



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 19 OF 2016

REPUBLIC.....PROSECUTOR

-versus-

MARGARET ROBI MWITA.....ACCUSED

JUDGMENT

1. **Margaret Robi Mwita**, the accused person herein, was charged with the murder of her daughter one **Dorcias Gati Mwita** (hereinafter referred to as '**the deceased**'). The particulars of the information were as follows: -

“On the 23rd day of July 2016 at Gaitwa village in Kuria East Sub-County in the Republic of Kenya murdered DORCIAS GATI MWITA.”

2. The accused person denied committing the offence and the case was set for hearing. A total of nine witnesses testified in support of the information facing the accused person. **PW1** was **Susan Boke John** and **PW2** was **Samuel Mwita Rioba** who was the father to the deceased and a brother to **PW1**. **Amos Marwa Siruri** testified as **PW3**. He was a close family member of the family of the deceased. **Marwa Peter Ngoko** who testified as **PW4** was the Assistant Chief for Keronje Sub-Location. A Government Analyst one **James Michael Welimu** testified as **PW5**. **Dr. K’ogutu Vitalis Owuor** testified as **PW6**. He produced the Post Mortem Report which was prepared by his colleague Dr. Juma who conducted the post mortem examination on the body of the deceased. A Registered Nurse from Komotobo Mission Health Centre one **Benedict Robi Maroa** testified as **PW7**. **No. 67595 Cpl. William Onuko** from Ntamaru Police Station testified as **PW8** and the investigating officer **No. 481670 Cpl. Helen Koech** attached to Kuria East CID offices testified as **PW9**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was based on circumstantial evidence for the reason that there was no eye-witness. It was the prosecution's position that the accused person poisoned the deceased using a pesticide known as Diazinon and then called **PW2** who was in Nairobi and informed him that the deceased was unwell. **PW2** directed the accused person to take the deceased to **PW1** and the accused person obliged. Given the condition the deceased was in, **PW1** asked the accused person to rush the deceased to Komotobo Mission Health Centre and again the accused person obliged. The deceased was briefly attended to by **PW7** at the said health facility before she passed on. As the family members to the deceased contended foul-play by the accused person on the death of the deceased **PW7** advised then to report the matter to the Area Chief. The members collected the body of the deceased and left the health facility.

4. Determined to unearth the cause of the death of the deceased, the family members were aided by the foam which oozed from the mouth of the deceased. The foam had a smell of a strong pesticide which according to **PW3** was used in kale growing. They decided to search for any such leads and **PW3** retrieved a bottle of Diazinon from a pit latrine and immediately called the Area Chief and informed him of all what had happened. The Chief sent his Assistant Chief, **PW4**, who visited the home of the deceased in the company of some police officers from Ntamaru Police Station. The police interrogated the family members. They then collected the body of the deceased and took it to Migori County Referral Hospital Mortuary. The accused person was also taken by the police for further interrogation. **PW3** accompanied the body of the deceased to the mortuary.

5. The police commenced investigations. **PW8** who was one of the officers who had visited the home of the deceased together with **PW4** recorded statements from some witnesses the following day and handed over the accused person to the DCIO Kuria East Sub-County for further investigations. The DCIO then appointed **PW9** to carry on with the matter after the accused person had been charged.

6. Dr. Juma conducted the autopsy on the body of the deceased and took samples of the stomach contents and the liver for further chemical analysis. Dr. Juma filled in a Post Mortem Report after the examination on the very 26/07/2016 where he formed the opinion that the cause of the death was organo-phosphate poisoning which caused cardio-vascular pulmonary arrest. The Report was produced as an exhibit by **PW6**. **PW9** forwarded the samples collected during the autopsy together with the bottle recovered from **PW3** at the scene to **PW5** for further analysis. **PW5** confirmed that the bottle contained an organo-phosphate liquid which was poisonous. The same poison was found in the stomach contents as well as the liver of the deceased. **PW5** prepared and produced a Government Analyst Report as an exhibit.

7. At the close of the prosecution's case, the accused person was placed on her defence and opted to give sworn testimony. The accused person denied the information and narrated the events of the day the deceased died. That, she woke up early and left the deceased asleep in her house and rushed to the river to fetch some water as there was a general water shortage problem in the village. That, as she left for the river one of her in-laws whom she was not in good terms with was digging next to her house. That, she rushed to the river and requested the people she found thereat to allow her fill her container and rush back as she had left the deceased alone. That, she was so allowed and returned after a short while. As she neared her home, she heard the deceased crying and she rushed to find her lying down with fever. She called one of the family members to see how the deceased was and also called PW2. It was PW2 who asked her to take the deceased to PW1 which she obliged. She then rushed the deceased to hospital on the advice of PW1 where the deceased unfortunately passed on. The accused person then left the hospital and returned home and she later learnt from the family members that the deceased had been poisoned. That, she was seriously assaulted and forced to admit so and sensing danger to her life she conceded to the demands of the hostile family members. She however vehemently denied killing her daughter and contended that there was absolutely no reason for her to do so. She as well refuted the claims that she had killed her other two children. She closed her case without calling any witness.

