koske & Another [1949] 16 EACA 135** and **Sawe v Republic CA Criminal Appeal No. 2 of 2002 [2003]eKLR**). I am now called upon to examine each piece of evidence carefully and determine whether the evidence excludes any other possibility other than the accused being guilty.

15. The prosecution case was that on the material evening the accused was the only one left with the deceased and only she could have strangled him. The evidence of PW 1, PW 2, PW 5 and PW 6 was that at about 6.00pm, PW 2 and PW 6 left the homestead for Itumbe. They left behind the accused, PW 1, PW 5, the deceased and two other children, M and E. PW 1 and PW 5 both testify that PW 5 left with M to go and fetch milk while E went to the posho mill leaving behind PW 1, the accused and deceased in the homestead. Although the accused stated that PW 2 and PW 6 left the home at about 4.00pm, I reject this aspect of her testimony as all the prosecution witnesses are clear that the time PW 2 and PW 6 left home was about 6.00pm and not earlier and nothing was suggested to them, in cross-examination, that they could have left earlier.

16. The prosecution case was that in fact, the child was left with PW 1 but the accused came and took the child and she was the last one seen with him until he was discovered dead. Counsel for the accused submitted that the court should exercise caution in relying on the "**last seen**" doctrine which was elucidated by the Supreme Court of India in **Anjan Kumar Sarma V State of Assam, CRIMINAL APPEAL NO.560 of 2014** where it stated as follows:

*18. The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence . . . There must be something more establishing connectivity between the accused and the crime.*

21. It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

17. Counsel for the accused also cited the of **Ramreddy Rajeshkhanna Reddy & Another v. State of Andhra Pradesh JT 2006 (4) SC 16**, where the Supreme Court of India held that:

*[T]hat even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.*

18. The same position was adopted by Lesiit J., in **Republic v E.K.K NRB HCCR No. 113 of 2014 [2018] eKLR** where, after reviewing the dicta in the Indian cases, she observed as follows:

*46. The prosecution has adduced evidence which establishes that the deceased was last seen alive in the company of the deceased. That was in the evidence of PW5. Time was 9.30 a.m. Her evidence was not corroborated by any other witness. The accused has denied that and has countered the evidence of PW5 by stating that in fact, it was PW5 he saw with the deceased last. Given that the evidence is the word of the accused against that of PW5, the court has to look for corroboration or other evidence implicating the accused. I am persuaded by the Indian case that even where evidence establishes that an accused was last seen with the deceased before she met her death, it is advisable to exercise caution and look for some other corroboration. I will get back to this later.*

19. Based on the foregoing, the counsel for the accused submitted that there was no evidence tendered to corroborate the allegations by PW 1 and that from the available evidence, the same irresistibly points her guilt as well. He contended that it was unlikely that the accused would have picked the deceased in her presence and barely a few minutes strangled him and drowned him in a bucket. He contended that if fact, it was PW 1 who sent the other children to various places so that she could strangle the child.

20. Going back to the evidence, PW 1 recalled that the accused came to her place and took the child saying that she was going to stay with him. The accused's testimony is that she came to PW 1's home to take the child but the child refused to go with her. The testimony of PW 1 is supported by that of PW 5 who came home and when he was sent to collect water, he found the deceased in the bucket. PW 5 also testified that when he asked PW 1 where the child was, she told him that she had left with the accused. PW 1's reaction and distress upon finding that the child had drowned was consistent with her innocence. Based on the evidence of PW 1 and PW 5, I am of the firm conclusion that the accused who left with the child and within the space of an hour strangled the child and dumped him in a bucket as he had drowned.

21. Counsel for the accused pointed to the possibility that it is PW 1 who strangled the child and suggested that the accused could have been framed. I find that there was no reason for PW 1 to strangle the deceased child as she was the child used to sleep in her house when PW 6 was away. If she wanted to kill the child, she would have already done so and there is no discernible reason for her to do so. Further, it was not out of ordinary to send children in the evening to the posho mill or to collect milk.

22. The prosecution suggested that the motive for the accused killing the deceased was because she was jealous of the PW 6. PW 1 stated that the accused did not want PW 6 to stay at home while PW 2 denied that there was any bad blood between the accused and PW 6. The accused denied that she did not have any bad blood with the accused or the children and that she took care of the children when PW 6 was away. Under **section 9(3) of the Penal Code**, motive is irrelevant in proving the commission of murder however where the prosecution case is founded on circumstantial evidence, the evidence of motive may support the chain of circumstantial evidence. In **Libambula v Republic [2003] KLR 683** the Court of Appeal observed as follows;

*We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain of presumptive proof especially where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.*

23. I hold that even if the motive was doubtful, there was sufficient evidence implicating the accused. Having considered the evidence, I find and hold that chain or evidence of evidence was so complete and that there were no other co-existing circumstances to exclude the possibility that any other person other than the accused strangled the deceased. Under **section 206(a) of the Penal Code** provides that malice aforethought includes, "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." The strangling of child leading to suffocation is a deliberate which is intended to cause death. The fact that the accused disguised the act by making it appear that the child had drowned leaves no doubt about the accused's felonious intention. I therefore find and hold that the accused killed the deceased with malice aforethought.

24. In conclusion I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I therefore find **NANCY MORAA ONYIEGO** guilty of the murder of **ADRIAN OBURE NYAMWANGE** and I convict her accordingly.

**DATED and DELIVERED at KISII this 20<sup>th</sup> day of MAY 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Ochoki, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.