



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL CASE NO. 31 OF 2012 (MURDER)**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**G N M.....ACCUSED**

**J U D G M E N T**

1. The accused person is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on unknown dates between the months of July and August 2012 in Nthawa location of Mbeere North sub-county of Embu County, she murdered K M. The accused pleaded not guilty to the offence.
2. The facts leading to this case are that the accused person lived with her children in Mbeere North sub-county while her husband PW1 lived and worked in Nairobi. The accused worshiped in the Truth of the Word Church at [particulars withheld] where fasting was part of the religious rites. In the course of the religious engagement that went on for several days, involving the accused and her children, the deceased aged six (6) years starved to death. He was secretly buried in a grave within the compound as was to be discovered later during investigations.
3. Only five witnesses testified in this case. PW1 the husband of the accused told the court that he works in Nairobi as a mason. On 21/07/2012, PW1 went to his home at [particulars withheld] village and found the door of the house locked. He knocked and there was no response. He broke into the house just to find his wife and child lying unconscious. He noticed that one child the deceased herein was missing from the house. PW1 took his unconscious wife and child to hospital where they were admitted for treatment.
4. PW1 said that the accused had a mental problem long before the incident. According to PW1, the accused had been left under the care of their first born daughter when PW1 went to work in Nairobi. PW1 reported to the police and to the Assistant Chief that one of his children had gone missing.
5. It was the testimony of PW5 the area assistant chief that PW1 reported to him on 23/07/2012 that the deceased had gone missing. Investigators discovered a shallow grave covered with fresh soil in the compound of PW1 where the body of the deceased had been buried. It was then exhumed for purposes of investigations in this case.
6. Dr. Maingi produced the postmortem report showing that the cause of death was acute starvation.
7. PW4 a police officer from Siakago police station told the court that he was in the deceased's search team before the body was discovered buried in PW1's compound. He obtained an order for exhumation of the body and had the exercise conducted with assistance of public health officers. The decomposed body of the deceased was taken to the mortuary and postmortem later conducted.
8. The accused in her sworn statement of defence said that her church known as the Truth of the Word Church at Siakago declared a seven day fasting period. On her own volition the accused decided to fast for twelve (12) days with her two minor children. These were the deceased aged six years and another aged six months. Her other children were away from home having gone to visit their grand mother at Riandu village. The deceased died long before the twelve days were over.
9. The accused said she was used to fasting for three days and that the 12 days she elected may have been too much for her and her children. Before the fasting commenced, the accused threw away all the food items from the house. She further stated that she has been suffering mental instability for quite some time.
10. Mr. Momanyi for the accused submitted that the charge has not been proved against the accused person and that the act of fasting cannot be said to be an unlawful act. The deceased was put on fact together with his mother and sibling. For that reason, there was no malice aforethought on part of the accused. The counsel urged to court to acquit the accused.
11. The prosecution submitted that the omission by the accused to feed the deceased was unlawful in that she had a legal duty to give the

necessaries being food, clothing and shelter. The act of the accused amounted to negligence as was admitted in her defence. The accused was also aware that her failure to feed the child would result to death. It was argued that malice aforethought was proved since there was intention to commit the unlawful act.

12. In her defence, the accused admitted that she put her two minors on fasting for twelve days. One of them survived the ordeal while the deceased succumbed to the severe starvation. The doctor DW4 confirmed that the cause of death was acute chronic starvation. It was argued by the defence that the fasting was a religious rite and was not an unlawful act.

13. The parents of every child have a legal duty to take care of it irrespective of whether it is the father or the mother. This parental duty is imposed by Article 53 of the Constitution and replicated in the Children's Act. The provisions do not exempt the parent from the duty for any reason whatsoever. The act of religious fasting does not amount to a defence known in law in respect to a criminal charge.

14. During the trial, the accused raised the defence of insanity. She told the court that before the incident she had been suffering from mental illness and had been treated before. Dr. Thuo examined the accused on 11/04/2017 and found her not mentally fit to plead. She was committed to Mathare Mental hospital for treatment under Section 162 of the Criminal Procedure Code. After receiving treatment in custody for some time, the accused was declared fit to plead. The trial then began and proceeded to conclusion.

15. The defence of insanity is provided for by Section 166 of the Criminal Procedure Code. It provides:-

*Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.*

16. Section 12 of the Penal Code is also relevant in this case and it provides:-

*A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.*

17. The issues for determination are threefold:-

(i) *Whether the act of the accused to starve the child was an unlawful act as described under Section 203 of the Penal Code.*

(ii) *Whether the accused caused the death of the deceased.*

(iii) *Whether the accused had malice aforethought as she committed the unlawful act.*

18. It is trite law that the burden lies on the accused to prove, on the balance of probabilities that she was insane before and at the time she committed the offence.

19. It was held in the case of **MARII VS REPUBLIC [1985] KLR 710**

*The burden on the accused to prove insanity is not as heavy as the one on the prosecution. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease the accused did not know what he was doing at the material time or that what he was doing was wrong, and so could not have formed the intent to kill the deceased.*

20. The facts of the case are quite straightforward in this case. The accused was found mentally unfit to plead during the trial by Dr. J.K. Thuo who had earlier treated her for the mental illness. When she appeared before the court for plea, the defence counsel told the court that he had a report showing that she was mentally unstable. During the trial, she was always escorted to court by her husband and her mother-in-law. In the course of the trial the court referred the accused for treatment to Mathare Mental hospital and Embu Level 5 hospital after observing that she was of unstable mind.

21. In her defence the accused said she had a history of mental illness before she committed the offence and had received treatment. The accused did not deny the fact that she starved the deceased to death having submitted to a religious fast. Having raised the defence of insanity during the trial, the provision of Section 166 of the Criminal Procedure Code is applicable in this case.

22. It was held in the case of **JUSTUS OYARO MACHUKI VS REPUBLIC [2015] eKLR** that it is evident that:-

*Section 166 is concerned with the situation where the defence of lunacy or insanity is adduced at the trial.*

23. The defence argued that the fact that the accused was insane and that the prosecution had totally failed to prove that the accused was not possessed of the mental capacity to commit the offence of murder. It was also submitted that the accused ought to be acquitted of the offence for she was not guilty of the unlawful act of killing the deceased.

24. It is my considered view that insanity on part of the accused has been satisfied and for that reason this court has a legal basis of making a

special finding under Section 166 of the Criminal Procedure Code that the accused was guilty of the act of starving the deceased who was her child to death but was insane when she did the act.

25. Section 166(2) provides that:-

*When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.*

26. The special finding under Section 166 is neither a conviction or an acquittal but a preventive measure where the accused is detained in a mental hospital, in a prison or other suitable place for safe custody at the pleasure of the president.

27. I therefore make a special finding in respect of the accused under Section 166 of the Criminal Procedure Code. It is hereby directed that a report to H.E. The President be made. The accused will be detained at Kamiti Prison or any other prison where specialized treatment will be accorded to her.

28. The President's powers under Section 166(1) may be exercised by the Minister responsible for prisons as by law established. As such the report will be sent to the Minister in charge of Prisons.

29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF APRIL, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Mate for the State**

**Mr. Momanyi for accused**

**Accused present**