



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 9 OF 2019 (MURDER)

CORAM: OUGO J

REPUBLIC	PROSECUTION
VERSUS	
FMM	ACCUSED

JUDGMENT

- **1. FMM**, the accused in this case, is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 23rd March, 2019 at Marani Sub-County within Kisii County, she murdered **PMM**.
- 2. In a bid to prove its case against the accused, the prosecution called six witnesses. Its first witness was the accused's husband, **KMC** (PW1) who claimed that the accused person had killed his child who was about 8 or 7 months old at the time of her death. He recalled that on 23rd March 2019, he left for the bar after work and went back home at about 12:30 p.m. He found the accused watching the television. He greeted her, put his shopping in the kitchen and went to sleep.
- 3. The following day, was a Saturday the accused came at him with a knife while he was sleeping threatening to stab him. She asked him whether he had been sleeping with their nanny and asked him to wake up and leave. PW1 managed to snatch the knife from her. He testified that the accused was holding the children who were crying at that time. She went outside with the children using the back door. From the sitting room window, PW1 saw that the well was open. He sensed danger, as the accused person had earlier on threatened that she would throw herself in the well. He went out and heard cries from inside the well. Luckily DW2, who was the accused person's friend was passing by the gate. He called out to her and she came in and began screaming.
- 4. PW3 entered the well which was about 30 meters deep and removed the older child. PW1 told him that the younger child was still in the well. PW3 went back in and removed the younger child. The older child was rushed to hospital and survived but the younger child died. PW1 rang his uncle who was a police officer and the child's body was taken to the mortuary. PW1 testified that the accused, who was pregnant at the time, was the last one to be removed from the well. She was also taken to hospital.
- 5. PW1 told the court that when he went to record his statement at Makaye Police Station, he was accused of throwing his family in the well and arrested. He told the officers that he had a CCTV camera. He managed to access the CCTV the next day. He put it on and his lawyer, relatives and other parties watched what the accused had done. They saw that the accused ran into the well. The 1st child tried to get away but the accused ran after him, caught him and threw him inside then she threw the 2nd child inside.
- 6. During cross examination, PW1 insisted that he was loving to his wife. He denied that he beat the accused daily or that he was a perpetual drunkard. Although he admitted that he had been drinking that night, he denied that he was drunk. PW1 denied that the people who lived where he stayed feared him. He also denied that he placed restrictions on his wife or that he suspected his wife of having affairs. He claimed that he had installed the CCTV cameras for security purposes although he admitted that he was not rich. He admitted that he had not slept with the accused in the same room for 3 years. He claimed that they slept separately because of the children. He insisted that the accused had not run away from him that morning and that he had put the knife he grabbed from her in the sink. He also denied erasing the part of the video that showed him chasing after the accused.
- 7. PW1 stated that he had attended the deceased's post mortem and knew that the cause of her death was an injury to the head and that she did not drink the water in the well. When he was referred to an extract of an Occurrence Book dated 27th December 2017, he claimed that the same was due to a housebreaking and had been the main reason he had put up the CCTV. He denied that he had ever pushed the accused out of a moving vehicle or that she had been called on many occasion to settle his bar bill because he did not have money. PW1 informed the court that the accused had taken out a loan of 1.2 million the previous year and it had been stolen. According to him, the accused was distressed due to financial issues.

