



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**HIGH COURT CRIMINAL CASE NO. 27 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AMM.....ACCUSED**

**JUDGEMENT**

1. **AMM**, the accused herein, is charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

The particulars as per the information dated 7<sup>th</sup> December, 2016 presented to this court are that, between 13<sup>th</sup> November, 2016 and 20<sup>th</sup> November, 2016 at unknown time at Mathukuni village, Kyanika in Nzambani within Kitui County, she murdered her child named FK (herein after to be referred as deceased).

2. The Accused person denied committing the offence and the prosecution presented a total of seven witnesses to prove their case. The Prosecution's case hinges on circumstantial evidence as there was no eye witness to the incident.

3. The first prosecution witness, **MN** (PW1), told this court he intended to marry the accused and had told her to wait but the accused pushed him to take her to his parents which he did but told her to leave after the visit. He testified that, the Accused had already had child and had gone to his home with the child. The witness further told this court that the Accused stayed for 2 weeks and left leaving the child who was around 4-5 months old behind. He stated that, he reported the matter to Makongeni Police Station who referred him to children's office. He added that, the children's officer advised him to stay with the child until the mother returns. He further told this court that with the help of his brother, one Philip Nzuki, he managed to trace the mother and that they escorted her to Mathulini Police Station where they handed over the child to her and they went separate ways.

4. He stated that, sometime in November 2016, he met a police officer from Mathulini Police Station, who showed him a photograph of a child he could not identify because the body had been mauled by dogs. He testified that, he was being arrested and placed in custody until the mother of the child was found and that he gave the officers her phone number which they used to trace her.

5. **DMN** (PW2), testified and confirmed that, a baby was abandoned at their home on 13<sup>th</sup> October, 2016 by the wife to his brother (PW1). He told this court that his brother, (PW1) declined to marry the lady (Accused) and told her to leave which she did but abandoned the child whom they took care of for two weeks. He testified that they later went to kitui with his brother where they found her and took her home and handed the abandoned child to her after which she left with the child.

6. **JKM** (PW3), on his part, testified that, on 20<sup>th</sup> November, 2016, his son named M discovered a body of an infant which had been mauled by dogs. He stated that, he reported to chief who in turn reported the discovery to the police adding that, the police later came and collected the remains of the infant from his compound which remains in his assessment was half the body of the infant with the other possibly eaten by dogs.

7. **APC Evan Mwaniki** (PW4), a police officer based in Nzambani, sub-county headquarters, testified that, on 20.11.2016, he received a call from PW3 indicating that a body of an infant had been seen in his compound. He told this court that, upon receiving the report, he notified the OCS Nzambani and together with other Police Officers they went to the scene and collected the remains of the body.

8. **CPL Winnie Mumbi** (PW5), another Police Officer based at Nzambani sub-county, also testified and informed this court that, on 6<sup>th</sup> October, 2016, she received a report of a lady who had abandoned her 4-month baby and that the lady turned out to be the Accused herein. She stated that, they later arrested the lady and handed over the child to her after the alleged father and her brothers took her to the station together with the infant.

9. She added that, on 20<sup>th</sup> November, 2016, she received a report that a body of an infant had been found at the home of PW3 and that they proceeded to the scene and collected the body of the infant and also recovered baby clothes which were dirty. She however, stated

that, she did not see the body of the infant and therefore, could not tell whether it was of the same infant she had handed over to the Accused and she added that she did not carry out further investigations in this matter.

10. **Nahashon Muthui Mutinda** (PW6) on his part, told this court that he assisted PW1 trace the Accused person after she abandoned her baby at the house of PW1. He further testified that, he is the one who advised PW1 to report the matter to the police and that the infant was handed over to the mother (Accused) when she was traced.

11. **Dr. Muriithi Miano** (PW 7) testifying on behalf of Dr. Mutuku who prior to his demise carried out post mortem examination on the body of the infant (Faith Kanini) and prepared a post mortem report.

