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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 89 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

JIN.....ACCUSED

JUDGMENT

The accused herein, **JIN** [hereinafter referred to as the accused and Ndehi interchangeably] is charged with the offence of murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code**.

The **particulars** of the offence are that on the 14th day of September, 2009 in Kiambu West District within Central Province, murdered **MWI** [hereinafter referred to as the **deceased** and **M** interchangeably].

The state called 7 witnesses in support of its case.

George Waireri Karinge (PW1), recalled the events of 15th September, 2009 about 9.00 am. He was on his way to the local Shopping Centre. A group of women asked him for the cell-phone number of the area Chief, Simeon Karanja. The ladies intended to make a report of murder. Instead of giving them the number, he called the said Chief on his mobile phone. The Chief acknowledged having already received the report regarding the death of the daughter of the accused.

Shortly thereafter the Chief visited the scene in the company of the said women. They entered the house of the accused where the body was lying. After viewing the body the chief then left after locking the door of the house and entrusting the keys with Macharia.

The Chief asked PW1 and accused to accompany him to Uplands Police Station. Accused was detained at the said Police Station, while some policemen, the chief and PW1 went back to the scene.

DW (PW2), a niece to the deceased, attended the post-mortem of the deceased on the 18th of September, 2009. After the post-mortem the body was released to her for burial.

RW (PW3), the grandmother of the deceased, was informed by the accused that the deceased had collapsed and subsequently passed on.

Simon Karanja Gicheha (PW4), the chief of the area was at home on 15th September, 2009. Accused informed him that his daughter died out of sickness at 3.00 am in the morning. That he had administered pain killers – **maramoja** – to his daughter before her demise. The chief sensed that the accused was uneasy. He looked like he was hiding something. With that in mind PW4 then told him to inform the neighbours. A neighbour by the name Dorcas (PW2) opined that the child could have been defiled and

in the process passed on.

At that point in time, the crowd that had gathered at the scene was restless. They threatened to kill the accused. He restrained the crowd and facilitated the taking of the accused to the police station for his own safety.

No 219948 Chief Inspector Ngetich Davies Naibei (PW5), was stationed at Lari Police Station. While on duty the Area Chief, in the company of a village elder and the accused, came to the said station.

The Chief booked a report of murder. He re-arrested the accused. In the company of the scenes of crime personnell and the chief he visited the scene – house of the accused. Scenes of crime personnel took the sketch plan of the scene and photographs. Thereafter the body was taken to the City Mortuary to await post-mortem.

After post-mortem the report was availed to him. The report disclosed that the child died of strangulation in the course of defilement. He compiled the report which he took to the Attorney General (A.G) who recommended that the accused be prosecuted for the offence of murder.

Dr. Peter Muriuki Ndegwa (PW6), a pathologist attached to the Department of Diagnostic and Forensic Services, Medico – Legal Section recalled the events of 18th September, 2009. While at the City Mortuary he performed post-mortem examination on the body of the deceased. Identification of the body was done by DW and Mary Wangui. No 80062 P.C Keprop attached to Lari Police Station was in attendance.

Upon examination, he formed the opinion that the cause of death was due to manual strangulation causing asphyxia with a possibility of defilement. He observed bruises on the vagina in addition to blood-stains. He dated and signed the P3 on 18th September, 2009 which he tendered in evidence as exhibit 1.

No. 59125 Cpl John Ngeno (PW7), attached to Lari Police Station took the accused to Dr. Kamau (PW6) for mental and age assessment. The age of the accused was assessed at 63 years. He was found to be mentally fit to stand his trial. By consent he produced the P3 as exhibit 2 on behalf of Dr. Kamau, courtesy of Section 33 as read together with **Section 77**, of the **Evidence Act [Cap 80]** Laws of Kenya.

On 18th September, 2009 Lari Police Station forwarded all the exhibits accompanied by exhibit memo to the Government Chemist for analysis. Lari Police Station received back the report dated 5th November, 2009 together with the exhibit memo. He produced the exhibit memo as exhibit 3 and the report as exhibit 4 under **Section 77** as read together with **Section 33** of the **Evidence Act**.

At the close of the prosecution's case, I placed the accused on his defence after carefully analyzing the evidence, that far, tendered by the prosecution witnesses upon duly complying with the provisions of **Section 306 (2)** of the **Criminal Procedure Code**.

In his sworn statement the accused herein, JIN, testified that 14th day of September, 2009, while at his home in Lari, he went to the local church in the company of his daughter. They returned home after the service.

At 9.00 pm, after supper, her daughter fell ill. He then went for medicine at the local Shopping Centre. He bought 2 tablets of **maramoja** and 2 other tablets of medicine whose name he could not remember.

The following morning he woke up at 6.00 am. He tried to wake up her daughter in vain. He then reported the matter to the village elder who in turn reported the matter at Lari Police Station. Subsequently he was detained at Uplands Police Station and eventually arraigned in court on allegation that he murdered his daughter. He denied the charge.

On the available evidence, it is clear to me that at all material time the accused was living alone with the deceased at his rural home. The wife to the accused had died and 2 other children of the accused were staying with their maternal grandmother. This left the accused and the deceased living all alone in a one bed roomed divided by a curtain into two.

On the 15th day of September, 2009 PW1, a village elder of the area, while going to the local Shopping Centre received information from a group of villagers comprising mainly of women that the child of the accused had died inside the house.

PW1 then reported the matter to Chief Simon Karanja (PW4). The Chief promptly visited the scene. Having secured the scene the chief, in the company of the accused and the village elder, reported the matter to Lari Police Station.

A contingent of Police Officer consisting of scenes of crime personnel accompanied the chief and the village elder to the scene. The scene of crime personnel then took the sketch plan of the scene and photographs. The body was then taken to City Mortuary to await post-mortem. Dr. Peter Ndegwa (PW6), performed post-mortem on the body of the deceased at City Mortuary on the 18th day of September, 2009. As a result of his examination he formed the opinion that the cause of death was manual strangulation causing asphyxia with possibility of defilement. Specimen vaginal swab were taken to the laboratory for analysis.

Against that backdrop of evidence, as to who strangled and possibly defiled the deceased, on the fateful night, was a fact particularly within the accused's acknowledge. Only he could explain how the deceased who was well during the day, and even accompanied him to the local church for service, happened to have been strangled and defiled leading to her eventual death.

The accused sworn statement by way of his defence does not appear to me to discharge that burden put squarely on him under Section **Section 111 (1)** of the **Evidence Act [Cap 80]** Laws of Kenya, of proving circumstances which would exonerate him from blame. In doing so, I have not lost sight of the provisions of **Section 111 (2)** of the **Evidence Act [Cap 80]** Laws of Kenya which in effect provides that **Section 111 (1)** does not diminish the obligation of the prosecution to establish by evidence the commission of the offence charged. It is with this in mind, that I make a finding that the evidence against the accused is purely circumstantial. The inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation on any other hypothesis other than that of guilt.

In the premises, I accordingly find and hold, as a matter of law, that the accused person herein, with **malice afterthought**, caused the death of the deceased on the night day of 14th September, 2009.

Accordingly, I convict the accused of the offence of murder contrary to provisions of **Section 203** as read together with **Section 204** of the **Penal Code**.

Having taken into due consideration the mitigating circumstances presented by learned counsel, on behalf of the accused, I sentence the accused to suffer death as prescribed by the appropriate law.

Accused has right of appeal within 14 days.

Dated Signed and delivered at Nairobi this 5th day of March 2015.

N. R. O. OMBIJA

JUDGE



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