- **8. Marita Ndunko Orungo** (PW2) testified that she had done housework for the accused person for 2 years. She used to go daily to the accused's house and look after her 2 children. PW2 recalled that on the day the deceased died, she had gone to get water when she heard people screaming from the accused's home. She ran there and found the accused inside the well. PW2 stated that by the time she got there, the children had been taken out of the well and had been taken to hospital.
- 9. PW2 told the court that she did not know how the family lived but had observed that when PW1 left for work, he never returned home early. She confirmed that in her statement, she had indicated that she used to take the children away because of PW1's drunkenness and his bad habits. She however went back on her statement and testified that she had never witnessed any of PW1's bad habits and stated that she did not know whether the accused and PW1 had gone to the area chief to discuss their issues. She recalled that the accused had once asked her to call for someone who sold CDs to her but she did not know what they spoke over.
- 10. The accused's neighbour, **David Nyanwago Momanyi** (PW3) testified that he was at home when they heard screams from a neighbour that fateful morning. They were informed that the accused had thrown herself inside the well. On getting to the scene, he realized that the people at the well were pulling at the generator. He stopped them and got inside the well. He knew that PW1 had one child. He pulled out the first child but was informed that there was another child. He went back inside the well and pulled out the other child and then pulled out the accused with the assistance of other people. During cross-examination, PW3 testified that he did not know whether his friend PW1 fought with his wife. He also did not know whether PW1 was perpetually drunk but stated that he usually was in school.
- **11. Doctor Morebu Peter Momanyi** (PW4), a senior medical officer attached to the Kisii Referral Hospital testified that he had conducted a post mortem on the deceased's body on 2nd April 2019 at the Hema Hospital mortuary. The deceased was an African female about ten (10) months. He observed salient fractures on the head and subgaleal haematoma on the occipital region of the head with intracranial haemorrhage. He explained that this meant that there was bleeding under the skin of the head on the posterior part and there was bleeding inside the skull in the brain. His conclusion was that the deceased succumbed from severe injury due to a blunt force trauma on the head. During cross examination, Dr. Morebu stated that the child had not drowned. He indicated that there was a possibility that the child had died elsewhere as bleeding on any part of the body was a gradual process. He also stated that a blunt force trauma could be caused by a metal or a fall from a height.
- **12. P.C. Paul Ochieng'** (PW5) a digital forensic examiner, from the DCI Cybercrime Forensic Unit recalled that the Unit received a request letter from the DCI Marani Sub County on 11th July 2019, for a digital forensic examiner to travel to Marani sub county to retrieve, analyse and make a report on a CCTV footage which was located in the homestead of PW1.
- 13. On 1st August 2019, PW5 and Elisha Chirchir, another digital forensic examiner proceeded to the homestead. Mr. Chirchir retrieved the video files from a digital video recorder make H/A vision model No. DS7104HGHIF1 and serial No. 0420170516AA WR76 4467198WCVU. The compound had 4 cameras but the incident had been captured by camera 3.
- 14. The survey of what was captured on the material day between 07.56. 16 a.m. and 07.56.20 a.m. was a woman wearing a white top running towards the borehole whilst carrying a child, followed by a child wearing a blue and red coloured T- shirt. At 07.56.20 a.m. the woman was captured throwing the child wearing the red and blue coloured T-shirt inside the borehole, followed by another child wearing a white cloth before she finally jumped into the borehole at 07.56.21 seconds.
- 15. One minute later at 07.57.08 a.m. a male adult was captured walking casually to the borehole. He tried to talk to the person inside the borehole and tried to pull the rope before walking towards the gate and opening it for another female adult at 07.58.33 a.m. At 08.00 a.m. members of the public were captured entering the compound and walking towards the borehole. At 08.06.10 a.m. the CCTV captured the 1st child being rescued from the borehole by the public. At 08.12.55 am the CCTV captured the 2nd child being rescued from the borehole. At 08.39.07 a.m. the CCTV captured the woman being rescued from the borehole being given first aid and being given a blue dress and then carried away from the scene.
- 16. During cross-examination, PW5 reiterated that there were 4 cameras. Camera No.3 covered the gate and the borehole, Camera No.2 covered the backside of the house, Camera No. 1 covered the sitting room in the house and Camera No. 4 covered the entrance to the main door. He stated that they had viewed the whole footage but only retrieved and analysed the footage from Camera No.3. which captured the incident and did not concentrate on the footages that did not cover the incident. PW5 stated that according to the footage, the woman was running towards the borehole but he could not tell what she was running from.
- 17. CPL Naboth Otieno Ondaro (PW6) who was formerly based at the DCI Marani within Kisii County recalled that on the material day while at the CID office at Marani they were informed that a murder had taken place in Bigege Location within their area of jurisdiction. He proceeded to the scene with other officers and found many people there including police officers from Makoya police base. They were briefed by the area assistant chief that the accused had thrown her 2 children into the well within the compound but they were in doubt. They arrested PW1 and took him to the DCI office at Marani for further investigations. PW1 denied throwing his family into the well and told them that it was the accused person who had done it. He indicated that he had a CCTV footage of the compound. They proceeded to the scene with PW1 and counsels and retrieved the CCTV footage which enabled them to arrest the accused and charge her with the offence of murder.
- 18. During cross examination, PW6 stated that they had only been shown 2 CCTV camera at the front part of the house and the gate and were not shown the ones at the back. He confirmed that the accused had been admitted at Kisii Hema Hospital and Dr. Mutinda who was treating her, had written a report indicating that she was suffering from depression. He also admitted that he had received information from the area assistant chief that the accused and her husband fought and that he had tried to resolve the matter.
- 19. At the close of the prosecution's case, the court found that the accused had a case to answer. In her unsworn statement, **FMM**, told the court that she had relocated to Nyamira County from Homa Bay under medical grounds and that she had been hospitalised under psychiatric depression and the psychiatrist had requested her to stay with her parents.

