



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Case 6 of 2010

REPUBLIC v DORCAS MUTANU KYALO

JUDGMENT

PW1, **Nyamai Munguti**, a brother in law to the accused testified that on 7th January, 2010 at about 8.30 pm his nephew **Calvin Mbatha** (PW3) came and told him that the accused wanted to see him. Accompanied by his wife, he proceeded to the accused's house where they found her with her 5 children. Among these children 2 were hers biologically whereas the other 3 were her step children from her husband's previous marriage. Among the children was the deceased who they found lying on the floor. The accused told them that she had punished the deceased for having stolen money. She had beaten her with a walking stick. The deceased appeared dazed and had blood on her legs. Seeing her state, they went to call their step mother, **Anna Syombua**. When they came back, they found the accused with all the children save, the deceased gone. The deceased had passed on though. They went looking for her as they screamed. Eventually they found the accused in the house of a neighbor, **Patrick Nzomo** (PW2). Later the accused was re-arrested by police from Matuu Police Station.

PW2, **Patrick Nzomo Mutunga**, at about 10pm on 7th January, 2010 was retiring to bed when he heard his dogs barking. He came out and about 100 metres from his house; he saw the accused and 4 children. He knew them as they were neighbours. The accused told him that she had been sent away by PW1 and was on her way home. He allowed them to spend the night in his house so as proceed to her parent's home the following day. Soon thereafter he heard screams. He called PW1 on his cell phone who asked him to go to his house as there was a problem. He rushed there and in the group of many people entered the accused's house. They came upon a lifeless body of the deceased. Her clothes were blood stained. Since he had left the accused in his house, he took aside a member of community policing and a member of the family and told them about the whereabouts of the accused. They told him not to disclose that information to anybody else fearing possible lynching of the accused. The 3 then proceeded to the house of PW2 where the accused told them that she had not intended to kill the deceased. She had only meant to punish her. When the mob came by the information that the accused was in the house of the witness, they swamped it with intent of lynching the accused. However, the local assistant Chief intervened and calmed the situation. He left with the accused whom he later handed over to the police.

PW3, **C.K.**, is a twin brother to the deceased. On 7th January, 2010, he returned from M Primary School where he was a pupil and found his sister, the deceased being interrogated by the accused, a stepmother in the house. The accused was demanding Kshs. 300/= from the accused. When the deceased refused to part with it, she descended on her with a walking stick and beat her senseless. She was beating her on the legs, hands and head. Overwhelmed by what he saw, he ran out of the house and went and stood at the window. He observed as the accused continued to assault the deceased. The beating went on until 8pm. At about 6pm he left the window and entered the house. At this time the accused and deceased had locked themselves in the bedroom. At about 8pm, the accused opened the bedroom and the witness entered. He found the deceased unconscious on the floor. He felt her chest and there was no heartbeat. The accused then sent him to call PW1. When PW1 came, he asked the accused what he had done and he left. Immediately the accused packed her clothes and asked him and other children to accompany her. They came across the home of PW2 who allowed them in to spend the night. After a while, PW2 came with a crowd of people and the accused was arrested. They were then taken home. The following morning, police came and collected the deceased's body.

PW4, **Dr. Joakim Mulwa** conducted the post mortem on the body of the deceased on 12th January, 2010. He noted multiple bruises all over the body, especially around the right clavicle bone, upper limbs, right side of chest wall, entire back, both thighs and lower limbs. There was also a cut wound on the right leg. Internally, there was slight hemorrhage on the base of the right lobe. On the head, though no fractures were noted nonetheless there was haematoma at the vortex. As a result of the examination, the doctor formed the opinion that the cause of death was cardiopulmonary arrest after severe assaults sustaining multiple external injuries. He could not though establish the cause of death from internal appearances of body. In his honest opinion, the external injuries were such that they could not have caused death. Internally, there were visible injuries that could not have contributed to death either.

