



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO.6 OF 2017

REPUBLIC

VERSUS

KULALA KITABA ACCUSED

JUDGMENT

The accused is charged with the offence of Murder Contrary to Section 203 as read with section 204 of the Penal Code, Chapter 63 Laws of Kenya. The particulars of the offence are that the accused on the 13th day of July, 2017 at Manyatta Willy in Marsabit Central sub County within Marsabit County murdered Taganyo Kitaba. The deceased was the accused’s biological mother.

Ten witnesses testified for the Prosecution. **PW1 ADISU DEBEBE** is the accused’s elder brother. On 13th July, 2017 at about 7.30pm he was at his house when he heard voice from his mother’s home saying “Ameanguka, ameanguka” – she has fallen down. He went there and found Bokayo Guyo (PW2) and the deceased’s sister, Turungo (PW7). The deceased was at the front of her house. He managed to get a vehicle and took the deceased to Marsabit hospital. The accused tried to restrain people from touching the deceased or taking her to hospital. While at the hospital they were sent to buy some medicine from a chemist. After administering the medicine on the deceased, the doctor informed them that the deceased had poison in her system. They were referred to St. Teresa Mission hospital in Meru.

PW1 further testified that they reached St. Teresa’s hospital in the morning of 14.7.2017. Their relatives from Nairobi took the deceased to Nairobi. The deceased died in Nairobi while undergoing treatment on 15.7.2017. Her body was taken to Marsabit on 16.7.2017 and was buried on the same day after a postmortem had been done at Marsabit General hospital. PW1 was living in the same compound with the deceased. His two children Debebe Adisu, son and Rufo Adisu, daughter, (PW4) were living with the deceased. At one time on 30.7.2015, the accused put poison in PW1’s food and the matter was reported to the Police. They used to take their meals together with the deceased and the accused. The deceased used to go to church every Thursday from 4.00pm to 6.00pm. A notice to vacate the plot where the deceased was residing had been issued to the accused. The plot belonged to the deceased.

PW2 BOKAYO GUYO is a cousin to the accused. Their mothers are sisters. She is PW7’s daughter. On 13.7.2017 she was at home when Rufo (PW4) went there and informed them that the deceased had collapsed. She is a neighbour to the deceased. She went to the scene and found the deceased had fallen on the ground near a shop. The deceased had foam in her mouth and could not talk. They took the deceased to hospital. They were sent to buy some medicine and were told that the deceased had poison. The deceased was taken in an ambulance to a hospital in Meru and later to Nairobi West hospital. The deceased died in Nairobi. Her body was buried on 16.7.2017 in Marsabit. It is PW2’s evidence that during the burial, Rufo told her that the accused had put poison in the deceased’s tea and the accused had threatened to kill her. At one time the accused put poison in a sufuria and at another time he put poison in PW1’s food.

PW2 was recalled and testified that the deceased used to undertake her household chores. The accused at one time removed the electrical wiring he had done to the deceased’s home. While at the scene, before the deceased was taken to hospital, the accused was present and told them not to touch their mother.

PW3 LOKO GALGALO is a relative to the deceased. On 13.7.2017 at about 7.30pm she went to the scene where the deceased had collapsed. They took the deceased to hospital. she went with the deceased to a hospital in Meru. The deceased was not sick. The deceased used to go to church daily.

PW4 RUFO ADISU is PW1’s daughter. She testified under oath. She was 14 years old and a class five pupil. On 13.7.2017 she arrived home from school at about 4.00pm. She prepared tea and put it in a thermos. The accused was in the house. The deceased had gone to church. The deceased arrived from church at 6.00pm. PW4 took part of the tea. The deceased filled a cup of tea for herself. she took the tea half way and went out to a shop. At that time PW4 was outside the house. The accused was also outside the house and then went inside. PW4 entered the house and saw the accused pouring poison into the half cup of tea. The deceased went back to the house and took the remaining tea. PW4 did not tell the deceased that her tea had

been poisoned. After taking the remaining tea the deceased became sleepy. She went outside for fresh air and collapsed. PW4 went to inform PW2. The accused was inside the house.

It is PW4's evidence that it was about 7.00pm when the incident occurred. The house has electricity light. Her brother Debebe Adisu was also in the house. PW4 testified that the accused warned that if she revealed the issue of poison he would kill her. The poison was in liquid form in a bottle. Every Thursday between 4.00pm to 7.00pm the deceased used to go to church.

