



**Republic v Sirengo & another (Criminal Case 25 of 2020)
[2022] KEHC 10733 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 25 OF 2020**

SN RIECHI, J

MAY 25, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

ANNET NANYAMA SIRENGO 1ST ACCUSED

ISAACK EDWARD KILWAKE 2ND ACCUSED

JUDGMENT

1. The accused Annet Nanyama Sirengo (accused 1) and Isaack Edward Kilwake (accused 2) are charged with offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the offence are that Annet Nanyama Sirengo (accused 1) and Isaack Edward Kilwake (accused 2) on June 3, 2020 at Masai village, in Mitukuyu sub location in Bungoma East sub county within Bungoma county murdered Elvis Nyongesa Lumuli.
3. The case for prosecution is that PW1 Isaack Magonga Makokha is a cousin to accused 1 Annette Nanyama. On May 31, 2020 accused 1 Annete came home with his wife Hellen Makokha to his home. Accused 1 had a child aged about 2 years. She stayed with them for 5 days but would go away and on occasions sleep out. Because of this he asked her to leave his home. She then left with the child.
4. On June 4, 2020 he received information that a child had been found drowned in a river. They were informed that the child belonged to accused 1. They looked for her. They later found her at the home of her aunt. On interrogation she confirmed she threw the child in the river. Police were informed who came and arrested her.
5. PW2 Richard Leru a boda boda rider and cousin of accused 1 Annete Met her at house of PW1 Isaac and she informed him that she had been there for 2 days. She later learnt that she had left. On June 7, 2020 he heard news in Sulwe F M radio station that the body of a child had been found in a river.



- They went to home of the aunt where they found accused 1 and asked her about the where about of the child. She at first told him she had taken the child to the father called Nyongesa. Later she confessed that she had met a man called Isaac who wanted to marry her but did not want the child. She led them to the house of Isaac where they recovered the child's clothes – towel, jeans trouser and shorts. She told them they threw the child in the Masai river. Isaac whose home accused 1 took them is the 2nd accused.
6. PW3 Everline Nasimiyu Machelesi a village elder informed by some boys on June 7, 2020 at 3 p m that they had gone to the river and found a body of a baby. She accompanied them to the river where she saw a body of a child floating on the water in the river, but held by a tree. Police officers were informed and took away the body.
 7. On June 14, 2020 she learnt that both accused 1 and accused 2 had been arrested in connection with the recovered body.
 8. PW6 Jackson Nyongesa Mumia received information from *mama* Jane a *nyumba kumi* official that accused 1 had a child but was not seen lately. They interrogated accused 1 in the presence of her brother and she confessed that she had drowned the child because she had found a man who wanted to marry her but did not want to have the child. She led them to the man accused 2 who was then arrested.
 9. PW7 Jane Nandakwa Khaemba the aunt of accused 1 testified that on June 7, 2020 she asked accused 1 on the whereabouts of the child. She then heard a child had been found drowned. On interrogating accused 1 further she revealed she had drowned the child. She led them to the home of accused 2. They reported the matter to police.
 10. PW9 no 85572 PC John Maru the investigating officer was asked to handle the file when the suspects were already in custody. He interrogated accused 1 Annete who informed him that she was girlfriend of accused 2 Issac and that Isaac wanted to marry her but was uncomfortable with having a child sired by another man. He asked her to drown it in the river which they did. After 2 days accused 2 asked accused 1 to go back to where she was staying. She went to her aunt who asked her about whereabouts of the child. With this information he handed her out to C I Kimani who recorded her statement.
 11. PW10 Dr Brian who performed the post mortem noted that body was extensively decomposed, and abdomen as swollen and lungs filled with clear fluid. He formed opinion that the cause of death was due to cardio-pulmonary failure due to drowning. He collected leg tissue, nails and small intestines sample for DNA analysis.
 12. PW4 Polycap Lutta Kweyu the government analyst received DNA samples from the deceased and a buccal swap from the accused 1 Annet. He generated DNA analysis. From the findings he formed opinion that Annet Sirengo the accused is the biological mother of the deceased. He produced his report as Exh.1.
 13. The accused upon being put on their defence gave sworn testimony. Accused 1 Annette Nanyama Sirengo testified that the deceased Elvis Nyongesa Lumula was her son. She testified that Loice Nakhumija had a problem with the deceased and had asked accused to take the deceased to his father's home as she (Loice) could not take care of her and the child. She then testified she did not know how the child died. She was only arrested on June 14, 2020 and told of his death. She testified that she did not know accused 2 Isaac.
 14. On being cross-examined by M/s Omondi she stated she did not know accused 2 Isaac and that he was not her boyfriend. She confirmed the deceased at time of death was 2 years old. She was with him on March 2, 2020 at the home of Loice.



15. Accused 2 Isaac Edward Kilwale testified that he did not know accused 1 Annete and that she was not his friend. He testified he did not know deceased or how he died.
16. Makokha for accused filed written submission. Counsel submitted that there were no eye witnesses to the murder and the prosecution relied on circumstantial evidence. He submitted that the DNA analysis did not follow procedure and therefore the integrity of the samples were compromised.
17. The accused were charged with the offence of murder contrary to section 203 of the Penal code. Section 203 provides.

