



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Case 59 of 1995

REPUBLIC..... PROSECUTOR

- Versus -

KHADIJA SALIM ACCUSED

JUDGMENT

The charge facing the accused person in this case is Murder contrary to Section 203 as read with Section 204 of the Penal Code.. Cap 63 Laws of Kenya.

Section 203 states:

"Any person who of malice afore-thought causes the death of another person by an unlawful act or omission is guilty of murder."

The particulars of the charge facing the accused are these:

"KHADIJA SALIM, on the 28th day of February 1994 at unknown time at Kisauni village in Mombasa District within the Coast Province murdered POPO ABDUL KADIR".

The evidence laid to prove that charge came from 13prosecution witnesses. In summary there was P.W.1 - RIJA MOHAMED ABDILLAHI (RIJA) -the mother of the deceased P.W.2 - CHIKU ABDULKADIR CHIKU) – the first born daughter of Rija and sister of deceased p.w.3 C.PL LUCAS KANJA (CPL KANJA) of Nyali Police Station Crime Section who was present during the Postmortem examination and collected some organs of the deceased for delivery to the Government Chemist p.w.4 DR KISHORE MANDALYA (DR. MANDALYA) the Doctor who carried out the post mortem examination of the deceased's body

P.W.5- DR. ERICK JAMES MAINA (DR. MAINA)the Psychiatrist who examined the accused' state of mind for pleapurposes.

P.W.6 ANTHONY KOMBO (KOMBO) the Government Chemist.

P.W.7 CI GEOFFREY WAMBUA (CI WAMBUA) of Nyali Police Station who ordered the arrest of the accused and obtained an exhumation order of deceased

P.W.8 OMARI HIRIBAE ALI (ALI) a nephew of the landlord who was present at the exhumation and subsequent post mortem

P.W.9 SHABAN MOHAMED MUSA (MUSA) the Retail Shopowner at Kisauni from whom the alleged

poison was purchased

P.W.10 MWANAMISI BUBU SAID (MWANAMISI) the neighbour who alleged to have smelt Diazinon as food was being moved by the accused

P.W.11 VELERIA SAVALA HARE (VELERIA) another neighbour who alleged to

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have smelt diazinon in the kitchen and the whole, house

P.W.12 - SALIM ALI HIRIBAE (HIRIBAE) the Landlord/Houseowner who also assisted in collection of the deceased's body and burial

P.W.13 CATHERINE WANGECHI GACHOKI (CATHERINE) the nurse/clinical officer at Bakarani Hospital where the deceased was first attended before transfer to Coast General Hospital,

Before the afternoon of 28th February 1994, Popo Abdulkadir (the

deceased) was a healthy normal, three and a half year old girl

playing with other children in Kisauni, Mombasa. It was a Monday.

But by 7 p.m. that evening, she was dead.

She was staying with her mother, RIJA (P.W.1) in a Swahili house within Kisauni village. It was described by the owner, Hiribae (P.W.12) as a house with six rooms and two stores. Each room is rented to different persons who reside there with their wives and children. Hiribae himself occupied two of the rooms with his family. All the occupants used a common toilet, bathroom and one cooking area or kitchen. Each had their own cooking apparatus in that area which was open with access by anybody. According to Rija, all the tenants and the landlord and his two wives are Muslims. There are also two other tenants who are Christian.

The fateful day fell on the Muslim period of Ramadhan. That is the period when Muslims fast from having meals until the fast is

broken in the evening. •

On that day at about 12 noon, Chiku (P.W.2) came home from School. She had been to school with her younger sister, Hadija and a young cousin known as Malik. They found other neighbours' children and the deceased. They joined in the play with those children outside.

In the house was the house girl, now the accused. She had been employed by Rija earlier in the month on 2.2.94. At the time she was aged about 17 or 18 years. She was employed to perform various chores in the house including cooking and taking care of the children.

At lunchtime, Chiku said the accused called the four children to go into the house to eat their lunch. The lunch was the pilau that was left over by the family the previous evening. She made an attempt to eat it

but detected a bad smell and taste. She then told the other children not to eat the food and they all went out. The deceased was however called back inside by the accused and according to Chiku was fed on the food. Thereafter, again according to Chiku, the deceased started foaming in the mouth and falling down.

