



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 24 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

CLAUDIA NENO MUKANDA.....ACCUSED

J U D G M E N T

The accused **CLAUDIA NENO MUKANDA** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that **CLAUDIA NENO MUKANDA** on an unknown date between the 1st day of May 2019 and 4th day of May 2019 at [Particulars Withheld] village in West Nalondo Location in Bungoma Central Sub county within Bungoma County murdered **EKA**.

The case for the prosecution is that the accused was the biological mother of the deceased **EKA** who was at time of death Two (2) months old. On 1.5.2019 PW2 Caroline Mukanda the mother of accused left accused with the child at her home and went to work. When she came back in the evening she did not find the accused and the child at home. She was informed that the accused had left with the child.

On 4.5.2019 the accused came home without the child. The witness asked accused the whereabouts of the child and she replied that the child had died. She however refused to say where the body was. Police were called and interrogated accused who led them to a place near the kitchen where she had buried the child. Police instructed her to exhume the body which she did. She was then arrested.

Upon cross-examination by Wamalwa for accused, she stated that accused had 3 children aged 6 years, 4 years and the deceased aged 2 months old. She also confirmed that accused was married to Rashid Asman who was the father of the deceased and on 27.4.2019 Rashid had sent money to her for the child's clinic expenses.

PW4 No. xxxxxx APC Josphat Mwaniki attached to Mabanga AP post received a report from PW2 Caroline who came with accused, and informed her that accused had a child who is not there now. He interrogated accused who at first said she took the child to the father but on further investigation led them to the home and pointed over where she had buried the child. They called the OCS and DCI officer and the accused removed the body from where she had buried it in a shallow grave. The body was taken to Nalondo.

Pw1 Dr. Haron Ombongi produced a post mortem report prepared by Dr. Reuben Nyongesa who performed the post mortem. Dr. Nyongesa found that the deceased had peeling of skin, on trunk, scalp and face, severe bluish of lips and fingertips. He had swollen lungs with fluid inside. He formed opinion that the cause of death was due to obstruction of the airways which was due to strangling or drowning.

The accused on being placed on her defence gave sworn evidence. She testified that she was the mother of the deceased and was 2 months old at time of death. She stated that the biological father of the deceased was RA and that he chased her away when she was pregnant. On 1.5.2019 the child cried and the father did not send her money. She placed the child on the bed and went to wash clothes. When she went back she found the child had covered herself with a blanket and died. She went and buried the child. She went to Kakamega where she loitered for 2 days. She then went to her aunt and she had mental problem. She was advised by the chief to go home. She was taken by her mother to police and that she did not intend to kill the child. She stated in cross examination that she led the police to where the child was buried and was exhumed.

The accused called Julius Wekesa Makokha who confirmed that the accused gave birth to the child and that the child used to cry a lot. She asked accused why the child was crying and she told him it is because she did not have enough milk to breast feed. He confirmed that he has seen accused again with another child after the deceased.

Mr. Wamalwa for accused filed written submissions. Counsel submitted that there was no eye witness to testify how the deceased was killed. He submits that the deceased died by a blanket covering her which was not a deliberate act by the accused nor was it a deliberate

omission. He submitted that there is no dispute that the deceased was 2 months old and that the accused had a problem in breast feeding the deceased and that her mind was affected. He submits that the accused should have been charge with offence of infanticide contrary to Section 181 of the Penal Code. Having been charged under Section 204, which is a wrong offence, she should be acquitted by this court.

The accused was charged with the offence of murder contrary to Section 203 of the Penal Code.

“Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder.”

The ingredients of the offence which the prosecution must produce beyond reasonable doubt are:

- a) The fact and cause of death***
- b) The unlawful act or omission that caused the death***
- c) That it is accused who occasion the unlawful act or omission or inflicted the injuries that caused the death***
- d) That the accused had the intention of causing death or malice aforethought.***

In this case the prosecution did not call any eye witness. It called PW1 Dr. Haron Ombongi who produced the post mortem from prepared by Dr. Nyongesa who formed opinion that the child died due to suffocation. The accused in her evidence confirmed that indeed the child died out of suffocation and that she was only 2 months old. The prosecution also proved that the deceased gave birth to the deceased, the accused was the last person seen with the deceased; that when interrogated on the whereabouts of the child by police and the mother (PW2) she led them to where she had buried the child in a shallow grave and body exhumed.

The accused in her defence explained the death of deceased by stating:

“On 1.5.2019 I did not sleep as the child was crying. The father did not give any assistance. He only used to abuse me. The next day I placed her on the bed and went out to wash the clothes. When I came back I found she had covered with a blanket and died. My mother was not present. I feared what my mother will say. I went and buried the child. I went to Kakamega where I loitered for 2 days. I then went to my aunt Jean. I slept in the street before I went to aunt Jean. I had mental problem as I would scam in the ho use. I had headache and dizziness.”

The accused in her defence explained the circumstances leading to the death of the deceased. Although she says the child may have covered himself, this is not true as a child aged 2 months cannot do so. The doctor confirmed there were peeling of skin on the trunk, sclap and face. From the evidence the deceased died due to strangling and not by covering of a blanket as the accused would want the court to believe. On how she died, I find there is evidence that deceased was strangled. I find accused is the one who committed the unlawful act that led to the death of deceased.

Mr. Wamalwa R for accused submitted that the evidence adduced disclosed an offence of infanticide not murder. I agree Section 210 of the Penal Code provides

Section 210. Infanticide Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide, and may for that offence be dealt with and punished as if she had been guilty of manslaughter of the child.

The prosecution has charged accused with murder. The evidence adduced shows that she was the mother of the deceased. It has also been established that the child was 2 months old and the offence was committed to a child under the age of 12 months.

Having considered all the evidence, I find that the prosecution has proved the offence of infanticide contrary to section 210 of the Penal code. I therefore under Section 179(2) of the criminal procedure code. I find accused guilty of the offence of infanticide contrary to Section 210 of the Penal code and convict her accordingly.

Dated at Bungoma this 29th day of March, 2022

S.N RIECHI

JUDGE