PW5 MOHAMED ORDOFA was informed by his mother on 13.7.2017 that the deceased had collapsed and had been taken to Marsabit hospital. He went to the hospital and found the deceased in critical condition. Foam was coming from the deceased's mouth. He called a doctor who examined the deceased. They were sent to buy medicine. The deceased was injected with the medicine and they were referred to Kiirua (St. Teresa) hospital in Meru. PW5 attended the postmortem exercise at Marsabit hospital and identified the body.

PW6 PC ODIRA OCHIENG was stationed at the Marsabit Police Station. He witnessed the postmortem on the deceased on 16.7.2017 at Marsabit referral hospital. The accused had been charged in another case of assault which had been investigated by PW5. The accused was at the hospital when the postmortem was conducted.

PW7 TURUNGO KITABA is a sister to the deceased and mother to PW2. On 13.7.2017 at about 7.30pm she was at home. PW4 went there and informed them that the deceased had collapsed. PW4 was living with the deceased. Together with PW2 they went to the scene and found the deceased in critical condition. They screamed and the accused went out. While trying to take the deceased to hospital, the accused caused commotion and tried to stop them. The accused is the deceased's last born and was living with the deceased. According to PW7, the accused and the deceased were not in good terms. She also had no good relationship with the accused. At one time the accused disconnected her electricity.

PW8 DR. DUB HALAKE is stationed at the Marsabit referral hospital. He conducted a post mortem on the deceased on 16.7.2017. The deceased had initially been treated at the hospital and the assessment was that she had features of poisoning. During the postmortem, specimen were taken for further analysis. The postmortem he conducted is not conclusive.

PW9 Sergeant BENEDICT MWANZIA was based at the Marsabit Police station. He investigated the case. The case was reported at the station on 16.7.2017. PW4 informed them what happened on 13.7.2017. A postmortem was done on 16.7.2017. Specimen were taken from the deceased's body. The accused was arrested for an assault case not related to the murder case. He prepared an exhibit memo and forwarded the specimen to the government analyst. They went to the deceased's home and recovered a blue thermos which had some liquid. The specimen taken from the deceased was her blood. The accused was arrested on 29.9.2017 and charged with the offence. It is his evidence that PW4 informed them that the poison was liquid substance in a small bottle labelled "**RAT**".

PW10 JAMES MICHAEL WELIMU works with the Government chemist in Nairobi. On 17.7.2017 he received exhibit marked A1 and A2 being the deceased's blood samples and another exhibit marked 'B', a blue thermos flask containing 15 mls of liquid. There was an exhibit memo form and the instruction were to ascertain whether the exhibits contained toxic substances. He analyzed the specimen and found that the exhibits labelled "A1", "A2" and "B" contained Zinc Phosphide (rodenticide) at a concentration of 10.02mgs and 12.00mgs per 100mls sample respectively. Rodenticide is poisonous and is harmful to humans if ingested. No other chemical substance was detected from the exhibits. According to PW10, the toxic quantities in the deceased's blood were harmful and could cause death. Zinc phosphate is used to contain household pests like rats and mice. Rodenticide does not rot and only gives smell when it reacts with other substances.

The accused gave sworn testimony. He is a Technician in Electronic and Electrical Engineering. He was doing his own business in electronic sales and services. The deceased is his biological mother. He had a very good relationship with his mother. He had a case of assault which occurred during the burial of his mother but it was withdrawn. His late mother used to take his daughter to school when she was in pre-primary. He was left with the child after having disagreement with his former wife. The deceased told him that she would not bless him if he

left her alone and travel abroad. He got a scholarship but did not travel. The deceased told him that she had put her trust on him because most of her children had travelled out of the country. If all the deceased's children lived elsewhere, it would have been difficult for her in case she had problems and required assistance. If it was not for his mother's request, he would be living in abroad by now.

The accused produced his witness statement as his evidence. The statement was typed and signed and was corrected once. He testified that he has never been charged in court. He was framed up by his family members who have past grudges over some land. The family members want to inherit the deceased's land and house. It is his position that PW4 has mental problems. Her age mates are in secondary school while she was still a class four (4) pupil. PW4 was also incited by other people to accuse him. PW4 did not inform other people about the poison. She alleged that she forgot only to later change and allege that she had been warned if she revealed the issue she would be killed. In her statement to the Police, PW4 stated that there was another person in the room this being Debebe Adisu.