The doctor told this court he had worked with the late Dr. Mutuku for over 5 years and was well acquainted with his signature and handwriting. Referring to post mortem report which he tendered as P. Ex 1, the doctor testified that the body had partly decomposed and at the time of examination, the doctor could not tell whether the body was of a male or female child because the remaining part of the body was only the head, part of the chest and hands. He testified that, the finger nails were bluish, indicative of the fact that the baby died due to lack of oxygen and the doctor formed the opinion that the cause of death was cardio pulmonary collapse possibly due to strangulation.

12. When placed on her defence, the Accused denied killing her child. She testified on oath and stated that she was married to PW1 after knowing each other for a period of three weeks. She testified that, she lived with PW1 at the homestead of the sister to PW1 and that she moved in with PW1 when she already had the child. She testified that, sometime in 2016, she left her baby with her sister in law and on coming back, she found her baby sleeping and unresponsive. She added that, when she inquired from her sister in law what had happened to her baby, she insulted her. She added that, when her husband (PW1) arrived, he ganged up with his sister and began accusing her. She stated, she asked them for assistance to take the baby to hospital but instead they called the police who went and arrested her. She denied killing her child and insisted that she left her child alive in the hands of her sister in law.

13. In her written submissions through the learned counsel, Joan Mati Advocate, the Accused submits that, there was no witness who witnessed the incident and that no one identified the body that was found and taken to hospital mortuary where post mortem was conducted. She contends that, no witness identified the body to be that of FK and that while the Accused is charged with killing her baby named FK, no one is sure that the body recovered belonged to her. She further submits that, that postmortem report tendered, indicates that, the gender of the body recovered could not be established. She submits that, the prosecution's case against her is purely circumstantial and that the prosecution's case is based on suspicion which cannot sustain a conviction in murder cases. She relies on the case of **Sawe versus Republic [2003] eKLR**, where the court held that, for circumstantial evidence to sustain a conviction or for an inference of guilt to be inferred, the inculpatory facts must be incompatible with the innocence of the Accused and incapable of explanation upon any other hypothesis other than the guilt of the Accused.

14. This court has considered this case and the defence put forward. This is a case of murder Contrary to **Section 203** as read with **Section 204 of the Penal Code**.

Section 203 of the Penal Code provides: -

**“Any person of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”**

From the above provision, the prosecution is required to establish and prove the following elements and connect them with the Accused person for a conviction to be sustained: -

- (i) Fact of death and its cause.
- (ii) That the Accused unlawfully caused the death (actus reus).
- (iii) Malice aforethought (mens rea).

15. **Fact of death and cause**

The evidence placed before this court is not very clear on this aspect because apart from the evidence that a body of an infant partly mauled by dogs was discovered on 20<sup>th</sup> November, 2016 by a son to Josiah Kinyavo Malombe and taken to Kitui General Hospital mortuary, there is no direct evidence showing that the body remains, belonged to baby FK-a child to the Accused herein.

The Accused states that, her child was a female and that she found her lying dead at the home of her sister in law, where she had left her alive. There are questions left lingering as to how the body of that baby, if at all was later found at the home of PW3 where it was discovered.

16. The other question which was left unanswered by the prosecution's case is why PW5 (CPL Winnie Mumbi) could not identify the body to confirm that the body belonged to the same infant she handed over to the Accused on 13<sup>th</sup> October, 2016 when she was taken there by PW1, ZM and DM all brothers to PW1. The other question posed is why didn't the aforementioned 3 who escorted the Accused to Mathuilini AP Post be taken to identify the body when post mortem was being conducted to at least confirm that the body belonged to baby FK? Or better still why could not they take any close relative of the mother to help identify the body?

17. In my view, the police left a lot of loose ends on the question of identify of the body that has created doubts as whether the post mortem report (P. Ex1) tendered is in respect of the body of FK or an unidentified body of an infant. The post mortem report indicates that the body was escorted by one CPL Karanja who was not called as a witness to at least reveal to this court whether he recognized or identified the body

of the infant to the doctor who performed the post mortem examination.