The accused accompanied by another boy of the neighbourhood called Sonny, rushed the deceased to Bakarani Hospital nearby. The Clinical Officer on duty, Catherine (P.W.13) remembers it was 3 p.m. and the child was in a coma. She tried to bring him round with an injection but was unable to. She referred them to Coast

General Hospital where the child died whilst undergoing treatment at about 7 p.m.

There is no difficulty in determining whether the fact of death was proved beyond doubt. On this there was the evidence of the mother, Rija, (P.W.1), who said she took a matatu at about 5 p.m. when she was told the child had fallen sick and headed for Coast General Hospital and found the deceased in the casualty ward. The Doctors were busy treating the child. By 7 p.m. the child had died. She was given the body at 10 p.m. the same evening and after performance of Muslim rites, it was buried the following day at 4 p.m. at Kisauni Sokoni cemetery. At the collection of the deceased's body the mother was accompanied by the Landlord Hiribae (P.W.12). He identified the deceased.

When it became necessary to exhume the body of the deceased, and an order was obtained from court for that purpose on 9.3.94, Ali (P.W.8) was involved in the exhumation. Two days later, he identified the same body to Dr. Mandalya (P.W.4) for post mortem on 11.3.94. Present at the exhumation and post mortem were Cpl. Kanja (P.W.3) and Cpl Wambua (P.W.7).

The two assessors were unanimous that the child who died on 28.2.94 is the same one whose body was exhumed on 9.3.94. The fact of death was therefore proved beyond doubt and I concur. The more serious question is what was the cause of death. It is also a more difficult question to decide. That is because there is no direct medical opinion on the cause of death. Such opinion

would have come from the Pathologist who performed the autopsy, Dr. Mandalya. But he was forthright that it was not possible to determine the cause of death. That is because the body was extensively decomposed. The other medical opinion would have come from the Government Chemist who examined various organs removed from the decomposed body. That was Kombo (P.W.6).

On 16.3.94, he received from Cpl Kanja specimens of intestines, stomach and contents, and liver. Dr. Mandalya had said in his evidence that the specimens taken for examination were, blood, liver, kidney, stomach and contents, and intestines and contents. It would appear therefore that only three of those specimens were forwarded to the Government Chemist. Mr. Kombo detected "Diazinon" in the stomach contents. He explained that "Diazinon" was an organophosphorus pesticide. That means a chemical which contains phosphorous, which in turn is a poisonous chemical compound. It kills bedbugs and other living organisms. The name "Diazinon" is not a trade name but refers to such chemical.

The best Mr. Kombo could do however by way of an opinion on the cause of death was to say that the chemical could have been the cause of death. He explained that he was not a Pathologist and he therefore used the words "could have been" because it was not conclusive. There were no soil contents given out for examination. The quantity taken in the body was not checked, and he was not in a position to tell what intake of such chemical was fatal for humanbeings, Some people may survive after taking the chemical, others may not. It is used for killing pests.

The other medical personnel to see the deceased was Catherine, (P.W.13). She was the Clinical Officer at

Bakarani Hospital when the child was taken there at 3 p.m. The child was in a comatose condition at the time and was frothing from the mouth. She also had concussion. No proper history on what had happened was given to her. She gave the child an intravenous injection to resuscitate her but there was no improvement, Catherine also noticed the child was passing some blackish stool, kind of diarrhoea. That is when she referred the matter to Coast General Hospital. There was no Clinical examination record to verify those observations. There was no evidence adduced from Coast General Hospital either to show the connection between the observations made by Catherine and the subsequent death of the child four hours thereafter.

One of the assessors Donald William Mbotela found on this issue that the specimen taken from the deceased for examination by the Government Chemist appeared to have been tampered with since not all of them reached the Government Chemist. More importantly the cause of death was not stated with finality by the Pathologist. Neither the Medical report from Bakarani and Coast General Hospitals were available to clear such doubts. In the event there were reasonable doubts as to what caused the death of the deceased. The other assessor Grace Otenyo was of similar views and was of the opinion that in the absence of conclusive medical proof there was no certainty on the issue of cause of death. I defer to these opinions as it is clearly the evidence that there was no conclusive evidence on the cause of death.