The accused further testified that PW1 is his brother. They have five brothers and sisters who live in Canada and North America. PW1 was an Administration Police officer for over twenty (20) years. PW1 never took care of his family. The accused used to work at Marsabit boys secondary school but was relieved of his work due to financial problems affecting the school. The deceased gave him a plot and he sold part of it and got capital to start his business. The accused employed PW1's daughter in his shop and also employed PW1's son (Debebe) as a boda boda rider. At one time Debebe assaulted the accused and he was charged in Court. The deceased asked the accused to have the case withdrawn which he complied. When he was arrested for the assault case, the local radio stations announced that he had been arrested for killing his mother. He was released on bond on 27.9.2017. He received a notice asking him to vacate from the plot. He reported the matter to the Police. On 29.7.2017 he was rearrested while preparing to travel to Nairobi for medical treatment. PW1 told him that the accused used to harass him while their mother was alive. It is the accused who installed electricity to the deceased's house and also to the house of their relatives.

The accused stated that PW2 is his cousin. They have a dispute over a plot. PW2 was divorced and has been living with her mother. She is jealous because of the money sent to the accused's family from America. He disagreed with PW7, Turungo as he disconnected her electricity. He was the one who used to pay the electricity bills and when his employment at Marsabit boys school was terminated, he could not continue paying the bills. The accused maintain that it would not have been possible for the deceased to have taken the tea and leave it halfway only to return and finish the other half. The alleged poison was not produced in court. The appellant was arrested two months later on 29.9.2017 yet he was available. This shows that there is something fishy about the case. If the poison was put in the cup of tea, how comes the flask also contained poison.

The accused also states that on 13th July 2017 he was in town on his normal duties. He conducted his last insha prayer at 8.00pm at Marsabit Jamia Mosque and went home. While approaching the homestead he saw a car in front of their gate.

He enquired what was happening. One Salat told him that the deceased had fell down and had been taken to her bedroom to rest. He called the deceased who was on her bed but she did not respond. He told those present to give him time to examine the deceased because he was the one who usually know how to handle her when she was sick. PW1 pushed him out of the house. The deceased was taken to hospital. He walked to Marsabit hospital. As the deceased was being treated, some brownish saliva oozed from her mouth. He went to the church where the deceased used to attend for prayers. The accused was told that the deceased was at the church during the day until 6.30pm. He went back to the hospital and got to know from relatives that the deceased had been referred to another hospital. He was not consulted when the decision to take the deceased to another hospital was made. He wanted to accompany the deceased when being transferred to Kiirua hospital.

On 14.7.2017 the accused stayed at home. He went to town at 12.30pm and returned at 6.00pm. The following morning, neighbours informed him that his mother had passed on. He participated in the burial. He was stopped by PW1's son Debebe and his cousin (Wako) from attending the postmortem. On 17.7.2017 he was charged with the offence of assault. While in remand he heard that the local radio stations had announced that he had killed his mother. He had no reason to kill his mother. He was the one who was very close to the deceased. He had very good relationship with his mother. Two months before her death, the two travelled together to Ethiopia to visit his sick

uncle. They stayed in Ethiopia for three weeks in April, 2017. He has bank accounts at Equity bank, KCB bank and Co-Operative bank and in all of them he indicated the deceased as the next of

kin due to his love for her. The deceased's death has turned his life upside down. Even his business premises is named after the deceased, "MUM'S Electricals and Electronic Sales & Services."

Section 203 of the Penal Code provide for the offence of murder. The core ingredient of the offence of murder is malice aforethought. The deceased's death should be attributed to the accused's act or omission and the accused should have been driven by malice aforethought before committing the offence. The act or omission which results to the deceased's death must be unlawful. Section 206 of the Penal Code defines malice aforethought as follows:-

Malice aforethought shall be deemed to be established by evidence providing any one or more of the following circumstances:-

- a) An intention to cause 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.**

The prosecution evidence does prove that the deceased died on 15th July 2017 while undergoing treatment at Nairobi West hospital. Her body was brought back to Marsabit and buried on 16th July, 2017. The issue for determination is what caused the death and who can be held responsible for her death.

The Prosecution evidence establishes that the deceased used to attend Church regularly. Particularly, on Thursdays, she used to attend Church between 4.00pm and 6.00 or 7.00pm. On 13th July, 2017, a Thursday, the deceased attended Church as usual. It is clear from the evidence that she reached her home on that day after 6.00pm. Her granddaughter, PW4 had prepared tea. The deceased took a half cup of tea and went out. She returned and completed the remaining half. Soon after consuming the remaining tea the deceased felt uncomfortable and went out for fresh air. She then collapsed. Neighbours who are relatives namely PW2 and PW7 went to the scene. The deceased was rushed to Marsabit General hospital. Both the prosecution and defence evidence confirms that the deceased had some foam oozing from her mouth. The deceased could not talk. Upon being injected with some medicine, the doctor attending to the deceased told the relatives that the deceased had poison in her system.