- 20. She told the court that when she got married in 2013 she stayed in Homabay and her husband stayed in Kisii and they would meet over the weekends. She took out a loan and bought a piece of land at Mosocho where they built a house together in 2015 and began living together. They began having issues from that point. Her husband became abusive and would beat her up and throw her out of the house. She informed her parents who told her that all would be well.
- 21. The accused recalled that she had once sustained injuries and had to seek treatment from Mosaic clinic. She decided to stay at Oyugis for some time. PW1 went to her place of work at Oyugis and asked her to return home saying that he would not abuse her anymore. PW1 had already told her not to stay in Master bedroom. She moved back and stayed in the guest room. At one point her younger brother had moved in with them but PW1 said that he did not want her relatives in the house so her brother moved out.
- 22. She gave birth to her son in 2016. After 2 months her husband began abusing her. He would go home drunk and if he found something had not been done, he would beat her up and tell her to leave his house. She recalled that when her son was 4 months old, PW1 held her neck and threatened to kill her. The following day, she decided to go back to her place of work and stayed there with her son. After 2 months, she went to the children department office seeking PW1's assistance in taking care of the child. They told her to go back to the area chief to explain why she wanted to be separated. The chief asked that he see both of them with the community policing. PW1 apologised and told the chief he would not abuse her. The chief asked the accused person to go back to her house as her husband had said that he would change. She did not get the letter from the children's department.
- 23. The accused testified that PW1 was very cruel to her and even brought women to the house. At one time she had caught him with a woman in the house. When she went back, they maintained their arrangement of staying separately. She in the master bedroom and him in the guestroom. They had no intimate relationship as she had been told that he had partners in the village. She testified that PW1 once forced himself on her and she had conceived the 2nd child. She claimed that PW1 installed the CCTV when she went back. He restricted her from having friends and did not want anyone in the house. If anyone went to the house, he quarrelled her so she decided not to let anyone come. She recalled that vendor selling gospel music CDS went to their door and she had informed PW1 about him. PW1 viewed the CCTV footage and claimed that the person was her sexual partner. The accused asked her nanny to come with the vendor and PW1 told off the man.
- 24. She testified further that PW1 and his parents would call her asking her to pay his bills. The accused told the court that she decided to stay for the sake of her children. The chief told her that he could not manage her husband's issue as he was abusive and arrogant.
- 25. The accused recalled that on 23rd March 2019, her son had told her that his father slept with the nanny. She confronted PW1 about what she had heard. PW1 rudely confirmed that he slept with the nanny and asked her to get a better father for the children. He started beating her up. She realized that PW1 had a knife. She picked up the younger child and tried to get out of the house. She managed to get out of the house and that was when she was told that she had thrown herself and the children in the well. She was hospitalized for some time and Dr. Mutinda wrote a report which she identified. The accused told the court that she had no intentions of killing her child. She told the court that she was staying with her son who kept pleading with her not to go back to PW1.
- **26. Irene Kwamboka Ogengi** (DW2) who had been the accused's friend and neighbour for 3 years recalled that on the material day, she heard the accused screaming. She went to her place and heard people in the well. The accused's husband was asking her to hold the rope so he could help her up. DW2 went out to get assistance from people who helped the accused come out of the well. She told the court that the accused had once called her at about 1.00 a.m. and informed her that her husband wanted to beat her. DW2 testified that the accused had slept at her home twice in 2018. She knew they had disputes but did not know their cause.
- **27. Fidelis Oweri Nyaata** (DW3), the chief of Obuseru South Location where the accused resided, recalled that 26th November 2018, at 8.00 a.m. the accused went to his home claiming that she had been beaten by her husband PW1. She told him that she wanted to return to her mother's home. DW3 called PW1 and talked to him. He told the court that he had heard PW1 telling the accused that he could cut her into a million pieces and throw her to the dogs. He cautioned PW1 who promised that they would try and stay in peace. In December, 2017 the accused went to him crying. She told him her house had been broken into and she had almost been killed by her husband who had chased her with a knife. He advised her to go to the police station. He however admitted that although they had held many meetings to solve the marital issues, he did not keep minutes.
- 28. On the day the deceased died, DW3 was called and informed that people had been thrown into the well at the accused's home. He testified that he found PW1 seated in the house, and wondered why PW1 was in the house yet his family was in the well. PW1 began fighting him and the people at the scene saying that he did not want to see them.
- **29. P.C. Lydia Mose** (DW4) who was attached to Nyakoe police station produced OB No. 10 and O.B No. 11 which were both dated 17/12/2017. OB No. 10 read "Housing breaking and stealing." She stated that the report had been made by the accused person. OB No. 11 talked of a threat of 16th December 2017. Since she was not in the station at the time, DW4 could not tell whether there was a follow up and whether PW1 had been charged with an offence or not.
- **30. Doctor Mutinda Nduku** (DW5), the County Psychiatrist based at Kisii teaching and Referral Hospital, testified that the accused was a patient she had been following up on. She recalled that the accused had once gone to see her looking very confused. The accused told her that the police had offered her accommodation to show her where the child was. DW5 recalled that the accused had been in a low mood. She was tearful and had suicidal thoughts. Her judgment was poor, she had no insight and her memory for recent events was also very poor. She complained then of hearing her baby crying constantly. They used the depression scale and made a diagnosis of severe depression. They recommended that the accused be admitted at the Hema Hospital for treatment.
- 31. DW5 produced to some letters she and her colleague Kevin Mutinga had written regarding the accused. She testified that they gave the accused an injection of moderate 25 mgs Fluoxetine an anti-depressant and Olanzipine 10 mgs. The accused started displaying erratic behaviour when they admitted her and they had to give her something to sedate her. She was later discharged. They had reduced Olanzapine to 5 mgs and the other medications remained as prescribed. Sometimes the accused would call her and tell her that she had a flash back and DW5 would ask her to go to the clinic for counselling. They later tested her mental status and found that all parameters were normal and she

