



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 83 OF 2011
REPUBLIC.....PROSECUTOR
VERSUS
W C C.....ACCUSED
RULING

The accused **W C C** faces two (2) counts of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the two counts are as follows

*“On 11th day of November 2011 at [Particulars withheld] Village in Kuresoi District Nakuru County murdered **BRIAN KIPEMOI**”*

COUNT NO. 2

*“On the 11th day of November 2011 at [Particulars withheld] in Kuresoi District within Nakuru County murdered **E K**”*

The accused pleaded ‘**Not Guilty**’ and her trial commenced on 23/11/2015. The prosecution called four (4) witnesses in support of that case. **MR MORINDAT** represented the accused.

PW1 R K was the husband of the accused. **PW2 R C** was the senior wife to **PW1** and the co-wife to the accused. However as explained by both **PW1** and **PW2**, the senior wife had left the home having separated with her husband about nine (9) years prior to the incident. Whilst **PW2** was away, **PW1** met and married the accused with whom he bore three (3) children **PW2** told the court that she returned to her matrimonial home. On 8/11/2017 just three (3) days before the incident. Although **PW1** and **PW2** denied it, undoubtedly there was strain in the home due to the return of **PW2**.

On the material day 11/11/2011 the witnesses stated that the whole family took supper together. After that they all retired to bed. **PW1** and **PW2** slept in the sitting room while the accused and her children slept in the bedroom.

At 8.00pm the accused got up and herded her three children out of the house. Upon being questioned by **PW1** the accused stated that she was talking the children outside to relieve themselves.

Suddenly **PW1** and **PW2** heard the daughter of the accused called ‘**N C, PW3** shouting that her mother had thrown her two brothers into the borehole. **PW1** and **PW2** tried to rush out of the house but found

that the door had been locked from outside **PW1** managed to break down the door and rushed outside. He found that the accused had thrown herself into the borehole. **PW1** caught the accused by the arm and pulled her out of the well **PW2** tried to rescue his two sons from the borehole but was unable to reach them. The chief was called and later police came and arrested the accused.

The following day the bodies of the two boys aged 2years and 1½ years were retrieved from the borehole. Police launched investigations into the matter after which the accused was arraigned in court and charged with the murder of her two sons.

The prosecution having closed its case this court must now analyze the evidence with a view to determining whether a '*prima facie*' case has been established to warrant calling upon the accused to defend herself.

The fact of death of thee two young children is not in any doubt. **PW1** the father of the children told the court that he was present when the bodies were retrieved from the borehole.

PW1 also confirms that he attended the autopsy where he identified the bodies of the two children to the doctor.

This case commenced in November 2011 but despite having been given several adjournments the prosecution totally failed to call as a witness the doctor who performed the autopsy on the bodies of the children. Thus the cause of death of the two children remains unproven. The evidence shows that the two boys were thrown into a borehole. The prosecution is therefore inviting this court to conclude that it was this act which caused the death of the deceased. However in order to prove the cause of death beyond reasonable doubt medical evidence must be availed to establish the effect of the action on the lives of the deceaseds.

In the case of **NDUNGU Vs REPUBLIC (1985) eKLR** the court held that

“.....where a body is available and the body has been examined, a post mortem (report) must be produced, the trial court having informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly producing the post mortem examination report as a result of which the Medical Officer who performs the post mortem examination is cross –examined”.

Likewise in **CHENGO KALAMA Vs REPUBLIC (2015) ekIR**, the Court of Appeal sitting in Malindi held as follows:

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt”.

It is clear that save in very exceptional circumstances, cause of death can only be proved by a doctor's evidence and production of a post mortem report. As stated earlier this trial commenced in 2011. There is evidence that an autopsy was conducted on the bodies of the two deceased. Doctor regularly attend at Nakuru High Court to testify when bonded. No reason and/or explanation has been given as to why from 2011 to 2017 no doctor was ever availed to testify in this case. The court cannot be invited to guess as to the cause of death. This is a fact in issue, one that requires proof beyond reasonable doubt.

The failure to bond a doctor and failure to produce the autopsy report in respect of the two deceased children is fatal to the prosecution case. Without such evidence notwithstanding during the strength of any other available evidence a charge of murder cannot stand.

The prosecution case was that the accused threw her two minor sons into the bore hole. **PW3** the

accused's daughter was the only eye witness to the incident **PW3** a child aged 10 years testified in court. She totally denied having seen accused throw her brothers into the well. Indeed **PW3** totally denied the existence of her two brothers. It is quite understandable that due to the trauma of the incident **PW3** may have blocked the whole incident out of her mind. She may have been trying to protect her mother. Whatever the case **PW3** denied having witnessed any incident and she was declared a hostile witness. In the circumstances her evidence was certainly not reliable to prove any fact.

All in all I find that no *prima facie* case has been established against thee accused. I therefore acquit the accused of both counts of murder. The accused is to be set at liberty forth with unless she is otherwise lawfully held.

Dated and Delivered in Nakuru this 7th day of April 2017.

Mr Mwalo holding brief Mr Morintat

Mr Chege for defendant

Maureen A. Odero

Judge