As to who caused the death of the deceased, the prosecution set out to prove that it was beyond any reasonable doubt the accused person. In doing so however, they did not tender direct evidence that it was indeed the accused who administered the organophosphorous substance into the stomach contents of the deceased, if such was the cause of death. Instead the prosecution relied on circumstantial evidence.

Circumstantial evidence has been likened to a chain or rope where each link or strand in the chain or rope must be carefully tested and if in the end it does not lead to the irresistible conclusion of the accused's guilt, then the whole chain or rope must be rejected.

As to the burden of proof, in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts or facts tending to show the guilt, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. All along the accused has no burden to prove her innocence since the burden is always on the prosecution to prove the guilt and it never shifts. The accused is entitled to remain silent and no adverse inference can be made out of that.

If the prosecution succeeds in tendering such evidence to such standard, then circumstantial evidence is as good as any direct evidence to prove the offence charged.

On the evidence on record, Rija P.W.I, stated that she had no reason to connect the accused with the death although she had been told by Catherine P.W.13 that it appeared that the child had taken poison. She said nothing about what the Doctors who treated the deceased at Coast General Hospital had advised her was wrong with the child, but when she conferred with the landlord, Hiribae, they both agreed it was not necessary to have any postmortem carried out on the body or to delay the burial. According to her the child may just have picked the poison from anywhere outside. They collected the body and carried out the Muslim ceremonies of KHITMA (citing of the Quran and food) and funeral. Burial was at 4 p.m. on Tuesday 1.3.94.

On arrival at home from work on 27.2.94 at 5 p.m., Rija had been told by Chiku that her child was very sick as she was foaming in the mouth and could not stand. That is when she rushed to Bakarani Hospital. There was no mention from Chiku at the time, of any poisoned food having been fed on the deceased by the accused. Chiku herself said she had given her mother the information on what had happened during the day. If Rija was told anything about the deceased having been fed on poisonous food that day by the accused, she neither confirmed it nor took any action to inform the police immediately. That was before the child was buried. It is also possible that Chiku did not inform her about the poisoning theory.

Then something happened on the third day after the burial and ceremonies, that made Rija start piecing together suspicions she had and information gathered from others, which convinced her that it was the

accused who had the motive to kill and did in fact kill her daughter. It is not clear how she received the initial information. According to her it was on 3.3.94 when the owner of the shop, MUSA (P.W.9) sent for her to go to his shop. He had sent Mwanamisi, a fellow tenant of Rija's. It is there that Musa asked her whether she is the one who had sent the accused to buy rat poison and bedbug poison. The shopkeeper told her that the accused had bought those poisons. That is when she started weeping and informed her own parents about the suspicions. They advised her to call the police that evening and she did. On 4.3.94 the accused was arrested.

On his part, Musa recollects that, it was not him who sent for Rija, but Rija who went to his shop and asked him whether he had sold any poison to the housemaid (the accused). That was the 2nd day after the death. He confirmed that she had bought rat poison and bedbug poison.

Musa had in his evidence in chief testified that he knew about the sickness of the deceased at 1 p.m. He had received information that the child was seriously sick and was foaming in the mouth. He did nothing upon receiving that information. He also received information that the child had been taken to hospital and had died the same day. He then stayed for one day and on the second day is when Rija went to enquire about the poisons. In cross examination however he said he did not know about the death until he received the news on the 2nd day when the mother (Rija) went to his shop to enquire about the poison. He also denied in cross examination that the accused returned to his shop after the death of the deceased but on being shown a statement he recorded with the police on 12.3.94 where he said she had, he again denied he said so.

