



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
HC CR 26 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

LYDIA KAARI.....ACCUSED

RULING

1. The accused **LYDIA KAARI** is charged with murder contrary to section 203 of the Penal Code. The particulars of the offence are that on 17th November, 2008 at Nduruma Location Kaongo Sub-location, Meru Central District, Eastern Province murdered BONIFACE KOOME MWITI.
2. The case was heard partly by Apondi, J, who heard the evidence of the father of the deceased and PW2, a brother of PW1 and uncle of the deceased. After Apondi, J, left the station, this case was taken over by Makau, J, on 20th February, 2013, the Hon. Makau J, ordered the case to start de novo.
3. I started the case de novo on 8th April, 2013. I heard 3 witnesses. PW1 James Mburugu testified that he sold wipe out, a chemical that dries grass, to the accused on 17th November, 2008. PW1 identified a bottle, P exh 1, as the chemical he sold to the accused.
4. PW2 was Dr. Stephen Bengo who produced a post mortem examination Report filled by Dr. Macharia at Meru General Hospital. It was in respect of deceased in this case, a boy child of 7 years. The doctor found nothing abnormal with the deceased, both internally and externally. The doctor formed the opinion that organophosphate poisoning was suspected and he gave samples for chemical analysis. The report is Pexh 2.
5. PW3, P.C. Mugo, was the co-investigating officer of this case. He visited the home of the deceased with I.P. David Abima, who was the head investigating officer. They collected the body of the deceased. They also took a container, P exh 1. PW3 said that he forwarded the bottle together with its contents and samples of the kidney and stomach of the deceased to the Government Analyst. The Exhibit Memo form was P. exh 3. The Government Chemist's Report was not produced in evidence.
6. PW3 testified that he got the accused in Isiolo with the assistance of the father of the deceased. The father of the deceased, John Mwit, was PW1 in trial before the case started de novo. PW3 stated that the said John Mwit died between 2011 and 2012 after "mob justice" and so could not testify in this case. No evidence was adduced to prove the death of the father of the deceased. .
7. The Prosecution has the burden to prove that the accused is the one who, by some act or omission caused the death of the deceased. No evidence has been led to show what caused the deceased's death. The post mortem Report P. exh 2 was inconclusive. The Doctor's opinion was that there was suspected organophosphate poisoning. The doctor proceeded to remove samples for chemical analysis.
8. PW3 testified that he did send the kidney and stomach specimen and a bottle with content found next to the deceased body (Pexh1) for analysis. That is proved by P. exh 3 the Exhibit Memo

- form. The Government Analysts Report showing the results of the analysis of the kidney, stomach and the bottle was not produced as an exhibit.
9. Without the results of the analysis of the kidney and stomach specimen and of the bottle P. exh 3 we are left in the dark as to the cause of deceased death. The prosecution needed to show that the samples of deceased kidney and stomach, and indeed the contents of the bottle P. exh. 1 had the phosphate the doctor suspected was the cause of death of the deceased. There is no evidence to show whether the deceased kidney and stomach had phosphate. Neither is there proof that the bottle P. exh. 1 had phosphate.
 10. Apart from falling short of establishing through evidence the cause of deceased death, the prosecution had no direct evidence against the accused. The only evidence was by PW1 that the accused bought “wipe out” a chemical that dries up grass from him on the same day the deceased died. That evidence creates suspicion but is not evidence to prove death was caused by the “wipe out”.
 11. Not to mention that there was no evidence to show deceased ingested the chemical, and more importantly that the accused gave it to him; or by some omission on accused part, motivated by an intention to harm or cause the deceased death, led to deceased ingesting the said chemical. All these facts were not established. The prosecution failed to discharge its burden of proof against the accused.
 12. This was an unfortunate case as we are told that the father of the deceased died before he could testify. However, he testified in the initial trial against the accused. All his evidence showed was that he left his son whole and well with the accused. The accused was his wife and step-mother of the deceased. His evidence shows that when he returned home, he found the deceased dead and his wife the accused, missing. He also testified that much later the accused called him seeking reconciliation and forgiveness for deceased death.
 13. The alleged confession without proof of deceased cause of death is still insufficient to found a conviction. There was need to have evidence to show that the deceased died for unnatural causes, not just suspicion. The cause of death should have supported the alleged confession. It fell short of same.
 14. Having carefully considered this case I find that the prosecution failed to establish a prime facie case against the accused to warrant the court placing the accused on her defence.
 15. **Consequently I give the accused the benefit of doubt at this stage and acquit her of murder contrary to section 203 of the Penal Code under S.306 of the Criminal Procedure Code.**

DATED AND DELIVERED AT MERU THIS 17TH JULY, 2014.

LESIIT, J,

JUDGE