



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 19 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

MARGARET NANJALA MUSEI.....ACCUSED

J U D G M E N T

The accused Margaret Nanjala Musei is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the offence are that on the 4th day of April, 2019 in Bumula Sub-county within Bungoma murdered PN.

The case for the prosecution is that **PW 3 Evaline Nachuma** is the mother of accused. On 23rd March, 2019, the accused who was pregnant went to deliver. She delivered a baby while at home. She advised accused to go and register the infant for the purpose of Pediatric Clinic. They named the child PN.

On 5th April, 2019, the accused went with the child to register him at the clinic. Accused said that she will then visit her sister. The accused then left with the child. Accused did not come back. On 7th April, 2019 PW 3 received information that accused had drowned the child in a river and had been arrested.

PW 4 Moses Liambila a clan elder received information that there was a body of a child at Malakisi river. He proceeded there and saw a body at the river. He reported the matter to police. **PW 6 No. 105322 PC Peter Masai** upon receipt of the information visited the scene where they recovered the body of a child from the river which did not have much water. They took photographs of the scene and body was taken to mortuary. On 7th April, 2019 the accused was brought by members of public on allegation that she was the mother of the baby and had drowned him. They took accused for Medical Examination which revealed she had given birth. A post-mortem on body of deceased revealed that the child had died due to drowning.

The accused was affirmed and gave her evidence. She testified that she was aged 22 years and had 2 children. The first born was born in 2018 and the second one on 24th March, 2019 whom she named PN. On 5th April, 2019 she went to her step-sister "Mummy" at Mayanja leaving the child at the home of Mary Nanjala who stays at Kitabisi. She came back on 5th April, 2019. On 7th April, 2019 she was arrested at Nabara. She denied drowning the child in the river or how the child died.

On being cross-examined by Thuo for the state, she confirmed she was the mother of the child, the deceased who was one month old. She stated that the baby suffered from epilepsy and that the father was a Ugandan.

Mr. Makokha for the accused filed written submission. He submitted that: -

"the prosecution has failed to prove its case against the Accused beyond reasonable doubt as per the required standard. No direct evidence was adduced to link the accused person to the commission of the offence. The evidence on record is purely circumstantial that needed corroboration in terms of carrying out DNA tests to ascertain that indeed the body of a child that was discovered and found on river Malakisi was indeed the biological child of the accused persons herein. It was extremely important that this was to be ascertained to rule out any errors. Since the same was not done, doubts are raised as to whether the body was for the child Phaiza Nebuhe There was no eye witness who saw the accused person throw the child in river Malakisi. As per the evidence of PW 2 it was not possible to ascertain whether the accused person had given birth to a child by examining her.

We submit at there is no other material evidence to corroborate the evidence adduced before the Court and hence the accused person shall not be liable to be convicted on such evidence"

The accused is charged with the offence of murder. To prove a charge of murder the prosecution must prove: -

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

PW 1 Dr. Nyongesa Reuben who performed the post-mortem testified that the deceased was one month old and upon examination found he had a severe discoloration of lips, peeling of skin at the scalp and the lungs were swollen. He formed opinion that case of death was due to lack of oxygen in the body due to drowning. The witness, therefore established the cause of death was due to lack of oxygen in the lungs occasion by drowning.

The prosecution can prove the case by direct evidence where evidence of eye witnesses is tendered to prove a fact. The prosecution can also prove a fact by circumstantial evidence. In this case, none of the prosecution witnesses saw the accused drowning the deceased. The prosecution, therefore sought to prove that accused committed the offence by tendering circumstantial evidence.

Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Before a court can found a conviction on circumstantial evidence the court in **R. Vs Kipkering arap Koske & Another (1949) 16 EACA 135** states that the burden of proving the facts means or and remains on the prosecution. The Court of Appeal in **Abange alias Onyango Vs Republic**, Criminal appeal No. 32 of 1990 on circumstantial evidence stated: -

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

i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established,

ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the 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 the accused and none else.

iv) In addition the prosecution must establish that there were no other co-existing circumstances which could weaken or destroy the inference of guilt. See Sawe Vs Republic (2003) eKLR which states: -

“the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.” The same case went on to state that “Suspicion, however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”: -

The prosecution has tendered evidence to prove the following facts: -

- 1) That the accused gave birth to the deceased. This the accused admits in her evidence that she had given birth to 2 children who include the Deceased who was named PD whose father was a Ugandan. She admitted in cross-examination by Thuo for state that the deceased was her child and died on 4th April, 2019 and was one month old.
- 2) That the accused left with the child. The evidence of **PW 3 Evaline Najuma**, the mother of the accused who testified that on 5th April, 2019 the accused left with the child on her advice to go and register him at the clinic for as the child was born at home. The accused then left with the child.
- 3) That the child was found dead at the river. The evidence of **PW 4 Moses Liambila** who upon receiving information visited the river and saw the body of the deceased. **PW 6 PC Peter Masai** also visited the scene and confirmed and **PW 7 CPL Benjamin Koone** took photographs of the scene.
- 4) That the cause of death of the deceased was due to drowning.

The accused’s defence is that she left the child at the home of Mary Nanjala her grandmother and that she does not know how he died. The accused’s explanation on that she left the one month old infant on 4th May, 2019 and came to know of its death on 7th May, 2019 when she was arrested cannot be true. I find that the accused was the last person seen with the deceased who was one month old and who was later found drowned in the river. I am satisfied that the circumstantial evidence adduced are incompatible with the innocence of accused and incapable of explanation upon any other reasonable hypotheses than the guilt of the accused.

From the evidence on record, it is not disputed that the deceased infant was one month old. It is also not disputed that it is accused who gave birth to the deceased. Section 181 (1) of the Criminal Procedure Code provides: -

“where it is established that an accused committed the offence which would have been Murder of a child under the age of 12 months then the accused would be guilty of an offence of infanticide under Section 210 of the Penal Code.

Section 210 of the Penal Code provides: -

“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.”

In view of the provisions above, I find that the deceased is not guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. I, however, find the prosecution has proved the offence of infanticide Contrary to Section 210 of the Penal Code. I, therefore, find accused, **Margaret Nanjala Musei** guilty of the offence of Infanticide Contrary to Section 210 Penal Code and convict her accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY JULY, 2021.

S N RIECHI

JUDGE