In the evidence of Rija herself in cross examination, she said, Musa's shop is about 100 metres away from her house. Musa himself said it was the third building from Rija's house. She also testified that Musa attended the funeral and also the Khitma of the deceased. Khitma was performed at 7.30 p.m. on 1.3.94. But on both occasions the shopkeeper (Musa) did not talk to her nor her to him. It was on the 3rd day that he sent for her, she said,

Mwanamisi who is said to have been sent to call Rija gave evidence as P.W.10. She ultimately admitted that she was lying to the court. On whether she is the one who was sent to inform Rija to go and see Musa, she said she was sent to the shop by her mother on 28.2.94. But all she says happened when she was there was the shopkeeper asking her whether she had heard there was a death in the neighbourhood. She made no mention of having been sent to call Rija. In passing therefore I express reservations on the matter of how Rija came by the information, which I find inconsistent and I doubt the veracity of such evidence.

Whichever way the information reached her, Rija must have connected the buying of the poison, with the accused and therefore with the death of her daughter. She saw a motive for it, which I will refer to shortly.

Musa the shopkeeper testified that the accused went to his shop on 27.2.94 and bought milk, sugar, half bread and some other items. She also asked whether there was rat poison called REDCAT and she bought one powder sachet of it. This is the same day Rija testified she asked the accused to prepare tea at 5 p.m. because the end of the fast was near. The accused said there was no milk and was given 20/= by Rija to go and buy it. That evidence of Musa stands on its own in the record.

Musa further testified that the accused returned to the shop on 28.2.94 and bought milk, bread and sugar. She then said the rat poison did not work since the rats were still going round the house. She asked for Diazinon which is a bedbug poison. She did not have enough money and left 20/=. At 10.30 a.m. she returned with the balance of 25/= and she took away one little bottle in liquid form. Two and a half hours later (1 p.m.) Musa heard that the child the accused was staying with called Popo was seriously sick and was foaming in the mouth. He did nothing after hearing that,

It was Musa's evidence that he explained to the accused how to use REDCAT poison but he did not explain how to use Diazinon. Although Rija said she gave out money to the accused before going to work that day, she did not say how much and what items of food she wanted bought for the day.

The next link in the chain after the purchase of Diazinon was from Chiku. Instructions had been given by Rija before she went off for work on 28.2.94 that the children should be fed on the pilau left over the previous evening. It will be recalled that Chiku and the other children had arrived from school as narrated above and it was Chiku's evidence that they were playing outside when they were called into the house by the accused to eat their lunch. That is when she tasted and smelt something bad on the pilau and told the other children not to eat it. They went out. She did not say she saw the accused feeding the deceased on the pilau. Having gone out of the house she would not have witnessed that. And if she did it is unlikely that she would have said nothing about it to the accused.

Chiku was aged about 10 years when the incident occurred. She was born in 1984. At the time of giving her evidence she was aged 12. She was in standard 5. So she was in standard 3 in 1994. I conducted an oral examination to test her level of intelligence and to determine whether she understood the meaning of an oath. I determined that she was intelligent enough but allowed her to testify without taking an oath. That meant that her evidence needed to be corroborated or supported in material particulars by other admissible evidence.

On this aspect her evidence stands alone. The other children, Hadija and Malik were not called to testify. Perhaps they were too young to do so as they were even younger than 10 year old Chiku. She did not know what a police station was or that she recorded a statement in one. She could not recall going to some place with her mother to explain what happened or telling that person that the accused gave them rice and soup for lunch. In the end in cross examination she said on the day her sister died she could not remember what they ate, . She did not accompany the accused, and one Sonny, a boy in the neighbourhood, as they took the deceased to hospital, Sonny was not called to give evidence either.

Two more links were introduced through Mwanamisi (P.W.10) and Veleria (P.W.11).

Veleria was sick in bed on 28.2.94. She is a tenant in the same building. At 4 p.m. she rose to go to the toilet and passed near the kitchen. At the time there were many people cooking in the kitchen area. According to her, there are nine people renting the house which has 9 rooms. She went back to bed only to return to the toilet again as she felt like vomiting. It was on her way to the toilet that she found the deceased vomiting. She asked the maid (Accused) what was wrong and the accused said the child was not feeling well. The accused was at the time cooking chapati and "sima". It was about 4 p.m. So Veleria advised the accused to take the child to hospital. After that she prepared porridge for her own child and went back to bed. It was Veleria's evidence that she went near the area where the accused was cooking. When she was cooking, the entire house was smelling "Dawa" like "Diazinon" the bedbug killer. Nobody told her where that smell was coming from and she did not follow up the matter. The kitchen and the whole house of 9 rooms was smelling. The nine rooms she said were occupied by different families and children.

