



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL CASE NO.33 OF 2019

REPUBLIC.....PROSECUTOR

V E R S U S

GRACE WAMBUI WAMBUGU.....APPLICANT/ACCUSED

R U L I N G

Grace Wambui, the accused faces a charge of *Murder contrary to Section 203 as read with Section 204 of the Penal Code*. The accused is alleged to have murdered Emmanuel Wambugu Njogu on 11/8/2017 at Kanyagia Location, Gatheru Village within Nyandarua County. She denied committing the offence.

The case proceeded to full trial with the prosecution calling a total of 11 witnesses. At the close of the prosecution case, this court is required to determine whether the prosecution has established a prima facie case against the accused to warrant the accused to be placed on her defence.

What constitutes a ‘prima facie case’ was discussed in the celebrated case of *Ramanlal Trambakal Bhatt v Republic Cr.A.76/1957 [EA 334 –335]* where the court stated:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one, which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether, there is some evidence, irrespective of its credibility or weight sufficient to put accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a prima facie case but at least it must mean one on which a reasonable tribunal, properly directing its mind on the law and the evidence, could convict if no explanation is offered by the defence.”

This being a murder charge under Section 203 of the Penal Code, the evidence of the prosecution must establish the following ingredients:

1. *Proof of the fact and cause of death of the deceased;*
2. *Proof that the deceased’s death was a direct consequence of the accused’s unlawful act or omission (actus reus);*
3. *Proof that the said unlawful act or omission was committed with malice aforethought (mens rea);*
4. *Proof of the identity of the perpetrator.*

The deceased was a son to the accused. Two of accused’s children were poisoned, one died but the other survived.

PW1, Steven Wanyoike, a friend to accused’s father, was called from his home by accused’s mother on 11/8/2017 about 11.00 a.m. He was not at the scene when the incident occurred. He did not know how the accused’s children got poisoned that resulted in the death of one of them.

PW2 Margaret Wangui, the mother of the accused told the court that on the material day, she had gone to fetch water from the borehole with the accused and on returning home, they found the accused’s children with a bottle which normally contains tactic, a chemical for spraying cattle. She did not know where the children got it. She contradicted herself as to what her relationship with the accused was and how they found the accused’s children with the bottle. It was obvious that she withheld the truth from the court.

PW3 Jane Nduta, a step mother to accused stated that she lives in the same house with PW2, accused and her children. She told the court

that on 11/8/2017, she had left home for Mailo Kumi and upon her return, found the children had been taken to hospital. In essence, she did not know what had happened to the children.

PW4 Peter Njogu Mwai, the accused's husband and hence father of the deceased, had parted with the accused and accused had left their matrimonial home with the children. He was called from his place of work in Kajiado and informed that the children had taken poison. He did not know what happened to the children. He identified the deceased's body to the doctor for purposes of postmortem.

PW5, Assistant Chief of Gathuru Sub-Location received a call from Alice Wamahiga (PW11) who informed him that the accused had poisoned her children. He proceeded to the scene and found when the children had been taken to hospital but was given a bottle with some substance inside which he took to the police station and it was later taken to the Government Analyst and produced in court as an exhibit.

PW6 Francis Mundia Waithera is a motor cycle owner who was called to take the children who had been poisoned to hospital. He did not know how the children got poisoned.

PW7 Cpl. Peter Wafula received a report of the children having been poisoned from the Assistant Chief PW5. PW7 re-arrested accused from PW5.

PW8 Dr. Cyrus Njoroge Ng'ang'a of Nyahururu Hospital performed a postmortem on the deceased on 17/8/2017. On examining the deceased, he found the bowels were inflamed with wounds and corrosion on the inner linings and there was a smell of a substance that is used to spray cattle. He concluded that the cause of death was cardio pulmonary arrest secondary to poisoning. He also took samples from the stomach which were later forwarded to Government Analyst.

PW9, Steven Matinde Joel Waibe an Assistant Government Analyst, on 5/9/2017, received a clear liquid in a bottle and stomach sample in a bottle. Upon examining the specimens, he detected Amitraz, an alcade, in the specimens from the stomach sample and the bottle.

PW10 Ip. Mary Wanja Njeru, Deputy OCS Ndaragwa Police Station received a report of poisoning of children from Cpl. Wafula (PW7). PW7 took to PW10 the accused and a bottle. PW7 prepared an Exhibit Memo Form which she arranged to have taken to Government Chemist and the exhibits were received back.

PW11 Agnes Wamahiga Waithera recalled that on 11/8/2017, at about 11.00 a.m. while in her home which is next to accused's, heard screams from PW2, mother to accused who called to inform her that accused had poisoned her children. She went to the scene, saw the children, called for a motor cycle to take the children to hospital. She saw PW5 come to the scene and recovered a bottle in some grass near the house and the contents smelt of tactic, a chemical for spraying cattle. She said that whenever they used the said chemical, the bottle would be thrown in the toilet.

The death of the deceased is not in doubt. PW2, 3 and 5 saw the deceased when still fighting for his life and later saw him dead. PW4, the deceased's father identified the deceased's body to PW8, who performed the postmortem which established the cause of death to be pulmonary arrest secondary to poisoning.

The next question is who committed this act? Was it self-inflicted as alleged by PW2? Although PW8 and 9 confirmed that poison was found in the deceased's intestines and the cause of death was poisoning, yet there is no direct evidence pointing to the accused as the person who administered the said poison on the deceased.

The prosecution case is therefore founded on circumstantial evidence.

Circumstantial evidence is said to be the best evidence in criminal cases. This is what the court said in *Neema Mwandoro Ndurya v. R CRA.446/2007*, the Court of Appeal cited with approval the case of *R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20* where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”

Circumstantial evidence, though the best evidence, has to be taken with utmost caution where the court relies on it entirely. In *Teper v. R [1952] AC at p. 489* the the court stated as follow:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

The only witness that came close to linking the accused to the death of her son, (the deceased) is PW11. She told the court that it is PW2, mother to accused who called her while crying alleging that the accused had poisoned her children. PW2 on the other hand claims to have been with accused getting water from a borehole and they found the children with the bottle of poison. PW2 did not impress the court as a truthful person.

PW2 suppressed the truth and decided to protect her daughter (accused) by telling the court lies. PW3 seems to have suppressed the truth too because she's said to have been was in the home when it happened but denied it in court. Since the prosecution did not declare them as hostile witnesses, their evidence stands.

According to PW5, he was given the bottle that contained the poison by PW11. PW11 on her part insisted that she saw PW5 pick it outside accused's house in the grass. PW2 did not tell court where they took the bottle they allegedly found with the children. However PW11 told the court that ordinarily, after using the tactic chemical, they would dispose of the bottle by throwing in the latrine. One wonders why this bottle would be in the grass and PW2 had seen it with the children. That confirms that the court was told many lies.

In the end, I find that there is neither direct nor circumstantial evidence linking the accused to the offence. There is indeed strong suspicion against the accused and I believe the witnesses, especially PW2 & 3 were not truthful. However, suspicion alone cannot found a conviction. The Court of Appeal has said that suspicion, however strong cannot be a basis for a conviction. The prosecution evidence falls for too short of the threshold of standard of proof, of beyond reasonable doubt, in criminal cases. For that reason, I will acquit the accused of the charge of murder under Section 306(1) of the Criminal Procedure Code.

Dated, Signed and Delivered at NYAHURURU this 16th day of December, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – Prosecution Counsel

Soi – Court assistant

Mr. Kaburu for accused