REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 35 OF 2015

LESIIT, J.

REPUBLIC.....PROSECUTION

VERSUS

L N M alias **"C"……..ACCUSED**

JUDGEMENT

1. The accused **L N M alias C** is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that:

> **"On the 22nd February, 2015 in Kosovo area, [particulars withheld] Estate, unlawfully murdered P K."**

2. The prosecution called a total of 7 witnesses in a bid to prove its case against the accused.

3. The prosecution case is that the deceased was a boy child aged 3 ½ years. He went out to play in their Kosovo home on 22nd February 2015 when he returned home at noon, he asked his grandmother, PW3 to hold her as he had a stomach-ache. The child screamed then told his mother, grandmother and PW2 that it was 'C' who asked him to drink 'Muratina'.

4. The deceased was first taken to a nearby private clinic and by then he was limb, weak and could not talk. His eyes were sticking out. He was injected after the doctor declared that the child had eaten dirty food.

5. On returning the child home he became worse and started foaming in the mouth and nose.PW1 and 3 called a woman village elder who decided that 'C', the accused should be called and when asked if she gave the child 'muratina', she said she gave him an empty cup.

6. The deceased was taken to Kiambu Hospital by PW1 and one M and the accused. At the hospital when the nurses there asked what happened to the child, the accused herself explained that she gave the child 'muratina' which she also gave her children as treatment for skin disease. The child did not make it and died upon admission to the hospital.

7.The results of Government Analysis as produced by PW6 were that the child had ingested a substance which had a concentration of 23.3 mg per 100 ml of methanol, a poisonous industrial alcohol and ethanol

to levels of 139.3 mg per 100 mls. These levels were fatal to a child according to the Pathologist and Government Chemist PW4 and 6 respectively.

8. The accused gave a sworn defence in which she said that her children were suffering from chicken pox and that 'muratina' was a cure for that condition. She stated that on the material day she bought some 'muratina' and poured it in a basin outside her house. She then went in to pick her youngest child, a son and took him outside to wash him.

9. The accused stated that she found the deceased playing with the basin where she had put the brew and she sent him away to play with other children. She said that she knew the deceased very well and that her mother, PW1 was her great friend and they lived 7 meters from each other.

10. The accused stated that when the doctor at Kiambu Hospital asked what problem the child had, she told him that they were suspecting that the brew she, accused, used to wash her son was drunk by the deceased. She told the court that she did not give the deceased any brew and added that when she bought the brew to wash her child with it, PW3, deceased's grandmother was present.

11. I have considered the evidence adduced by the prosecution as well as the accused defence. I have considered submissions by both counsels.

12. Mrs. Nyamongo for the accused in her submissions urged that a sample of the alleged 'Muratina' that caused the death of the deceased was not recovered from accused house and that neither was any sample of the substance which caused deceased death produced as an exhibit in court. Counsel further urged that no analysis of the said 'Muratina' was tendered as proof that it was the same portion that the child consumed.

13. Regarding the cause of death, counsel submitted that the prosecution had failed to establish what had occasioned the death of the deceased. Counsel urged that since the pathologist was not able to establish the same, the deceased death should not be blamed on the accused.

14. In regard to the Government Analysts finding, Counsel urged that no ethanol or methanol was found in the deceased stomach and liver which meant that the child had not swallowed the substance as alleged by the prosecution. Counsel urged that the Government Analyst found fatal doses of the two substances in the deceased blood which could have been the cause of death.

15. Regarding investigations, Mrs. Nyamongo urged that the Investigating Officer was unable to find the clinic where the deceased was first treated and injected with some medication. Counsel urged that since the investigating officer was unable to establish the nature of the treatment the deceased received in that private clinic, the accused cannot be blamed for his death.

16. Ms. Njuguna, Learned Prosecution Counsel in her submissions stated that the prosecution had proved the case against the accused beyond any reasonable doubt. Counsel urged that the prosecution had proved malice aforethought under **section 206 (b)** of the **Penal Code** on the basis that when the accused gave the deceased 'muratina', she had knowledge that doing so would probably cause death or grievous harm to the deceased.

17. Ms Njuguna submitted that the accused admitted to the doctor at Kiambu Hospital that she had given 'muratina' to the deceased. Counsel urged that the deceased had implicated the accused at the very beginning when he said that 'Caro' which was the name the accused was commonly known by, gave him 'muratina' to drink.

18. The Learned Prosecution Counsel urged that the substance found in the deceased specimen by the Government Chemist contained methanol, a highly toxic substance to humans.

19. The accused faces a charge of murder, which offence is created under **section 203** of the **Penal Code** in following terms:

"Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder"

20. In order to prove murder, the prosecution must adduce evidence to establish that the accused action leading to death was driven by malice aforethought. The circumstances which constitute malice aforethought are set out under **section 206** of the **Criminal Procedure Code** as follows:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

1. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not,

2. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

3. An intent to commit a felony;

4. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

21. The prosecution relies on the statement by the deceased, accused statement at Kiambu Hospital and expert evidence to prove the charge against the accused as there was no eye witness who saw the accused give 'muratina' drink to the deceased.

22. There is no dispute that 'muratina' is an alcoholic drink which is a traditional brew sold in Mathare area where the prosecution witnesses, the accused and the deceased lived.

23. The defence has made heavy weather of Dr. Njeru (PW4) not being able to establish the cause of death of the deceased until Chemical Analysis were done. PW4 testified that at the initial Post Mortem all organs appeared normal. She therefore gave out the stomach and its contents, the blood, a portion of the liver and the kidney for analysis by the Government Chemist. Upon receiving the toxicology report, she concluded the post mortem finding that the deceased died of ethanol and methanol poisoning. Her report was P.Exh.1.

