



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 72 OF 2012**

REPUBLIC.....PROSECUTOR

VERSUS

ESTHER NJOKI MUCHUNU.....ACCUSED

**RULING**

The accused **ESTHER NJOKI MUCHUNU** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

*“On the night of 29<sup>th</sup> and 30<sup>th</sup> September, 2012 at unknown time at Silibwet Location Goodfor Village within Nyandarua County, murdered **JANE NGIMA**”*

The accused entered a plea of ‘**Not Guilty**’ to the charge. Her trial commenced on 25/11/2013 before **Hon. Lady Justice Helen Omondi** who heard the first three (3) prosecution witnesses. Thereafter the Honourable Judge was transferred to Bungoma High Court and I took over the matter. A further two (2) witnesses testified before me. The prosecution called a total of five (5) witnesses in support of their case.

The brief facts of the case are as follows. The accused was the mother of the deceased who was a girl aged about 20 years. **PW4 SIMON KAMARU MUTHUI** and **PW5 JASON KARIUKI** were both neighbours of the accused. They told the court that on 29/9/2012 at about 10.00pm they heard a commotion from the home of the accused. They rushed there and found the accused outside her house. She refused to let the two in. **PW5** then called the village elder who came to the homestead. The dead body of the deceased was found lying inside the house. Police were then called in.

**PW2 CORPORAL FREDERICK OPONDO OWINO** was the first officer to arrive at the scene. He told the court that upon arrival he found the accused surrounded by irate villagers. She was muttering incoherently and appeared to **PW2** to be of unsound mind. Next to the house **PW2** noticed a dead sheep and a cup containing blood was near it. Inside the house lay the dead body of the accused’s daughter. Members of public present informed **PW2** that the accused had beaten her child to death. **PW2** drew a sketch plan at the scene which he produced as an exhibit **P. exb 1**.

The body of the deceased was removed by police to the mortuary whilst the accused was arrested for further questioning. Upon conclusion of police investigations the accused was arraigned in court on a charge of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto her defence. She gave a sworn defence in which she categorically denied having killed her daughter. The

accused told the court that on the material night unknown thieves invaded her house at night and fatally assaulted the deceased.

The court must now analyse the evidence on record with a view to determining whether this charge of murder has been proved beyond reasonable doubt as required in law.

The offence of murder is defined by section 203 of the Penal code in the following terms

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.***

In order therefore to prove a charge of murder the prosecution must tender evidence to prove beyond reasonable doubt the following

- (i) The fact as well as the cause of death of the deceased
- (ii) That the deceased died as the result of an unlawful act or omission on the part of the accused
- (iii) That said unlawful act or omission was committed with malice aforethought

There can be no doubt regarding the fact of the deceased’s death. **PW2** who was a police officer told the court that when he arrived at the scene he found a young girl lying dead on the bed. **PW4** a neighbour went to the scene also confirmed having seen the dead body.

**PW1 PETER MUCHUNU WACHIRA** a brother to the deceased told the court that he identified the body of the deceased to the pathologist before the autopsy was conducted. The witnesses who knew the deceased identify her as ‘**Jane Ngima**’.

**PW3 DR. KAMWEYA MWANIKI MACHARIA** testified regarding the autopsy that was conducted on the body of the deceased. **PW3** told the court that upon examination, the deceased was found to have cuts and lacerations on the head, as well as fracture of the frontal parental bone and occipital bone. The cause of death was opined to be ‘**cardio-pulmonary arrest secondary to severe head trauma caused by a blunt object**’. This was expert medical opinion evidence which was neither challenged nor controverted by the defence. It is clear that the deceased met her death due to a vicious and fatal attack around her head.

Having so proved the fact and cause of death the prosecution is required to tender evidence to prove beyond reasonable doubt that it was the accused who fatally attacked the deceased.

There was no eye-witness to the actual assault on the person of the deceased. Both **PW4** and **PW5** claim to have heard a commotion in the homestead of the accused but neither witnessed the events which caused that commotion. Although it has been stated that a son of the accused and a brother to the deceased was in the home at the material time. It seems that no effort was made to have this person record a statement and he was not called as a prosecution witness. This son who was in the home at the material time undoubtedly saw what happened and was therefore a crucial witness. No reason was given for the failure to have him testify. In my view this was a serious omission.

**PW2** in his evidence suggested that the accused was mentally unstable. He went on to suggest that she engaged in occultic practices which led her to kill her own child. Apart from the musings of **PW2** there was no evidence to prove this theory. Nobody saw accused kill her child. **PW2** spoke of a cup full of blood found at the scene. However **PW2** admitted that the blood could have come from the sheep which he found dead in the compound. The exhibits were never taken to the government chemist for analysis, thus it is not known whether this was human or animal blood, or indeed if it was blood at all.

**PW4** told the court that when he and **PW4** went to the scene the accused denied them access. It was only after they called the chief that accused let them in. This chief though a crucial witness was also not called

to testify in the case.

**PW4** went on to state in his evidence that the accused told them that she had beaten the deceased to death. Such a statement if made by accused would amount to a confession. The law governing the admissibility of a confession is to be found in Section 25A of the Evidence Act. Any statement made by the accused which does not comply with Section 25A of the Evidence Act is not admissible as evidence against her.

**PW4** claimed that the accused gave to the chief the stick which she used to beat her child. The chief who received this stick was not called to testify. No stick was produced as an exhibit in court. Further **PW4** contradicted himself severally in his testimony. He claims that he **'forgot'** to mention the issue of the stick in his statement to the police. I do not accept that **PW4** would forget to include such a crucial piece of information in his statement to the police.

**PW5** is no better as a witness. He told the court that in his statement to the police he said he saw a stick with blood on it at the scene. However under cross-examination **PW5** says

***"I did not see any stick at the scene".***

**PW5** confuses things further when he says

***"I do not recall if I saw a stick. I saw the stick. I am not sure if I saw a stick..."***

I was able to observe the demeanour of **PW5** as he gave evidence. He did not strike me as an honest witness. He was shifty and hesitant and had problems answering questions put to him directly. I had grave doubts about the veracity of this witness.

In her defence the accused told the court that on the material night her home was invaded by thugs who broke down her door. The accused herself ran into a maize plantation for safety leaving her daughter behind. Thirty minutes later when accused returned to her house she found her child lying bleeding from a wound from the head. The accused categorically denies having had any hand in the death of the said child.

The defence raised by accused is a feasible explanation of how the deceased met her death. There is nothing to disprove this defence. On the other hand the prosecution case lacks cogency, is full of contradictions and inconsistencies. I find that the prosecution have failed to prove their case beyond reasonable doubt. The defence of the accused places a doubt on the prosecution case. I award the benefit of doubt to the accused and I acquit her of this charge of murder. The accused is to be set at liberty forthwith unless she is otherwise lawfully held.

**Dated and Delivered in Nakuru this 21<sup>st</sup> day of July, 2017.**

Ms Chemgetich holding brief for Kerubo

Mr. Chigiti for DPP

**Maureen A. Odero**

**Judge**