18. PW1 who had stayed with the infant for about 2 weeks told this court that he could not recognize the photo of the infant shown to him by the police. The police for unknown reasons failed to take the witness to identify the body to tie up the loose end. According to PW1, his sister one Musembi, went to the mortuary and confirmed that the belonged to the child that had been abandoned in their home for 2 weeks. The said Musembi however, was not called as a witness which left a lot to be desired in so far as proper investigations was concerned. The brother to PW1, DM, (PW2), testified that he stayed with the abandoned child for about 2 weeks but the police for unknown reason failed to take him to identify the body of the infant recovered. He was, and could have provided a crucial link in this case because, he could have told this court whether the body abandoned in their home for 2 weeks by the Accused, and handed to her on 13<sup>th</sup> October, 2016, at the police station was the same infant found dead at the home of PW3.

19. It is true that, the prosecution in this case is solely reliant on circumstantial evidence which I find to be supported to some extent because, there is sufficient evidence showing that the Accused was not happy for being jilted by PW1 and that's why she abandoned her baby aged approximately 4 months. A mother who abandons her baby at that tender age, shows that she is either negligent and cares little about the infant or out rightly reckless.

20. This court would not have had difficulty in discounting her defence on that account and drawing an inference of guilt on her part but for the bungled investigation which failed to link up the fact of death of the infant with that of baby FK. That omission weakens the inference of guilty being made against the accused.

21. That undeniable fact is further weakened by the fact that the body recovered by PW3 had been mauled by dogs which made it difficult for the pathologist to tell whether the body belonged to a boy or girl. In *Dorcus Jebet Ketter and Anor. Versus Republic [2013] eKLR*, the Court of Appeal held that, while in some instances causes of death can be established without medical evidence, (especially where the offender in an attempt to conceal evidence hides or conceals evidence of death), a court should exercise caution and reach that conclusion (fact of death) where evidence is led to establish that indeed death occurred but the body was disposed to hide that fact.

The Court of Appeal in that decision also made relevant observation when it cited a decision of New Zealand Court of Appeal in *Republic Versus Harry [1952] NZLR*'' (3<sup>rd</sup> Digest Supp.) where the court made the following observations;

***“At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body or any trace of the body has been found and that the Accused has made no confession of any participation in the crime before he can be convicted. The fact of death should be proved by such circumstances as renders the commission of the crime morally certain and leave no ground for reasonable doubt; the circumstantial evidence should be so cogent and compelling to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.”***

22. In light of the above holding, this court finds that, based on the evidence placed before one, the prosecution case falls short in respect to the first element listed above, which is the fact of death. It is true that the doctor found strong evidence despite the fact that the body had been mauled by dogs that the baby died due to strangulation. But that evidence in the absence of positive identity of the body cannot stand.

### 23. Actus Reus

The Prosecution's Case on the above element is based on circumstantial evidence but as seen in the case cited by the defence in *Sawe versus Republic [2003] eKLR* the court of appeal held as follows: -

***“In order to justify 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 then than that of guilt. There must be no other existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of other reasonable hypothesis of innocence remain with the prosecution.....”***

24. As I have observed above, the prosecution's case left a gap in the chain of circumstances relied upon in this case because of the omission to positively identify the body of the infant recovered in order to connect it with that of baby FK. That omission was fatal to the prosecution case because it left the prosecution's case hanging on suspicion and suspicion alone however strong, cannot found a conviction. This court finds that the prosecution's case has not established and proved to the required standard in respect to the element of *actus reus*. They have submitted that they have good reasons based on her past conduct that the Accused killed her child, but owing to my observations above, this court is not satisfied that the prosecution's case has made the threshold.

25. In view of my finding on the element of *actus reus*, the question of the element of *mens rea* cannot lie and it only an academic exercise to delve into it.

In the end, this court finds that, the prosecution's case against the Accused in this case falls short of the threshold required. It is not safe to render a conviction against the accused person when the circumstantial evidence solely relied upon by prosecution has left gaps due to want of proper investigation. The evidence laid before this court is weak to that extent and in the premises, the accused person is found not guilty and is acquitted of the charge.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 27TH DAY OF JULY, 2021.**

**HON. JUSTICE R.K. LIMO**

**JUDGE**