24. The Government Chemist was PW6, Dr. Njoya. Her Report was P.Exh.4. It shows that there was no methanol or ethanol poisoning in the stomach, liver and kidney of the deceased. PW6 report further indicated that methanol a poisonous industrial alcohol was detected in the blood of the deceased at a concentration of 23.3mg per 100mls of the sample and ethanol at a concentration of 139.3mg per 100mls, which was equivalent to 7 tots of whisky.

25. Mrs. Nyamongo took issue with Dr. Njeru's PW4 findings that the internal organs of the deceased were grossly normal yet Dr. Njoya's (PW6) evidence was that if the substance causing death had been swallowed through the mouth then the same may have had harmful effect on the internal organs of the child.

26. PW6 found the organs submitted to their Department for analysis normal with no poisonous substance. Her evidence was that the Department was not requested to investigate how methanol and ethanol got to the deceased blood. She however stated that it must have gotten to the blood through the mouth. Dr. Njoya explained that if the substance was swallowed, the amount found in the stomach would depend with the time the substance was ingested.

27. In this case the evidence is clear that the child returned home complaining of stomach ache at midday according to PW1. By the time he was taken to Kiambu Hospital where he died it was 5 pm. Those are

five hours. No evidence was led from PW6, Dr. Njoya to give an indication whether a liquid substance consumed through the mouth could still be found in the stomach five hours later.

28. The issue is whether there was a nexus between the accused and the substance which caused the deceased death. The prosecution is relying on the statement the deceased made to PW1, 2 and 3 about what he had taken which was causing him severe pain. PW1, 2 and 3 said that in their presence, when they asked the deceased what he had taken that was causing him pain, he said that 'Caro' had given him 'muratina'. The three witnesses testified that the accused denied it when asked while still in Mathare but that she however admitted to the doctor in Kiambu Hospital that she gave the child 'muratina'.

29. Issue is whether the child's statement implicating the accused was a dying declaration. The answer is that it was a dying declaration for reason it was a statement made in extremity when death was imminent and also spoke of what may have led to death.

30. For that proposition I am guided by the case of **REP V PETER MBURU MUTHONI HCCR CASE NO. 27 OF 2004/ [2005], eKLR** OSIEMO, J. referred to **CHOGE V REP** and observed as follows:

> **"The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See** CHOGE –V- R [1985] KLR 1."

31. A close examination of deceased alleged statement reveals a lot. According to PW1 the deceased stated **"Ni Caro ameniambia nikunywe muratina."** PW2 on her part said that what the deceased said was that **'Caro' gave him 'muratina' and told him to say that she had given him 'muratina'.** PW3 said that what she heard the deceased say was that 'Caro' gave him 'muratina'. The question is whether the dying declaration by the deceased can be relied upon.

32. The question is whether the dying declaration by the deceased can be relied upon. The Court of Appeal in the case of **MICHAEL KURIA KAHIRI V REPUBLIC CRIMINAL APPEAL NO.45 OF 1991** observed:

> **"There is no doubt that the appellant's conviction by the superior court was dependent on the deceased's statements as to her cause of death. The law relating to the weight to be attached to such statements was correctly stated in** PIUS JASUNGA s/o AKUMU –V- REGINA [1954] 21 EACA 331. **In that case the Court of Appeal for Eastern Africa said that although it is not a rule of law that, in order to support a conviction; and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration.**

33. PW1 told the court that the child did not know what 'muratina' was. That would therefore mean that the deceased did not understand the meaning of 'muratina' or its significance. It then would mean that what PW2 stated is more likely the correct version of what the deceased said. That is, that it is 'Caro' who told him to say that she gave the deceased the drink. That also means that if the deceased did not know what 'muratina' was, there is no certainty that indeed he was given 'muratina' by the accused.

34. The alleged admission to a doctor in Kiambu Hospital has been denied by the accused in her defence. She told the court under oath that she told the doctor that they were suspecting that the child took 'muratina'. The accused further explained that she poured 'muratina' on a basin to use it to wash her sick son only to find the deceased playing with the basin.

35. The accused defence retracted the alleged admission to the doctor at Kiambu Hospital. That weakened

the prosecution case against the accused even further. What was required was other evidence, independent in nature, to implicate the accused as having given the 'muratina' brew to the deceased.

36. The prosecution had the burden to adduce evidence to establish that it was the accused and no one else who gave the deceased the lethal substance. The standard of proof for circumstantial evidence as was held in the case of **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135,** is that**:**

> **"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt**."

37. I have examined the entire evidence on record. I find that indeed the deceased drunk some substance which had lethal levels of both methanol, an industrial alcohol used to make things like paint, and ethanol an alcohol meant for humans but at far much lower concentration than one found in the deceased blood. The methanol level was 23.3 mg per 100 ml while ethanol was 139.9 mg per 100 ml.

38. I also found that the substance that PW7, the Investigating Officer seized at a house, said to be the house where accused bought her 'muratina' was not the same substance found in the deceased blood. The one seized from the stranger's house had only 2.15 mg per 100 mls ethanol and no methanol in it.

39. I find that the child was playing outside the house with other children. There was no adult watching him, at least none of her relatives PW1, 2 and 3 were watching him. The chances of the child having gotten the 'drink' from other sources other than the accused cannot be ruled out.

40. I find that the evidence before court was shaky and therefore cannot lead to a conclusion that it was the accused and no one else who gave the deceased the lethal substance leading to the deceased death.

41. In conclusion, I find that the prosecution has failed to prove the charge against the accused on the required standard of proof beyond any reasonable doubt. I therefore give the accused the benefit of doubt and acquit her for this offence under section 322 of the Criminal Procedure Code.

DATED AND SIGNED AT NAIROBI THIS 13TH JULY, 2017.

LESIIT, J.

JUDGE.