



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.25 OF 2010**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**S W G.....1<sup>ST</sup> ACCUSED**

**T W G.....2<sup>ND</sup> ACCUSED**

**RULING**

1. On 23<sup>rd</sup> October 2009, LW a child aged 1 year 8 months went missing from her home.
2. Her mother JW had left home for church with her older child leaving her step daughter TW then aged 16 years old, and her sister **MN PW3** at home with the child.
3. The mother had left the child asleep, and when she came back from church about 7:00pm and asked for the baby she was told she was still sleeping she checked for the baby in her own bedroom, she was not there neither was she in the children's bedroom.
4. The mother raised alarm and also rang the child's father SKG who by then was working in Nairobi.
5. The search for the child began in earnest involving the neighbours and friends.
6. On 24<sup>th</sup> October 2010 it was alleged that the clothes the child was wearing were found in the neighbour's pit latrine. These included the blanket, shawl she was wrapped in while sleeping.
7. On 27<sup>th</sup> October 2010, another neighbour was watering her garden from the well/borehole, when she threw the bucket in to fetch the water, she heard it hit something, only to find that it was a baby.
8. She raised alarm and the police were called. They came to the scene retrieved the body and took it to the mortuary. According to PW1 the body had an injury on the forehead, and blood was oozing from the nose. The child was naked.
9. According to Pw1, the key suspect for the missing child was his step daughter, the 2<sup>nd</sup> accused and he instructed his wife to report the same to the police.
10. By an information dated 29<sup>th</sup> July 2010 to SWG was arraigned before court for the murder of LWG on 23<sup>rd</sup> October 2009 at [particulars withheld], Mukurweini sub-location.

11. S pleaded not guilty to the information on 5<sup>th</sup> October 2010, and the trial commenced before Wakiaga J on 4<sup>th</sup> December 2013. He heard three witnesses.

12. On 16<sup>th</sup> September 2014, the State sought to consolidate S case with that of TWG who had been arraigned before court vide an information dated 10<sup>th</sup> March 2014 for the same murder in Criminal case No.6 of 2014.

Justice Wakiaga allowed the application for consolidation/amendment of the information.

13. On the 5<sup>th</sup> March 2015 the consolidated/amended information was presented to court before Justice Ngaah, each accused took plea for the alleged murder of LW on 23<sup>rd</sup> October 2009 contrary to section 203 as read with 204 of the Penal Code and pleaded not guilty.

Mr.Kimunya appeared for the 1<sup>st</sup> accused, Mr.Abwour for the 2<sup>nd</sup>.

14. The trial proceeded before Mativo J on 8<sup>th</sup> February 2016, and by the time I took over on 22<sup>nd</sup> February 2017, he had heard 10 witnesses. I only heard PW11, 12, and 13 before the prosecution closed its case.

15. The issue for determination is whether at the close of the case for the prosecution there is sufficient evidence amounting to a prima facie case to warrant the accused being put on the defence.

16. Neither the State nor the defence made any submissions on the issue but it would appear to me it is because the record does speak for itself.

17. Among the 13 witnesses it is only PW1, the step father to Accused 2, and cousin to Accused 1, PW3, the step mother to Accused 2, PW4 the sister to PW3 who attempted to implicate the accused persons.

18. PW3 **JWK** testimony was that she suspected her step daughter Accused 2 because on 22<sup>nd</sup> October 2009, she came home from school early. When asked what problem she had she said none. PW3 told her to return to school but when she came back later, the girl had not returned to school.

Apparently she had washed her uniform and other clothes. After supper around 9:00pm PW3 told her to go and pick the clothes. The girl just stood at the door.

Pw3 testified she thought the girl was scared of leaving the house but on asking he she said the clothes were not on the clothes line. Her uniform had been stolen. PW3 told her she would still have to go to school. The following morning she left the house at 6:30am but her school bag and lunch box were still on the table.

