



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 56 OF 2012

REPUBLIC..... PROSECUTOR

VERSUS

1. S M M
2. C W M.....ACCUSED

JUDGMENT

The two Accused persons are charged with the offence of murder contrary to Section 203 as read with Section of the Penal Code.

“The particulars being that a day between the 16th day of September and 19th September, 2012 at [particulars withheld] within Taita – Taveta County, murdered J W”.

The prosecution called eleven (11) Witnesses.

PW 1 L M had taken their parents cattle to the pastures when he discovered some dug holes at their neighbours shamba. The following day they found the holes having been covered with soil. They reported the matter to their parents who in turn reported the matter to the area village elders, assistant chief and police. It is the prosecution case that when the holes were dug the body of the Deceased was recovered together with her clothes.

The two Accused persons, husband and wife do not deny that the body that was recovered in a hole in a part of their shamba was that of their daughter **W M**.

Their defence is that they had sent their daughter (the deceased) to visit her grandmother at [particulars withheld] and they were not aware of her predicament only to be surprised when the body was retrieved from a hole in some section of their shamba (farm).

Under Section 203 of the Penal Code murder is defined thus,

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

Malice aforethought is the operative word here.

Section 206 of the Penal Code provides,

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;-

(a) An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) 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 to commit a felony

(c) An intention to commit a felony

(d) An intention by an act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

In the present case no Witness saw the Accused persons kill the Deceased and conceal her body in holes dug in their compound. The evidence against them is therefore circumstantial in nature.

In the case of **MWANGI -VS- REPUBLIC CRIMINAL APPEAL NO. 132 OF 1983** the Court of Appeal held,

“(1) An offence of murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed.

(2) In a case depending exclusively on circumstantial evidence, the Court must before deciding upon a Conviction, find that the inculpatory facts are incompatible with the innocence of the Accused and incapable of explanation upon any other hypothesis than, that of guilt. It is also necessary before drawing the inference of the Accused guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. The facts surrounding the first appellants possession of the property of one of the Deceased persons and his posing as the Deceased were not compatible with the appellants innocence and inconsistent with any other conclusion”.

In the MWANGI case,

“The three appellants were Convicted by the High Court of the charges of murder and were Sentenced to death. The evidence against the first appellant was circumstantial in nature, in that being a nephew of the Deceased who lived with the Deceased family, had either sold or given some property of the Deceased son, who had also been killed, and lied about the whereabouts of the Deceased and her son a few days after the Deceased and all her three children were murdered and secretly buried in their garden. The first appellant was adversely mentioned in the second appellants statement under inquiry”.

It is common ground that the Deceased **W M** was a girl child aged 4 years old, whose body was found buried in a grave about 200metres from her parents home.

Exhibit No. 6 contains of pictures showing the grave and onlookers and other pictures showing the Deceased and two sacks from where the body of the Deceased had been placed.

This is a rectangular grave measuring 2.4 feet deep.

It is not the kind of a hole which can be made by mineral prospectors as alluded to, on account of the area containing some minerals. The grave has clear clean rectangular sides which may go to show that

the person digging it was not in a hurry. PW 1 a son of the neighbour had spotted the hole of the grave before it was filled on 19th September, 2012 with soil.

PW 2 the father of PW 1 had on 20th September, 2012 after receiving information from his son proceeded to the scene while in the company of one **K M (PW 3)**, they confronted the first Accused who was wearing clothes inside out. They enquired from him what was in the hole and he told them that his grandmother had ordered him to cover the hole with soil and that there was nothing concealed inside. When confronted by the Area Assistant Chief, the Accused persons said that the child was at her Aunts place a fact which was denied by the area chief who was a relative. Later the 2nd Accused told them that the first Accused had killed the child and had her buried in their compound.

The Doctor who carried out the postmortem examination found no obvious external injuries. The body was decomposing, he was of the view that the cause of death was suffocation.

The question that comes to mind is whether there was a possibility that another person or persons killed the Deceased and buried her in the farm of the Accused?

The conduct of the Accused persons speaks volumes. The deceased was their child. In their defence they told the Court that they had sent their daughter to her grandmothers home at [particulars withheld].

When confronted by his neighbour PW 2 and the area assistant chief the first Accused had told them that he had been ordered to cover the hole by his grandmother and that there was nothing concealed inside. When the hole was dug the body of his daughter was recovered from the said hole.

His neighbour PW 2 and the area Assistant Chief PW 3 respectively bore no grudge against the Accused (none was adduced in evidence). They had no reason to lie in Court so as to fix him and his wife. The grave was dug 200 metres from the homestead of the Accused persons. They cannot be heard to say that they did not know of its presence therein. A hole can be burrowed by wild animals but they do not cover them. A covered hole ought to raise suspicious more so when it was covered in the cover of darkness.

The Accused persons did not bother to check out the holes and what was concealed inside most probably because they knew of the contents.

If its correct as alleged that they had send away their daughter aged four (4) years to [particulars withheld] to the home of their grandmother, as reasonable parents they ought to have been alarmed by the presence of a hole or holes in their farm which were covered with soil.

A person who buries another one while alive has the intention of suffocating him or her to death and this falls squarely under the definition of malice aforethought.

The evidence of the Doctor is that the cause of death of the Deceased was cardio respiratory arrest due to suffocation. The circumstantial evidence before the Court points irresistibly to the guilt of the two Accused persons.

The deceased was under their custody. She was a small girl of four (4) years old. They had access and the opportunity to kill and conceal her body. The body was recovered in a hole in their farm.

Any person can draw the inference that murder was committed and by the Accused persons. If another person had killed their child and buried her in their farm they should have been the first persons to have reported the matter to their neighbours and to police. I have carefully evaluated their defence to the effect that they had sent the child to her grandmothers home at [particulars withheld]. If indeed they did so they ought to have made a follow up so as to ascertain whether the child had arrived there or not, more so, when the child is aged four (4) years.

There is no evidence to that effect and the prosecution Witnesses denied this and in particular PW 5

an Assistant Chief at Mwatate did testify that when he interrogated the two Accused persons they said that the child was at their Aunts place, they contacted the area chief who is a cousin of the said Aunt and the chief told him that there was no such child sent there.

I am of the considered view that the defence by the Accused persons has no merit. The Court finds the two accused persons guilty as charged of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

Judgment delivered signed and dated this **12th** day of **March, 2014**

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M. MUYA

JUDGE

12TH MARCH, 2014

In the presence of:-

Learned State Counsel Miss Kagori

Learned defence Counsel Mr. Mushelle

Court clerk Mr. Buoro