8. At the close of the defence case, Learned Counsel for the accused person **Mr. Odhiambo Kanyangi** submitted that there was no sufficient circumstantial evidence to prove the information since the cardinal ingredients of the offence of murder had not been demonstrated as required in law. Counsel relied on several judicial decisions in support of his submissions. The prosecution through Learned State Counsel **Miss. Atieno** supported the information and relied on the evidence on record as tendered.

9. It is now on the basis of the foregone circumstantial evidence that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder. This Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;

(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

10. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (supra)** and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

11. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:-

“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R (1958) EA 715* citing with approval *Teper v. R (1952) AL 480* thus:

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

12. For the prosecution to secure a conviction on the information of murder, it must link the circumstantial evidence with the three cardinal ingredients of the offence of murder. The ingredients are: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

13. There is no doubt that the deceased died and what caused her death. With an exception of PW5, PW6 and PW9, the rest of the witnesses saw the lifeless body of the deceased. As to the cause of death, PW6 took this Court through the Post Mortem Report prepared by Dr. Juma which opined that the cause of death was shock due to organo-phosphate poisoning which led to cardio-pulmonary arrest. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

14. As to whether the accused person poisoned the deceased, several issues came to the fore. First, there was the issue of the accused person having confessed to committing the offence. That was alluded to by PW8 and PW9. However, both witnesses admitted that the alleged confession was not taken as required in law. That leaves the assertion as purely hearsay. Second, there was evidence that the accused person was not in good terms with her husband (PW2) and the rest of the family members. PW2 testified as such alongside other witnesses. The accused person also buttressed that position and stated that she had left one of the family members she did not relate well with digging near her house as she rushed to the river leaving her daughter alone in the house. That is to be closely viewed with how the allegation of poisoning arose and how the poison was recovered.

15. PW7 testified that when the deceased died at the hospital the family members asserted that she had been poisoned by the accused person and PW7 advised them to immediately report the matter to the Chief. The members however did not do so. Instead they returned home with

the deceased. On reaching home they began searching for the poison. As to how they knew that the bottle containing the poison was inside the pit latrine which was almost full with human waste remains a mystery. The members went straight to the pit latrine and PW3 used a stick with thorns to retrieve the bottle therefrom. Thereafter PW3 called the Chief. The two inevitable questions are at what point did the members know that the deceased had been poisoned and why they did not immediately inform the police or the administration so as to allow the police undertake the recovery of the exhibit. Can it be certainly taken that whatever PW3 allegedly retrieved from the latrine is what he handed over to the police? Was there a possibility of interference with the alleged recovery?

16. The questions are not about to end: Given the poor family relationships, is there any possibility of the deceased being framed up? Was there any evidence that the accused person had poisoned the other two of her children who passed on earlier? Could such a negative perception by the family members on the accused person have wrongly influenced their decisions?

17. There was no evidence that the accused person was at any time in possession of or had any access to the poison. Equally, no one saw the accused person administer the poison to the deceased. There is the fact that the house of the accused person was accessible to any one when she left to the river including all the family members whom she was not in good terms with. The possibility of someone taking advantage of the absence of the accused person from her house to administer poison to the deceased who was then an infant cannot therefore be certainly overruled. There was also an allegation that the accused person bought the poison from a local chemist but that aspect was not pursued in terms of collating such crucial evidence including ascertaining how many other people bought such poison from that chemist.

18. Be that as it may, by placing the prosecution evidence and the defence side by side, I am inclined to find, which I hereby do, that the prosecution did not attain the required legal standard to sustain any conviction based on circumstantial evidence on record. It is clear that the prosecution rested on rumours and suspicions and was greatly influenced by the death of the two children of the accused person. That being so suspicion alone however strong cannot be a basis of finding a conviction; the circumstantial evidence relied upon must meet the required legal standard. The glaring gaps and the loose ends in the evidence coupled with the failure to avail crucial witnesses including the owner of the local chemist without any justification leaves the circumstantial evidence in this case unreliable.

19. As was stated by the Court of Appeal in the case of James Tinaga Omwenga v. Republic (2014) eKLR: -

“ 20 Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion.....”

It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic -Criminal Appeal No. 17 of 1998, the court held,

'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'

See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.”

20. It is therefore the finding of this Court that the prosecution has failed to establish that the accused person caused the death of the deceased having failed to satisfy the conditions attendant to circumstantial evidence as required in law. I now come to the conclusion that the information of murder facing the accused person has not been proved. The accused person herein, **Margaret Robi Mwita**, is hereby found **NOT GUILTY** of the murder of her daughter one **Dorcas Gati Mwita** and is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 4th day of October, 2018

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Odhiambo Kanyangi, Counsel for the Accused person.

Joseph Kimanthi, Senior Principal State Counsel.

Evelyne Nyauke – Court Assistant