



REPUBLIC OF KENYA

High Court at Embu

Murder Case 15 of 2009

REPUBLICPROSECUTOR

VERSUS

PENINAH THARA ACCUSED

RULING

PENINAH THARA hereinafter referred to as the accused is charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that the accused on 10th July 2009 at Kavairi village, Kirie sub-location Mutitu location in Mbeere North District within the Eastern Province murdered Jefrin Wawira.

The Prosecution called a total of 11 witnesses. The accused was first arraigned in Court on 23/7/2009 but it was not until 28/5/2012 that the matter took off as a hearing. The brief facts of the case are that P.W.3 (Judith Mboya Kithaka) who is the mother of the deceased left the latter (aged 15 months) under the care of her 2 older children (P.W.7 and P.W.8). This was on 10/7/2009 at 12.30pm. On arrival at 6pm she was informed by P.W.7 and P.W.8 how the accused (her neighbour) had come home, caned P.W.7 and later hanged Jefrin on a mango tree. The children P.W.7 and P.W.8 removed Jefrin from the tree and took her inside the house. Thereafter they went to report to P.W.2 how the accused had beaten them. P.W.2 went out to look for the accused to explain why she had beaten the boys. The boys never told him anything about Jefrin. Reports were made and accused was arrested and charged. The doctor (P.W.1) who produced the post mortem report on behalf of Dr. Okenwa found the cause of death to be ***asphyxia secondary to a blocked airway secondary to strangulation***.

The evidence of P.W.5 and P.W.6 is that they had interacted with the accused in the day at the river and parted ways and rejoined again.

Mr. Githinji Ken for the accused submitted that the evidence of the Prosecution witnesses was contradictory. And that the evidence of P.W.7 and P.W.8 was evidence of 2 minors. And that the mode of strangulation had not been indicated in the post mortem. He cited the case of ***KARISA KWISA MONI & ANOTHER CR. APPEAL NO.220/07 COURT OF APPEAL AT MOMBASA*** to support their submission of no case to answer.

The Prosecution case is based on the evidence of P.W.7 and P.W.8 who are minors. When they testified on 28/5/2012 **Livingstone** (P.W.7) was aged 5 years while **Bensah** (P.W.8) was aged 9 years. It therefore means that at the time of the offence P.W.7 was about two years old while P.W.8 was about 6 years old. Theirs was therefore evidence of two minor children. Section 124 of the Evidence Act provides;

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the

evidence of alleged victim admitted in accordance with that section on behalf of the Prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.”

From this Provision of the Law and the following authorities its clear that the evidence of a minor and/or a child of tender years must be corroborated for it to form the basis of a conviction. The Proviso to this section only applies to offences under the Sexual Offences Act.

REF: 1. KAVISA KAVISA MONI & ANOTHER (Supra)

2. KINYU -V- REPUBLIC [2003] KLR 294

3. KINYUA -V- REPUBLIC [2004] KLR 301

4. ONSERIO -V- REPUBLIC [1985] KLR 618

A Court faced with evidence of a minor or minors must look for independent evidence to corroborate the minors evidence. And the Independent evidence cannot be that of another minor.

P.W.2 is the one who first received P.W.7 and P.W.8. This was around noon and the accused had already left with P.W.2's mother. It is P.W.2's evidence that the boys just complained to him that the accused had beaten them. He further stated that they never mentioned to him anything about Jefrin the deceased. The evidence of P.W.8 is that he reported to P.W.2 that the accused had killed the deceased and P.W.2 came to their home and saw the dead child. P.W.2 maintained that the 2 boys never told him anything about the deceased. The evidence of the two boys on how they removed the deceased from the mango tree is also contradictory.

In cross examination P.W.3 had told the Court that she and her husband had tied a piece of lessa on a mango tree. This is the piece of string that had been used to hang the deceased (EXB 1). She did not explain why they had tied that piece of lessa on the tree. Besides these two minors there is no independent person who saw the accused go to the home of the P.W.3 where the deceased was. Children of the ages of P.W.7 and P.W.8 then i.e. two years and six years are children who need proper care. They were left alone at home to take care of their 15 months old sister. There was this piece of lessa tied on the mango tree by P.W.3 and her husband for whatever reason. Could it have been these children who may have done this to their sister or was it the accused? Why did the boys find it easier to report to PW.2 about their being beaten by the accused and say nothing about their sister?

I am unable to find any independent evidence to corroborate that of P.W.7 and P.W.8.

Would it then be safe to say that the Prosecution has established a prima facie case? Prima facie evidence is evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced. The commonly asked question which the Court must deal with is whether the evidence adduced would sustain a conviction in the event that the accused person elected to keep quiet and offer no evidence in his/her defence. My take on this is that the fact and cause of death in this case have been established. However the Prosecution has failed to produce evidence, sufficient enough to connect the accused with this killing of the deceased. Placing the accused on her defence would amount to asking her to prove her innocence.

The burden of proving one's guilt is on the Prosecution. It has never shifted. For my part I do find the charge against accused not proved to warrant me place her on her defence. She is found not guilty and acquitted under section 306(1) Criminal Procedure Code.

Orders accordingly.

DATED AND DELIVERED AT EMBU THIS 11TH DAY OF APRIL 2013.

**H.I. ONG'UDI
J U D G E**

In the presence of;

Mr. Githinji Ken for accused

M/s Ingahizu for State

Accused

Njue