On checking PW3 found her outside washing clothes. She was asked why she did not go to school, she said nothing.

About 10:00am PW3's workman came carrying some clothes which he said belonged to Accused 2 and which he said he had found in the shamba. These clothes were not produced.

19. Be that as it may later in the day, PW3 left to escort her mother in law who had come to visit. She left the baby with Accused 2 and her sister MNN PW4. When she came back about 4:00pm she spoke to her sister who told her the baby was asleep. About 4:30pm she left for prayers with a friend and her elder child. It is upon return that they found the child missing.

20. PW3 suspect Accused 1 because though they were friends mutually, she began to plant bad blood in her by telling her that her husband had AIDS. She realized it was because there was a land dispute between her family and that of her husband.

21. According to the teacher PW10 **MW**, Accused 2 had left school early on 22<sup>nd</sup> October 2009 because she was having her period and had stained her dress. The teacher had left her leave early so that she could go home and sort out herself and that could have been the reason why she did not attend school on 23<sup>rd</sup> October 2009.

22. PW4, **MNN** the sister to PW3 is the only adult who was at home on 23<sup>rd</sup> October 2009. Her testimony was that she was seated outside sorting maize for cooking while Accused 2 was in the house with the baby. That at some point accused 2 came out of the house carrying the baby, took her back and came out with PW4's baby. She said she had just changed her and put her back to sleep. She also took back the other child and came out with an empty sack to go collect firewood, but came back running saying that she heard some people saying "*leave her alone...*"

When PW3 came back and they found the baby was missing they all began to search. The lessor was found on the neighbour's pit latrine. That on 27<sup>th</sup> October 2009, it was Accused 1 who at a time when no one else had that information, told her that she had heard that the baby had been found in a well. She also repeated the same to the mother and later at 3:00pm that day, is when screams were heard from the direction of the well. They went there and found.

On cross-examination this witness told the court that on 22<sup>nd</sup> October 2009 some clothes, bed sheets, accused 2's uniform, sweater disappeared from the clothes line and were brought by one M the following day.

She also said that the baby's clothes were found in a pit latrine behind the house by the police. She confirmed that she did not see the 2<sup>nd</sup> accused leave the home with the baby at any one time.

She also confirmed that at the material time Accused 2 was a Primary School going child, and she PW4 was the only adult in the home. She said even though she alleged Accused 1 had told her she had heard that the child had been found dead, she did not take any action because she believed the child would be found alive. That she did not believe what the 1<sup>st</sup> accused had said.

23. PW12, PIM testified that it was his wife RW who found the body on 27<sup>th</sup> October 2009. He told the court that on that day between 11:00am and 12:00pm he was going to work then he heard screams from the neighbouring shamba. He went there and found a crowd. His wife was fetching water from the borehole when she found the body. He said it was that of a child aged between 2 and 3 years. They reported to the chief who came with police officers and they took the body away but he did notice slight injuries on the forehead.

On cross-examination he confirmed that the body was found by his wife, that he did not identify whose body it was. He said he did not know where his wife was but that the police were very much aware of the problems between him and his wife.

24. The rest of the witnesses either assisted in searching for the baby and witnessed the recovery of some clothes from the pit latrine/the body from the well.

25. It is notable that the police investigation and arresting officers did not avail themselves to testify.

26. For a prima facie case to arise, the prosecution must establish at least the ingredients of the offence and unlawful killing. With malice aforethought and in this case, common intent by the accused persons.

27. No post mortem report was produced. The cause of death was not established. PW2 attended the postmortem examination but the prosecution failed to avail the pathologist to testify to establish the cause of death. Hence though the body of the child was found in a well/borehole there is no evidence before me to connect the 2 accused persons before me with the cause of death. Nothing to indicate whether child died of natural causes/was killed.

28. There is no evidence of malice aforethought on the part of either or both of the accused persons. For Accused 1, the evidence of PW12 indicated that if at all she told PW3 and PW4 around 12:00 noon that she had heard that a baby had been found in a well.