had insight. DW5's conclusion was that the accused had regained insight but still had flash backs. She explained that one could lose insight due to physical or a psychological trauma which could affect one's mental state making the person unable to reason normally. She confirmed that a person who had taken the life of her own child could lose insight and it could be so traumatic as to cause the person to lose insight.

32. DW5 stated that the report was erroneously dated 10th March 2019 as she had not given the accused any psychiatric treatment before. She stated that that was the mistake of the secretary. She clarified that she had seen the accused on the day she was brought in by the police.

SUBMISSIONS

- 33. At the close of her case, the accused's learned counsel filed written submissions in support of her defence. Counsel began by reminding the court of the prosecution's duty to prove its case beyond reasonable doubt. He submitted that PW1 had been very economical with the truth as he evaded to tell the court the part he played in the misunderstandings between him and the accused. He submitted that PW1 fit the description of a domestic violent partner as defined in *R vs Truphena Ndonga Aswani Criminal Case No. 11 of 2020*. Counsel described the accused as a depressed, battered house wife who could not recall what had happened when the deceased died. He argued that from the events, it was clear that the accused was not in her normal senses. He relied on the evidence of DW5 in support of this.
- 34. It was also his submissions that the injury sustained by the deceased according to the post mortem report by Dr. Morebu was not sustained by the deceased being thrown into the well full of water. He surmised that the injury was sustained elsewhere, particularly in the house when there was a push and pull between the accused and PW1.