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
18. The prosecution to prove a charge of murder against an accused person must establish the following ingredients of the offence:
 - a) The fact and cause of death.
 - b) The unlawful act or omission causing the death
 - c) That it is accused who caused the unlawful act or omission or inflicted the injuries that caused the death of deceased.
 - d) That the accused committed the unlawful act with malice aforethought.
19. On fact and cause of death PW10 Dr Brian performed the post-mortem on the body of the deceased which he found extensively decomposed. He however from the examination found the lungs were filled with clear fluid, right arm had swiveled and stomach empty. He formed opinion that cause of death was due to apoplexia. He issued death certificate No. 1246915 thus confirming the fact of death. On the cause of death he formed opinion that deceased died as a result of drowning.
20. From the evidence of the witnesses, the deceased was aged about 2 years old. The body was found in a river on June 7, 2020. None of the witnesses who testified said he saw how the deceased was drowned. The prosecution sought to establish that it is accused 1 Annete who drowned the child by adducing circumstantial evidence. The circumstantial evidence the prosecution sought to prove was that; it was the accused and no other as the person who killed the deceased.
21. PW1 Isaac Magonga Makokha the cousin of accused 1 testified that accused 1 Annete went to his home with a child and stayed at his home for 5 days. Unhappy about her going and sleeping out without explanation he asked her to leave and she left with the child. Later he learnt that the accused had thrown a child into the river.
22. PW2 Richard Weru also saw the deceased with her child at home of Isaac and later received information that she had left with the child. On June 7, 2020 he heard news in Sulwe FM Radio that a child had been found drowned in a river. PW7 Jane Ndakwa Khaemba the aunt of accused 1 Annete had enquired from accused 1 where her child was and accused 1 told her she had taken the child to the father Nyongesa Lumuli but upon enquiring found it was not true. She went and informed *nyumba kumi* officials who came and arrested accused 1.
23. PW4 Polycap Luta Kweyu processed DNA analysis of specimen form the body of the deceased and buccal swap of accused 1. Upon analysis the same, he formed opinion that the accused 1 was the biological mother of the deceased.
24. The accused in her defence admitted that she was the biological mother of the deceased.



25. The facts which the prosecution has therefore proved in this case are:
1. The deceased was 2 years old.
 2. The accused 1 Annete was the biological mother of the deceased.
 3. The accused 1 was the one last seen with the deceased.
 4. The deceased body was found in a river and that he had died due to drowning.
26. The case of *Kipkering Arap Koske and Kamure Arap Matata* [1949] 16 EACA 135 at page 136, gives the standard required to prove a case on circumstantial evidence.

“In order to justify 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.”

The court then added.

the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecutions. It is a burden which never shifts to the party accused.”

27. The accused 1 in her evidence admitted that she was with the child. She however denied knowing where he went and how he died. The court notes that the child was only 2 years old and was last seen with accused 1. It is not therefore true for accused 1 Annete to testify that she did not know how he died. Indeed when being asked she lied to the witnesses that she had taken the child to the father at the instigation of accused 2 who wanted to marry her.
28. As for accused 2, I find no evidence to connect him with the death of the deceased except for allegations that he was a boyfriend of accused 1 Annette. I therefore find no evidence against him. I find him not guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and acquit him. Accused 2 Isaac Edward Kilwake to be set at liberty unless otherwise lawfully detained.
29. The evidence against accused 1 being circumstantial evidence the prosecution must prove the elements stated in *Abanga Alia Onyango vs Republic* Criminal Appeal no 32 of 1990: -

“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests (1)

- i) The circumstances from which an inference of guilt is sought to be done must be cogently and firmly established.
- ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of accused.
- iii) The circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by accused and no one else.

30. In *Deepok Sarna v Republic* the court of Appeal stated that: -

“In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually. However, in applying this principle a



distinction must be made between facts called primary or basic on one hand inference of facts to be drawn from them on the other. In regard to proof of primary facts the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused shows be considered.

In dealing with this aspect of the problems the doctrine of benefit of doubt applies. Although there should not be any missing link in the case yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from proved facts. In drawing these inferences the court must have regard to the common cause of nature events and to human conduct and their relations to the fact of the particular case. The court, thereafter has to consider the effect of proved facts. In deciding the sufficiency of circumstantial evidence, for that purpose of conviction, the court has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt.”

31. The prosecution has established facts upon which they urge the court to make an inference that it is accused and no other who murdered the deceased. The accused’s explanation is that though she admits being in custody of the child, she does not know how he died and was only surprised when she was arrested on June 14, 2020.

32. In *George Kamau Wambai v R* [2020]eKLR Criminal Appeal no 180 of 2016(R)

“We entirely agree with the submissions of counsel for the appellant that his conviction turned solely on circumstantial evidence.

While considering how to test circumstantial evidence, this court in the case of *Republic v Kipkering Arap Koskei & Another* 16 EACA 135 stated “In order to justify 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...”

33. In *Rafaeri Munya Alias Rafaeri Kibuka V Reginam* (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

“The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

34. Where as in this case the accused explanation is obviously false, contradictory, or incredible the same reinforced the facts proved and circumstances established.

35. I therefore find from the circumstantial evidence that it is the accused 1 Annete and no other who murdered the deceased. I find that she did so with malice aforethought and find her guilty of murder contrary to section 203 as read with Section 204 of the Penal Code and convict her accordingly.

DATED AT BUNGOMA THIS 25TH DAY OF MAY, 2022

S N RIECHI

JUDGE