PW12's testimony is that the body was found between 11:00am and 12:00pm. It appears that 1<sup>st</sup> accused if she said those words to PW3 and PW4 she was indicated by the PW12. He said the body was found between 11:00am and 12:00pm.

Accused 1 is alleged to have told PW3 and PW4 about the body of the baby having been found at around 12:00pm and the alarm was raised around 3:00pm that it was the body of the missing baby.

The police did not testify. However PW12 did say that upon the body being found in the well, the chief was informed, then he rang the police, who came and removed the body from the well. It must have been after the removal that it was realized it was the body of the missing child.

Anyone else could have learnt about the finding of the body and spiced the word without saying whose body it was.

Accused 2 is alleged to have heard about the finding of the body from 'Mama M'. From the evidence of PW12, it is clear that there was a crowd when his wife screamed having found the body. The police came later. People could have left from the scene.

In any event, that evidence alone cannot form the basis for charging the Accused 1 with murder. The prosecution needed to have evidence.

With the regard to the 2<sup>nd</sup> accused, it is noteworthy that she was charged four years after the alleged murder. Why? There was no explanation at all.

The murder allegedly happened in 2009. Accused 1 was charged in 2010, the Accused 2 in 2014. Why? The record does not reveal any explanation by the prosecution for the DELAY. It only appears to me that they waited for the accused 1 to become an adult, then charged her. I do not know. That is speculation on the part of this court which is not acceptable but appears to have been one possible reason.

29. With regard Accused 2, her missing school on 22<sup>nd</sup> and 23<sup>rd</sup> October 2009 was put forward as a theory of intent to harm the child. PW3 kept saying she did not know why the girl came home early on 22<sup>nd</sup> and why she did not go to school on 23<sup>rd</sup>. But the school teacher PW10 M W gave a clear explanation the girl was on her periods. She stained her school uniform on 22<sup>nd</sup> and had to leave school with her sweater tied to her waist to cover the stain. Her step mother PW3 had no idea what was going on. She washed her school uniform only for it to go missing. The following morning her step mother ordered her to go to school. She did not go but was instead found washing more clothes a sign perhaps of stained clothes. Clearly there was no love last between PW3 and her step daughter and PW1 her father and his daughter. One can tell from PW1's evidence that the moment he learnt that his baby was missing the first suspect to his mind was his own daughter.

He did not explain why, neither was there any explanation in the case for the prosecution. Her subsequent arraignment in court 4 years after the alleged murder appears to be based on these suspicions.

30. However no amount of suspicion without evidence can support this charge **see Sawe Vs Republic**.

31. Finally there was the issue of the attempt to withdraw the information under section 87(a) of the CPC. I rejected the application by the State because:-

- 1) There was no justification it is against public policy and the rule of law, it would amount to violation of the rights of accused person to an expeditious trial. They had come to court all the while, the State had failed to avail witnesses, had sought and was denied any adjournment and was

now seeking one from the backdoor because this case would continue to hang over the heads of the accused persons for the fault of the prosecution.

2) Section 87(a) of the CPC is not available to the prosecution in a murder trial. The provision is applicable to matters in the subordinate court.

In conclusion, it is my considered view that the demand made in **Bhatt V Republic** on the prosecution has not been fulfilled. I find that no *prima facie case* has been made out against the accused to warrant them being put on the defence. I make a finding of not guilty as required by Section 306(1) of the CPC. *Each accused is to be set at liberty unless otherwise legally held.*

**Dated, delivered and signed in open court this 6<sup>th</sup> Day of December 2018.**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Gichuki holding brief for Kimunya for Accused 1

And Abwuor for Accused 2

Magoma for state

Court Assistant-Jerusha

Accused present

Right of Appeal 14 days

Mr. Gichuki: We apply for release of the sureties

Court: Application is granted effective 14 days from today.

**Mumbua T. Matheka**

**Judge**