The Prosecution relied on the evidence adduced.

ANALYSIS AND DETERMINATION

- 35. The offence of murder under **Section 203** of the **Penal Code** is proved when, "Any person who of malice aforethought causes death of another person by an unlawful act or omission." The prosecution must establish beyond reasonable doubt the following three ingredients in order to prove its case; first, it must prove the death of the deceased and the cause of that death; second, that the accused committed the unlawful act that led to the death; and third that the accused committed the unlawful act with malice aforethought.
- 36. The fact of the deceased's death is not in contention. Dr. Morebu (PW1) conducted a post mortem on the deceased's body and concluded that the deceased had succumbed to severe injury due to a blunt force trauma on the head.
- 37.As to whether the accused inflicted the deceased with the injuries that led to her death, the prosecution relied on eye witness accounts and a video footage which showed that the accused had thrown the deceased into a well after which she died.
- 38. The prosecution's star witness was the accused's husband, PW1. Although a spouse is not a competent or compellable witness for the prosecution in a case against his spouse, PW1 fit within the *proviso* set out in **Section 127 (3) (c)** of the **Evidence Act** as he was testifying with regard to the death of his child at the hands of his wife. The Court of Appeal in the case of *Mathias Obuya Aringo V Republic CA KSM Criminal Appeal No. 49 of 2015 [2020] eKLR* held as follows in a case where a wife testified against her husband for the murder of their child;
 - "It was submitted that Serfina was an incompetent witness because she was the appellant's wife and section 127 (2) (ii) of the Evidence Act expressly prohibited a spouse from testifying against the other. As pointed out by counsel for the State, section 127 (3) (c) qualifies such evidence, and provides that;
 - "In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness, where the person is charged—
 - (a)...
 - (b)...
 - (c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise."

We agree with Mr. Kakoi that Serfina was a competent prosecution witness because the appellant had been charged with the murder of their son, the deceased herein."

- 39. PW1 told the court that on the morning that their youngest child, P died, the accused came to him brandishing a knife and accused him of having an affair with the nanny. He claimed that at that time, the accused was holding the children who were crying. She went with them outside using the backdoor and before he knew it, he heard them all in the well.
- 40. What transpired between the time the accused left through the backdoor and the time she threw herself and the children into the well was captured by CCTV cameras installed in the house by PW1. The digital forensic examiner, PW5, told the court that he had retrieved and analyzed footage from CCTV Camera No. 3 which covered the gate to the borehole. In it, the accused was seen running towards the well while carrying a child with another child following her. According to the still photos produced by the prosecution, the accused was holding the younger child in her hands at the material time. She threw in the older child into the well, followed by the younger child and went on to

jump into the well herself. The younger child who was about 10 months old passed away but the older child survived.

- 41. It is expected that the deceased would have died as a result of drowning but Dr. Morebu's ruled that out. He indicated that the cause of death was a severe head injury. The accused's counsel suggested that it was likely that the deceased had died elsewhere during the altercation between the accused and PW1. But from the evidence presented before this court, there is nothing to suggest that that was the case.
- 42. The evidence connecting the accused to the cause of the death was circumstantial. In the case of *Joan Chebichii Sawe v Republic [2003] eKLR* the court held as follows on the reliance of circumstantial evidence;

In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other coexisting circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