The people who were cooking at the same time with the accused were Malkia Salim, one of the wives of the landlord, and Hashora Salim. She did not know what these other women were cooking.

Then finally there was Mwanamisi (P.W.10) who as I stated earlier had admitted to having lied to court or at best having said different things to the police on 11.4.94 and other things to the court when she gave evidence on 5.3.97. To the police that she went to Rija's house to help them carry items to make way for mourners who were visiting the bereaved. The accused then called her into the bedroom and served her with food in a big plate. Mwanamisi smelt the food and was smelling of rat killer poison. She asked the accused whether she knew who had poisoned the food but she said she did not know. To the court that she heard noises coming from Rija's house at 8 p.m. on 28.2.94 and she went to check. She found other neighbours removing items from one room to another saying a child had died. She found out it was Popo and then started assisting them to remove the items and she returned to their house. That is when she was sent to the shops by her mother and met Musa the shopkeeper.

The following day, she said, she found the accused cooking a dish of "pojo" or "green grams" and another dish. She then smelt poison in that food like Diazinon as the accused was moving the food to a place she did not know.

Mwanamisi admitted what she told the court was not true and on that score her evidence is of little probative value.

It is on that circumstantial evidence that the conclusion has to be drawn whether or not it was the accused who acquired and administered the "Diazinon" found in the stomach contents of the deceased.

The evidence on that issue was carefully considered by both assessors. Mr. Mbotela was of the view that the evidence of Rija was unclear as it comprised two versions; that death at first was natural and then three days later that it was caused by another person, the accused. He was of the view that the evidence of the minor, Chiku, appeared, to have come out through coaching. The shopkeeper's evidence was contradictory and Mwanamisi lied to court. An important person mentioned in evidence, Malkia Salim was not called as a witness. All in all the chain of events from the time of death to burial is not consistent enough to sustain the charge laid. On her part Ms. Otenyo was skeptical about Rija's evidence as it was not explicit on how she came to connect the accused with the death. Between her and Musa, their evidence was not consistent. She found the evidence of Chiku uncorroborated and not worth believing as she had been briefed on what to say. The evidence of Veleria and Mwanamisi is contradictory and as regards the latter, tainted with admitted lies.

Both assessors were of the firm view that the issue of who caused the death of the deceased was fraught with doubts and they were not satisfied it was the accused, as alleged in the charge, who was responsible.

Once again I defer to these opinions as I have evaluated the evidence myself and reached the same conclusion.

I found no corroboration of the evidence of Chiku as by law required. I found considerable difficulty in reconciling the evidence of Rija and Musa the shopkeeper which does not combine to form an unbroken chain of credible events. There is little probative value in the evidence of other prosecution witnesses on this aspect, one of whom is a confessed liar. It would also appear that a possible suspect in the offence, if any was committed, one Malkia Salim, was never introduced into these proceedings for reasons best known but undisclosed by the prosecution. She had been mentioned adversely by the accused to the police during investigations,

Even if the prosecution had established that the accused was responsible for the death I would find it difficult to conclude that malice aforethought, which is a necessary ingredient of the offence of murder, was proved.

It was sought to prove through Rija that the accused had the motive to commit the heinous crime of poisoning and killing the entire family. And the reason for doing that was because a few days earlier Rija had suspected that the accused was involved in the theft of her household and personal effects. Five lesos, two curtains, one full dress and one "Hijab" or Muslim headscarf had all gone missing from the house since the arrival of the accused as the housemaid on 2.2.94. Some utensils, 3 plates, 2 cups, 2 saucers, hairpins and tray had also disappeared within the same period. They were all worth about 5,000/=. After discussing the matter of theft with the landlord, Hiribae, Rija decided that she would look for her items by subjecting the accused to the Muslim oath of "Albadiri". It was for this reason that the accused wanted to poison the whole family.

