



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 77 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

DENIS MWANGI WANGARI.....ACCUSED

JUDGEMENT

1. The Accused Person, Denis Mwangi Wangari, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars in the information are that on the 1st day of July, 2014 at Arash Farm in Subukia within Nakuru County, he murdered Moses Ndungu (“Deceased”).
2. The Accused Person pleaded not guilty to the charged offence and the case proceeded to full trial. The Prosecution called nine witnesses to prove its case.
3. The case was rather straightforward.
4. Mary Wamuyu Muturi (Mary) was married to the Accused Person. She testified as PW1. The Deceased was their child. He was six years old. Mary testified as follows. That she and the Accused Person had had marital strife as a result of which she went to her parents’ home with her two youngest children on 30/06/2014. The Accused Person went to her parents’ home and demanded to take back the children the same evening. The two children were the Deceased and his younger sister, S. S was three years old at the time.
5. The following day, Mary went to her place of work at Subati Flowers Farm. While there, at around 1:00pm, she got a distressing phone call from Mary Nyambura (Nyambura), her sister-in-law. Nyambura testified as PW2. Nyambura told her to rush home as her husband had poisoned her children.
6. Mary hailed a motor bike and rushed home where she found that her husband, the Accused Person, and the children had been taken to Subukia Dispensary. She went there. She was further distressed to find that the Deceased had already succumbed to death. His sister was taken to Nakuru PGH for further treatment. Fortunately, she recovered.
7. Nyambura, the Sister-in-law, testified that on 01/07/2014 at around 12:30pm, he received a phone call from the Accused Person. He told her that it appeared that he was never going to reconcile with his wife (Mary) and he blamed her (Nyambura) for helping his wife to move out.
8. Nyambura testified that the Accused Person disconnected the phone but then called her back after a short while with a threat: that he was going to do something which their whole family would regret. He disclosed that he was planning to take poison and give it to the two children he had with him also. He called a third time and this time gave the phone to the two children to bid good-bye to their aunt (Nyambura).
9. On realizing that something horrible was likely to happen, Nyambura says she called a neighbour by the name Serah and asked her to check on the Accused Person’s home. When Serah did so, she found the door locked and the radio on on high volume. Nyambura called the Accused Person again. She lied to him that she was at the door so that he could open but the Accused Person told her that he had already taken poison and given it to the two children as well. At that point, Nyambura says she called another neighbour, Mwareri and asked him to go and check at the Accused Person’s house. Mwareri confirmed her worst fears: that the Accused and the children had, indeed, taken poison. Nyambura then boarded a boda boda and rushed to the Accused Person’s house then to the hospital. He found the Deceased had already passed on while the Accused Person and his daughter were in critical condition.
10. Lucy Wambui Muturi (Lucy), the Accused Person’s mother-in-law was next on the witness stand. In her testimony, she confirmed that the Accused Person went to her house on 31/6/2014 at 7.00pm and demanded to take her two children – the Deceased and SW. He handed

over both children to him. Her house is about 100 metres away from the Accused Person's.

11. The next day, at around 1:00pm, while at her shamba, she heard screams coming from the Accused Person's house. She rushed there. She found the Accused Person and the two children lying unconscious on the ground. They had been removed from the house. She followed them when they were taken to the hospital where, unfortunately, the Deceased died.

12. The younger child – SW – was the next witness. She was only four years old at the time of the testimony. The Learned Justice Odera who took her evidence concluded that she did not understand the nature of oath after conducting voir dire. Hence, she gave an unsworn statement. Her statement was short and to the point: one day her mother went to work. Her father went to buy poison. He gave her the poison to drink in a cup. She drank a little and I poured the rest. The Accused Person also gave Ndungu (the Deceased) the poison. The Accused Person had told them to tell "aunty Mwendu" goodbye as "he was going to give us poison." She recalled being taken to hospital and her grandmother giving her good medicine leading to her recovery.

13. Susan Wangari Mwangi, the Accused Person's mother's testimony only confirmed that she left the children at home with the Accused Person but that at 1:00pm she received a call from a friend that there was a problem at her son's home. When she rushed home, she found that the Accused Person and the two children had been taken to the hospital and she headed there too.

14. Stephen Matinde Joel Weibe is the Government Chemist who conducted examination on items related to the case. The items he examined were:

- Lung sample said to be of deceased Anthony Ndungu
- Kidney sample taken from deceased
- Liver sample of deceased
- Stomach sample of the deceased
- A 100ml bottle 'A'
- A 28ml bottle of insecticide 'B'
- A cup marked 'C'
- A plate marked 'D'

15. The Analyst's examination led to the conclusion that Diazinon and dimethoate which are both organophosphorous pesticides were detected in the stomach sample, in the Cup marked "C"; and on the plate marked "D". Dimethoate was detected in the 100 ml bottle marked 'A' while Diazinon pesticide was detected in the 28 ml bottle marked "B". These pesticides are poisonous and can be harmful to humans if ingested.

16. The Government Analyst compiled a report which he produced as Exhibit 2 for the Prosecution.

17. Mary Wanjiru Waiganjo, a neighbour to the Accused Person testified as PW7. She recalled hearing screams coming from near the Anglican Church in their neighbourhood. When she rushed to check what was happening, she found a crowd of about twenty people gathered at the Accused Person's house. The Accused Person and his two children were unconscious. She heard people say they had taken poison. She rushed to her home and came in her vehicle to take them to the hospital. By the time she came back, the children had been rushed to a nearby clinic in a boda boda so she just ferried the Accused Person to Subukia Health Centre. Wanjiru testified that when the Accused Person was brought to the car, she smelt the odor of pesticide on him and that she knew the smell as it is one which is used in cattle dips.