PW8 conducted a postmortem on the deceased on 16th July, 2017. The deceased was about 70 years old. It is clear from the postmortem report that PW8 did not form any opinion on the cause of death. The internal systems were not examined. It appears that the body was not opened. The Postmortem report indicate that blood specimen were taken for chemical analysis. I do agree with PW8 that the postmortem report is not conclusive.

PW10 received the deceased's blood samples as well as some 15mls of liquid contained in a flask. He analysed the specimen and in his report dated 10th December, 2018 he indicated that the deceased's blood contained zinc phosphide also known as rodenticide at a concentration level of 10.02mgs per 100mls. According to PW10 no other chemical was found in the deceased's blood. The chemicals in the deceased's blood were capable of causing death.

What then caused the deceased's death? As stated herein and in line with the evidence of PW8, the postmortem is not conclusive on the cause of death. However, blood samples of the deceased were taken and PW10 confirmed that the toxic substance in the deceased's blood could cause death. PW4 took part of the tea she had prepared but did not suffer any ailment. The deceased took the tea and went out. She then completed the remaining portion and soon thereafter became sick and died two days later. I am fully satisfied that the cause of death was the toxic substances that were found in the deceased's blood. The deceased was not sick. She was doing her normal duties and even went to church on 13th July 2017. Her condition started to deteriorate soon after taking the remaining portion of her tea and immediately she could not talk. There is no evidence that the deceased could have taken some food or drink at the church or elsewhere. The sequence of events does prove that it is the remaining portion of the tea she took which triggered reaction in her system. Soon after being taken to Marsabit hospital, the doctor attending to her opined that the deceased had poison in her system. This opinion is confirmed by the findings of PW10, the Government analyst.

Who then caused the deceased's death? The prosecution evidence points at the accused herein. It is the prosecution evidence that it is the accused who put poison on the deceased's tea. PW4 is the eye witness to that line of evidence. On his part, the accused maintain that he had no reason to kill his mother. He was the one living with the deceased. Even his business is named after his mother. His mother is named as the next of kin in all his bank accounts. He has really suffered as a result of the deceased's death. It is the accused's evidence that he was not present when the deceased became sick. He conducted his Insha prayers in Marsabit town at 8.00pm and went home. Upon reaching the gate he found many people and was informed of his mother's sickness. He tried to assist but was pushed aside by PW1. He went to Marsabit hospital where the deceased was taken. The prosecution evidence does confirm that indeed the accused went to Marsabit hospital. This is the evidence of PW3, Loko Galgalo.

The evidence on the administration of the poison on the deceased's tea is that of PW4. It is PW4's evidence that the accused was in the house on 13th July 2017. The deceased arrived home from church at about 6.00pm. Initially the accused was outside the house. The accused then entered inside the house. PW4 saw the accused pouring poison into the half cup

of tea. The deceased came back from the shop and took the remaining tea. She then became sleepy and collapsed. The accused maintain that PW4 was being used to implicate him. He also contends that pW4 suffers from mental problems. At the age of 14 years she is still in class 4 while her peers are in secondary school. I saw PW4 testifying and even made some observation in the proceedings. The witness testified properly just like any other witness although at time she took sometime before responding to questions. She told the Court that she was number 21 out of 131 of class 4 students. I am satisfied that PW4 is a competent witness and has no mental problems. Although she had been repeating classes, that does not denote that she has mental problems. There is a difference between intelligence and mental problems. Her performance in school is not bad at all. Not all repeaters perform well in school. The witness was duly cross examined and answered all the questions fairly well.

It is PW4's evidence that she was threatened by the accused. That is why she did not tell her grandmother about the poison in her tea. The accused contends that if the poison was put in the cup of tea, how comes traces of the poison were found in the flask. The accused also contends that according to PW4, there was another person in the house. This is Debebe Adisu, PW4's brother. In other words, the accused is raising the issue that it could be possible that the said Debebe Adisu is the one who administered the poison in the deceased's tea.

According to PW4, the accused entered inside the house first. When PW4 entered in the house she found the accused putting poison in the half cup of tea. The flask was there and the logical possibility is that the poison was put in the flask before the cup of tea. The same chemicals found in the deceased's blood were found in the 15mls found in the flask. Whoever put the poison in the tea must have as well put the same poison in the flask. Even if PW4 did not see the accused putting poison in the false, it is clear that poison was put in the flask. The police recovered the flask from the house and upon being analysed, toxic substance was found in the 15mls that were in the flask. Presumably, the 15mls was the remaining tea.