She said an attempt was made by the accused on 27.2.94 at 5 p.m. when the accused was asked to make tea just before the break of the days fast. That is when she went to the shop and bought rat poison which, according to Rija, she laced the tea with. As soon as the signal for breaking the fast went, Rija poured the tea which was in the thermos flask to drink. She drank half the cup but felt a different taste and smell. She called the accused and asked her why she was not drinking tea but the accused said she was busy in the kitchen. She also asked the accused why the tea had a funny smell, and the accused told her it had been prepared by another neighbour because she had to go to the shops to buy ginger and when she returned she found that neighbour having taken the tea from the jiko. She poured it into the flask and took it into the house. At that time, Rija said, there were many people cooking in the common kitchen.

She denied Rija's story about household items having been lost and her being suspected and being threatened with an oath of Albadiri. All these she said were lies. She could not understand why Rija was telling such lies because they were all along in good terms. The landlord was never asked to ask her anything about lost items and he did not say so in his evidence either. She denied any connection with any Kamba woman at Changamwe. She denied having bought any rat poison from the shopkeeper Musa on 27.2.94 or poisoning the tea made that evening. The tea was not poured down but was drunk by everybody including herself. Everyone also ate the pilau she made that day. On 28.2.94 she also cooked chapati and "pojo" and everybody ate.

She denied that Rija had told her to feed the children on the left over pilau for 27.2.94. That pilau was eaten by neighbours' children. The children took tea instead and did not want to eat lunch. The small child took porridge while the bigger ones said they would fast. She never forced anyone to eat pilau. She denied the version of events as narrated by Chiku.

There is one thing she admitted having done on 28.2.94 however. That was going to the shop of Musa to buy some food items and also Diazinon. But she explained that she was called by the wife of the landlord - one Malkia Salim - as she left for the shops and was given Shs. 200/= by her. She was requested to buy Diazinon which she did and brought it back to Malkia together with the change. The Diazinon was not hers therefore and she does not know how Malkia Salim used it. At no time did she cook any food which emitted the smell of Diazinon to the whole house or at all. The neighbours who said so were lying.

The accused said she told the police all these things when she was arrested and placed in custody for three weeks before she was charged. It is not denied by the prosecution that she made a statement to the police. She particularly told the police about having been sent by Malkia Salim to buy the Diazinon for her. Apparently the police do not appear to have crosschecked that assertion and the prosecution did not call Malkia Salim to discount the accused's version of events. The presumption of law that evidence which could be but is not produced, would if produced be prejudicial to the party who withholds it, would apply in this case. The failure to call Malkia Salim, who it was in evidence was the third wife of the landlord and was present during this period and was indeed one of the women said to have been cooking in the common kitchen on the material day, was a withholding of material evidence, hence attracting the presumption.

The behaviour of the accused all along on the material day and the few days thereafter before her arrest is relevant.

She had taken care of the children since she was employed earlier that month. She is the one who rushed the deceased to hospital on noticing that she had fallen sick. The Clinical Officer, Catherine, described her demeanour when she saw her at Bakarani hospital as being distressed and worried. She wanted the doctors to see the child first. She was concerned about the health of the child. At the Coast General Hospital as they waited for the Doctors to treat the child she cried together with the mother. She was still crying later that evening after the shock of hearing about the death of the child when the mother, Rija, was making arrangements to go and pick the body from the hospital for burial. She was ordered to stop crying and cook for the other children and she did so.

She continued to work until 3.3.94 on which day Rija says she had asked for permission to go home. It was also on that day that Rija received information about the purchase of poison and decided to call the police who came the following day and arrested her. But the accused said that it was not true that she sought leave to go home. It was Rija instead who had told her that she would go home on 3.3.94. She did not want to go home or run away because there was nothing to run away from.

I have carefully considered this entire evidence together with the accused's evidence in her defence and submissions of Counsel. I am one with the assessors that the charge laid against the accused has not been proved beyond reasonable doubt. Only the fact of death has been proved beyond reasonable doubt. There is no evidence either to draw any inference that the lesser offence of manslaughter was committed by the

accused.

In the result I acquit the accused of the charge laid. She will be set at liberty unless she is otherwise lawfully held.

Dated at Mombasa this 4th day of September 1998

P.N. Waki

JUDGE