18. At the Health Centre, Wanjiru testified that she saw the two children – but that the Deceased was already dead. Both children, she said, smelt of the same pesticide. She also testified that she asked the Accused Person what had happened and that the Accused Person said that he was angry because he had disagreed with his wife and that his in-laws had demanded bride price; that he had bought the poison and given it to his children in response to this.

19. Wanjiru says that a crowd had gathered at the hospital and they were demanding to be let to lynch the Accused Person but that he called the Police to protect him.

20. The boda boda operator who ferried the two children to hospital was Anthony Mureithi Njoroge. He testified as PW8. He got a call from a neighbour to go rush the children to hospital. He obliged. On getting there he found the Accused Person and the children inside the house. He smelt a strong odour of pesticide inside the house. He took both children to the Subukia Clinic in his boda boda.

21. Dr Pauline Wambui performed the autopsy on the body of the Deceased. She was, however, not available to produce the Post-mortem report in Court as she was away pursuing her post-graduate studies during the trial. With the concurrence of the parties, Dr. Karimi Joseph Kinyua who is familiar with her writing and signature produced it on her behalf. The report noted hyperpigmentation of some areas of the liver.

22. The final witness was the Investigating Officer, Corporal Joseph Makelo of Subukia Police Station. He took over the case from Chief Inspector Sifuna who passed away before he could adduce evidence in the case. With the concurrence of the Defence, he produced the burial permit for Chief Inspector Sifuna as well as the statement he recorded on the case.

23. Corporal Makelo recalled going to the Accused Person's house at around 3:00pm on 01/07/2014 in the company of Chief Inspector Sifuna upon getting a report of an incident there.

24. At the scene, they found things scattered all over the two-bedroomed house. There was a strong odour of insecticide. In the bedroom, he noted traces of vomit. On the table, there were 2 bottles of meosidoel (insecticide). They took the 2 bottles, a cup and remains of ugali they found there. They later submitted these items to the Government Chemist for analysis. After the Accused Person was discharged from hospital, they arrested him since they had concluded, based on their evidence, that he had taken the poison and given it to his two children.

25. Based on the evidence by these Prosecution witnesses, the Learned Justice Odero put the Accused Person on his defence. By the time the date for defence hearing came, the Learned Judge had been transferred out of the station. It therefore fell to me to conduct the remainder of the case after duly complying with the provisions of section 200(3) of the Criminal Procedure Code.

26. The Accused Person elected to give an unsworn statement in his defence. He said that on 28/06/2014, he phoned his wife to send the two children to him. The children went and they spent the whole day together.

27. The following day, he says he also spent the day with them. Then, in the evening, he heard his wife arguing with a neighbour about a jiko. The quarrel was, he said, about a jiko his wife had put outside and the neighbour claimed the smoke from the jiko was blowing into her house. He said that he heard the neighbour say: '*mmenishinda*'

28. The Accused Person says that while his wife told him that they should move from the plot but he reportedly told that they could not move. They argued about it. He then said that his child came and told him that a parent was needed in school and he offered to go.

29. The Accused Person claims that at around noon his wife called him and told him to meet her on the road. That she told him she was going to work and had brought him the younger child. That he went back to the parents' meeting with the two children where he remained until 1:00pm. Thereafter, the Accused Person says he went home with the two children and they ate food prepared by his wife. That is when, he says, they started having stomach aches and started vomiting. He says that he screamed and some people who were cleaning a nearby church came to their rescue. They took him to the hospital. He produced the discharge summaries from the hospital.

30. In short, the Accused Person insisted that he did not poison the Deceased.

31. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

32. To successfully obtain a guilty verdict in a murder charge, the prosecution, therefore, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

33. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or
- 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; or
- c. Intent to commit a felony; or
- d. 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.

34. In this case, it is undisputed that the Deceased died on 01/07/2014. The *actus reus* of the offence is not an issue in the case. The main issue is who caused the death; and whether there was malice aforethought. In my view, the evidence as rehashed above is straight-forward and clear that it was the Accused Person who administered poison to the Deceased which led to his death. There is direct evidence of the minor (PW4) that was unchallenged in evidence. Indeed, so direct was it that there was no cross examination on the point. In addition, there is the corroborating evidence of the other witnesses which make the conclusion that it was the Accused Person who administered the poison ineluctable. This includes the evidence of PW1; PW2; PW3 and PW7 and PW8. The testimonies are all very consistent on what happened that fateful afternoon. The testimonies are straightforward and credible. They remained so even after cross-examination.

35. As for the Accused Person's defence, it is so implausible, illogical and incredible that there is absolutely no possibility that it could be

true. It does not raise any reasonable doubt in view of the cogent evidence presented in Court.

36. Finally, the element of malice aforethought is easily proved in this case. Any person who knowingly and willingly administers poison to a minor intends to cause either the death of that person or grievous harm to them. This meets the threshold for malice aforethought in section 206 of the Penal Code.

37. In this case, therefore, the evidence presented by the Prosecution establishes beyond reasonable doubt all the elements of the offence of murder. In the premises, I find the Accused Person guilty in the murder of Moses Ndung'u contrary to section 203 as read together with section 204 of the Penal Code. I hereby convict him accordingly.

38. Orders accordingly.

Delivered at Nakuru this 18th day of July, 2019.

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JOEL NGUGI

JUDGE