PW5, **I.P. Harriet Kinyai** was the investigating officer in this case on 8th January, 2010 at around 5.30 pm, she received a report made at Matuu Police Station by an Assistant Chief regarding the death of the deceased. In the company of **Cpl Omukaka** and **PC(d) Lehomon**, they proceeded to the scene. At the scene, they entered the house of the accused and found a dead body of an 11 year old lying on the floor in the bedroom. Besides, the deceased wore bloodstained blue shirt which she collected. There was also a walking stick which she again collected on suspicion that it may have been used in committing the offence. She saw on the body of the deceased clear bruises on both legs and arms. She collected the body to Matuu Nursing Home where she noted bruises on the buttocks after her clothes were removed. Back at the station she called the accused from the cells and interrogated her. She admitted punishing the deceased on account of her having stolen Ksh. 300/= from a nearby church. She then took the accused to **C.I. Macharia** of Kithimani Police Station to take her confession. She tendered in evidence the walking stick and a blue shirt.

The final witness called by the prosecution was PW6, **Benedict Munguti Delango**. He was the paternal grandfather to the deceased. He identified the body to PW4 for purposes of postmortem.

She stated that she is married to **Charles Munguti**. Together they had 7 children, 2 biological and 5 from **Munguti** previous marriage. The deceased was among the 5 children. She was attending Kwa Mulinga Primary School in class 3. On 7th January, 2010, she failed to go to school claiming that she had head pains. At about 9am she took her to the nearby dispensary and she was given Panadol tablets. They had lunch whereupon the deceased went to fetch water at about 12.30pm in the company of a neighbour's child. She came back at about 7pm. When given food by the accused she started crying claiming that she had been assaulted by another young man at the river. As they were eating, she started vomiting and retired to bed. Apparently, she had been hit by the young man on the legs. At around 10pm, the deceased called her complaining that she was feeling a lot of pain in the legs. Because of her truancy, she picked a walking stick and beat her. She promised to go to school the following day.

Cross-examined by **Mr. Mwenda**, learned State counsel she stated that she was not persuaded that the deceased was actually sick. As far as she was concerned she was being truant. She conceded that she beat her once at 10pm with a walking stick. She claimed that PW4 had lied in his testimony. The deceased had gone to the river but came back without water and the jerrican. She had been injured on the legs only. She had hit her once on the leg which had not been injured. She did not know how the doctor had come by the injuries in the post mortem. PW2 did not find the deceased sleeping on the floor. She was infact on the bed. She denied caning the deceased in the presence of PW3.

Section 203 of the Penal Code defines murder as the causing, by a person or persons with malice aforethought, the death of another person by an unlawful act or omission. From the foregoing, for an accused to be convicted of murder, the prosecution must prove by cogent evidence and beyond reasonable doubt the 3 ingredients for murder;

The death of the deceased and the cause of such death,

§ § Dealing with the first element, there is no doubt at all that the deceased passed on. There is overwhelming evidence proving that the death of the deceased actually occurred. Indeed there is a post mortem report tendered in evidence confirming that fact. Nor has the accused discounted that fact. If anything she confirmed the fact. However, PW4 was not categorical as to the cause of death. I shall revert to this finding later in this judgment.

However, notwithstanding the foregoing, the issue as to the cause of death of the deceased has not been determined nor resolved. The post mortem opines that the death of the deceased was caused by cardio pulmonary arrest. However, the doctor is unable to state categorically that the injuries both external and internal he observed on the deceased were the cause of such death. In his own words;

“In my honest opinion, the external injuries were such that they could not have caused death. Internally there were visible injuries that could not have contributed to the death of the deceased as well”.

Even if the reverse was correct, where was the intention of the accused to kill the deceased? Ordinarily this is what is called *mens rea*. Section 206 of the Penal Code gives instances when such intention, *mens rea* or malice aforethought may be inferred:-

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

a. **harm is caused or not, or by a wish that it may not be caused;**

c. An intent to commit a felony.

d. .

The offence of murder too can be established where the accused does an act which causes death which is intrinsically likely to cause death or grievous harm to the deceased. The question here then is whether the accused had the foresight of the consequences for her acts. I do not think so. Considering that smacking or chastising a child once in a while in order to instill discipline is an acceptable way of bringing up children, the accused cannot be said that she intended to commit a felony by her actions.

JUGMENT DATEDASIKE-MAKHANDIA

JUDGE