



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 38 OF 2012

REPUBLICPROSECUTOR

VERSUS

VERONICAH KAREI M'ITIMITU.....ACCUSED

JUDGMENT

The accused person, Veronica Karei M'Itimitu is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the charge are that on 25/4/2012 in Tigania West District, murdered **E M K**. The case proceeded to full hearing with the prosecution calling a total of 6 witnesses. Karei testified on oath and called one witness.

The deceased was aged about 9 years old. According to **PW1 J M** aged 13 years and **PW2 J M** aged 12 years, together with M (deceased), went to cut grass for their cows at Karei's farm at about 9.00 a.m. on the fateful day. PW1 said that Karei found them in her farm and he advised the others that they should run but M said he would ran when Karei was near; that Karei threw two stones at them but missed them but the third stone hit M on the back of the neck; that M fell and screamed; that Karei picked him up, put him on her back and went with him to her home. They followed to find out what had happened to M and found Karei fanning M but he did not wake up; that she then put him on her back and took him to hospital accompanied by another lady – Karambu. Later, they learnt that M died. PW1 said that their father had sent them to cut grass but not necessarily on Karei's land. PW1 said that they did not have Karei's permission to cut grass on her land. He denied that it is the children who threw stones at Karei.

PW2 corroborated PW1's evidence as to how Karei found them cutting grass in her farm, threw two stones at them and the third stone hit M who got injured.

PW3, Harriet Karambu told the court that on 25/4/2012 about 10.00 a.m., she heard children screaming and saw them running. She then went to find out and saw Karei a neighbour, carrying a child near her gate. She enquired from Karei what the problem was and she informed her that she had found the children cutting her grass and when she talked to them, they were shocked and that M fell and she was taking him to Hospital. PW3 accompanied Karei to Ngundune Clinic but were referred to Meru General Hospital and after a short while, they were informed that the child had died. PW3 denied seeing any injury or blood on the deceased save for the presence of soil was in his mouth.

PW4, D K is the father of the deceased He said that on 25/4/2012, he left his children at home while heading to his other farm, but he was called by somebody who informed him that he had seen somebody

carrying his child. He followed them to Hospital where he found the child had died and noticed an injury at the back of the neck which was swollen. He later identified the body to the Doctor before post mortem was done.

The Investigation Officer in this case, **CPL James Okoth (PW5)** received a report of the child's death. He visited the scene where he found grass had been cut and took possession of it. He also visited the body of the child at Mithene Hospital and transferred it to the Meru Hospital Mortuary. He observed the deceased's body which had a swelling behind the left ear. He found many stones at the scene and could not identify which one hit M.

The post mortem was conducted by **Dr. Janet Tungani** and the report was produced in court by **Dr. Nicholas Koome** of Meru Referral Hospital. The Doctor found a swelling on the left posterior neck just above the shoulder. Internally, there was haematoma on the left anterior chest wall from the 2nd to the 4th ribs and the left side of the neck. The Doctor was of the opinion that the cause of death was haemorrhage from major blood vessels from the left side of the neck secondary to a blunt trauma.

When called upon to defend herself, accused testified on oath that she knew the child before together with the parents as they are neighbours. She said that on the fateful day, she was returning home with one Evangeline when she informed her that there were people in her farm. She saw that the children including M and M were cutting grass which she had not permitted them to do; that the children saw her and started to run towards the road. She heard M scream because she had fallen. She went where M had fallen, picked him up; that the place is rocky as evidenced by the photographs DEX.No.1 (a)-(d); that she found M had fallen on the stones and was unconscious; that she picked and took M to Hospital but he was pronounced dead on arrival and she reported to Nkundune Police Station; that it is the Assistant Chief who wanted her arrested because she had testified against him in a case between him and his wife. She denied having thrown any stones at the children. Accused denied that J was present at the scene.

DW2, Jane Nkirote is a daughter to Karei. She said that accused's land is steep and stony and identified the photographs as showing the accused's land. She only heard of deceased's death, went to the hospital where accused had taken the child; that the doctor gave them a letter indicating that the child was anaemic and dehydrated.