- 43. PW1 and the accused testified that they slept in separate rooms. Both also testified that the accused had confronted PW1 about sleeping with the nanny that fateful morning. PW1 told the court that when the accused confronted him about the affair, she was holding the children who were crying. On the other hand, the accused testified that when she confronted PW1 about sleeping with the nanny, the children were in the kitchen. They had an exchange of words and PW1 started beating her up. When she realized that PW1 had a knife, she picked up the deceased and looked for a way to escape from the house after which she threw herself and the children into the well.
- 44. Although the prosecution did not prove the exact point of impact, it proved that the during her confrontation with PW1, the deceased was alive and that the accused was the last person in contact with her before she died. The video footage showed the accused leaving the house in a huff with the deceased in her arms. She threw the deceased into the well and when the deceased was pulled out of the well she was dead. PW4 confirmed that a blunt force trauma could be caused by falling from a height. The prosecution led sufficient evidence to demonstrate that the deceased died in the course of being thrown down the well which was 30 feet deep. It therefore established a nexus between her death and the accused. I thus find that the accused caused the death of the deceased.
- 45. Next, the prosecution is required to prove that the accused had malice aforethought when she killed the deceased. In her defence, the accused raised the defence of temporary insanity which negates *mens rea* or malice aforethought. She testified that she could not recall what had transpired after she managed to get out of the house that morning and that she only learnt that she had thrown herself and the children into the well later.
- 46. The defence of insanity is defined under **Section 12** of the **Penal Code** thus;

12. Insanity

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

47. There is a legal presumption that every person is of sound mind, and has been of sound mind, until the contrary is proven. The accused therefore bears the onus to prove the defence of insanity. On this, the Court of Appeal in the case of *C N M v Republic CRIMINAL APPEAL NO. 116 OF 1985 [1985] eKLR* held;

It was not disputed in that case, that where an accused raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown. But while this burden rests with him, it is not such a heavy one as rests on the prosecution, and indeed after considering the evidence it is to be decided on the balance of probability, whether it seems more likely that due to mental disease the accused did not know what he was doing at the material time, or that what he was doing was wrong, and so could not have formed the intent to kill the deceased.

- 48. An inquiry into the mental status of the accused before plea showed that she was mentally unfit to stand trial. Subsequently, the accused's mental status stabilized and she was declared mentally fit to take plea. DW5, a psychiatrist at the Kisii Teaching and Referral Hospital, informed the court that when the accused was taken to see her team, she appeared confused and had suicidal thoughts. Her judgment, her insight and recent memory were very poor. The accused was diagnosed to be suffering from severe depression.
- 49. Although PW1 denied that his marriage with the accused was troubled, there was overwhelming evidence that their relationship was strained and abusive. The accused recounted to the court the abuse she had suffered at the hands of her husband PW1. She testified that PW1 was physically, sexually and verbally abusive to her. That he was controlling, a perpetual drunk and a womanizer. She testified that she had tried to have their marital issues solved to no avail.
- 50. This account was corroborated by DW2 who had given the accused shelter after being battered by PW1. From his interaction with PW1, the area chief, DW3 concluded that he was cruel. He testified that PW1 had threatened to cut the accused into pieces and throw her to the dogs in his presence. DW4 confirmed that the accused had lodged a complaint at Nyakoe Police station about being threatened by PW1.
- 51. According to DW5, the accused's mental capacity has improved. All the accused's parameters were within normal and the accused had since regained insight. She however experienced flashbacks and was still under medication.

- 52. The accused's state of confusion after the incident and her loss of recent memory showed that she was not in her right senses when she committed the offence. There was no proof that the accused had the requisite *mens rea* to commit the murder of the deceased.
- 53. While there was overwhelming proof that the accused's actions led to the death of the deceased, I am unable to find that malice aforethought is proved. I therefore find the accused guilty of the offence of manslaughter contrary to **Section 202** of the **Penal Code** as read with **Section 205** of the Penal Code and convict her accordingly.

DATED, SIGNED AND DELIVERED AT KISII THIS $6^{\mathrm{TH}}\,$ DAY OF OCTOBER, 2021

R.E. OUGO

JUDGE

In the presence of:

Faith Mokenge Moturi/ Accused

Mr. Kerosi For the Accused

Miss Gogi Watching brief for the Victim's family

Mr. Kaino State Counsel Office ODPP

Ms. Rael Court Assistant