Given the evidence on record, I am satisfied that it is the accused who put the poison in the deceased's tea. It was not Debebe Adisu who put the poison as inferred by the accused. The sequence of events prove that the accused was at home on 13th July 2017 and was not at the Mosque. PW7, an elderly woman and the deceased's sister testified that upon reaching the scene and seeing the deceased in critical condition, they screamed and the accused came out. The Prosecution evidence does displace the defence evidence that the accused arrived home and found the deceased had fallen sick and was taken to her bedroom. PW4's evidence that the accused was at home is corroborated by that of PW2 and PW7. They found the accused present at home. PW4's evidence that the accused poured poison in the deceased's tea is corroborated by the evidence of PW10. The deceased's blood contained toxic chemicals. Although PW4 did not testify on the label on the bottle which contained the poison, it is PW9's evidence that during investigations, PW4 told them that the poison was a liquid

substance in a small bottle labelled "**RAT**". PW10 testified that rodenticide is used to contain rats and mice. There is ample corroboration of PW4's evidence. PW8 equally removed blood samples from the deceased for chemical analysis. It is the same blood that was analysed by PW10.

It is PW4's evidence that the incident occurred at around 7.00pm. There was electricity light in the house. The accused is not being framed up. The accused is well known to PW4. The issue of a grudge over a plot does not exist. The accused's contention that the family members want to inherit the deceased's land and house cannot be the cause of the death. The other family members did not cause the deceased's death. It is the accused who put the toxic chemical in the deceased's tea. There could be no issue of inheritance while the deceased was alive.

Was the accused actuated by malice aforethought? In the case of **REX V TUBERA S/O OCHEN, 1945 EACA, 63**, the Court stated as follows:

“to determine whether malice aforethought has been established, consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident.”

In the case of **REPUBLIC -V- NDALAMIA & 2 OTHERS (2003) KLR**, Osiemo J (as he then was) held as follows on malice aforethought.

For the offence of murder, malice aforethought is deemed to be established by evidence showing knowledge that the act or omission causing death or grievous harm will

probably cause death or grievous harm to some person whether that person is actually killed or not although such knowledge is accompanied by the indifference whether such death or grievous harm will occur.

I am satisfied that the prosecution has proved malice aforethought on the part of the accused. The accused was well aware that his act of putting poison in the deceased's tea could have caused death or grievous harm on the deceased.

Section 213(a) of the Penal Code states as follows:

A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases -

(a) If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, it was employed in good faith and with common knowledge and skill, but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was employed without common knowledge or skill;

The accused's act of putting poison in the deceased's tea caused injury to the deceased. Soon after the deceased took the tea she became sick and had to go out for fresh air. She then collapsed and had to be rushed to hospital. She died two days later. Her cause of death can be attributed to the poison that was put in her tea.

The Prosecution is expected to prove its case beyond reasonable doubt. I am satisfied that the prosecution has

discharged that burden. It is true that PW4 took about three days before stating that she saw the accused pouring poison in the deceased's tea. The lapse of three days is immaterial. Soon after the deceased was taken to Marsabit hospital, it was found that she had poison in her system. The question as to who put the poison that was found in the deceased's system is solved by

the evidence of PW4. It is her evidence that she feared the accused. The accused in his evidence has tried to discredit all the family members who testified. I do find that there was no plan by the family members to implicate the accused. Although PW1 testified that he did not have good relationship with the accused, I do not find that PW1 instigated his daughter to implicate the accused. Equally PW7 had no good relationship with the accused. PW7 was only called as a neighbour and a sister to the deceased. She had no reason to implicate the accused. I believe the money being sent by the accused's relatives who live abroad used to be sent to the deceased. The accused's contention that PW2 was jealous because of that money cannot be true.

The appellant's defence amounts to one of alibi. In the case of **KARANJA V REPUBLIC (1983)KLR, 501** the Court of appeal held as follows:-

1. The word “alibi” is a Latin verb meaning “elsewhere” or “at another place”. Therefore whereas accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was

mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, i.e when he was initially charged.

2. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.

The accused was at the scene. I have already found that the accused's evidence that he was at the Mosque at about 8.00pm cannot be true. PW1, PW2 and PW7 saw the accused at the scene immediately the deceased had collapsed and was about to be taken to hospital. The accused contend that he arrived at home at that time. PW7 screamed upon seeing her sister (deceased) in critical condition and the accused came out of the house. PW4 clearly saw the accused pouring poison in the deceased's tea. The alibi defence has not been disproved by the prosecution evidence.

The upshot is that the prosecution has proved its case beyond reasonable doubt. The accused is hereby found guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code and is convicted accordingly.

Dated, Signed and Delivered at Marsabit this 2nd day of May, 2019

S. CHITEMBWE

JUDGE