After the close of the defence case, Ms. Nelima, Counsel for the accused submitted that the prosecution had failed to prove that accused had malice aforethought; that the children were stealing accused's grass and she scared them away; that the stones used were small; that accused's conduct after the offence proves that there was no malice aforethought; that accused never ran away but took the child to Hospital. Counsel's submission was that accused should not be found guilty of murder.

In reply, Mr. Mulochi, Counsel for the State submitted that there was ample evidence to the effect that the stone that Karei threw inflicted the injury that caused the death though she did not admit to that fact in her defence.

To establish a charge of murder, the prosecution has the duty to prove beyond reasonable doubt;

- 1. The death of deceased;**
- 2. That the accused caused the death through an unlawful act or omission;**
- 3. That the accused had malice afore thought.**

In the instant case, the death of the deceased is not in doubt. The post mortem revealed that the deceased had an injury on the posterior part of the head (neck) and the Doctor explained that that must be the injury that caused the death because it damaged the major blood vessels. The Doctor's findings are supported by the evidence of PW1 and 2 who told the court that the deceased was hit on the back of the neck with a stone. PW3 who observed the deceased's body confirmed the above. Death of M is not in dispute.

Whether accused inflicted the fatal injuries on the deceased: PW1 and 2 who were both minors were subjected to a *voire dire* examination by the court and found to be intelligent enough and understood the meaning of the oath and therefore testified on oath. The evidence of the two was corroborated in all material particulars and was not shaken in cross examination. PW1 and 2 remained consistent in all their testimony that they were indeed harvesting grass from accused's farm without her permission when she found them and threw stones at the deceased who had remained behind as they fled, and that it is the 3rd stone that hit the deceased behind the neck. In fact, their evidence was consistent with the accused's defence that there were stones in her farm and that is why the Investigations Officer could not identify which stone may have inflicted the fatal injuries. Both PW1 and 2 further said the deceased fell after being hit with a stone. The injury that caused the death – the one at the back of the neck is consistent with PW1 and 2's testimony. The stone was flung at the deceased at a close range of between 10-15 metres and that is why it was able to cause damage to the major blood vessels on the neck.

The Doctor told the court that the injuries on the chest, which might have been sustained after the fall, were not serious as to cause death but the injury on the neck which involved major blood vessels. Unless the deceased may have fallen from a steep slope many metres high, a mere fall was unlikely to cause the fatal injuries. I believe PW1 and 2 were truthful.

The defence seemed to suggest that Karei merely scared the children away, but did not explain how she did it. By picking a stone and aiming it at the child, three times cannot be meant to scare the children because the consequences of throwing a stone are to hit the target, which was achieved. Karei also alleged in her defence that Jesse PW2, was not at the scene but when PW2 testified, that issue was never put to him. Further, Karei alleged that she had disagreed with the Chief and that may be the reason she was framed up. Again, that allegation is an afterthought because it was never raised during the prosecution case.

Whether accused possessed malice aforethought: Section 206 of the PC defines malice aforethought. In brief, malice aforethought is an intention to do grievous harm or to kill. In this case, the accused came home only to find that the children were in her farm harvesting grass without her permission. To put it carefully, they were stealing her grass. It is not something they had done there before. She then picked stones and threw at the children. Her reaction was instantaneous as there was no time for her to put in place a plan or intention to do harm to the child although she acted negligently by throwing stones. Even after the child fell, her actions clearly show that Karei never intended to do serious harm to the child. She injured the child, but regretted it immediately by picking up the child and taking him to hospital. Karei had no intention to do grievous harm to the child or intention to kill him.

There being no proof of malice aforethought, I find that the prosecution has failed to prove the ingredients of murder but has proved that Karei caused the death of the deceased but unintentionally. I therefore find her guilty of the lesser charge of manslaughter contrary to **Section 202 of PC as read with Section 205 of the PC,**

I convict her accordingly.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MAY, 2016.

R.P.V. WENDOHO

JUDGE

12/5/2016

PRESENT

Mr. Mulochi for State

Mr. Kaumbi for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused