



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL CASE NO. E021 OF 2021[MURDER]**

**CORAM: R.E.ABURILI J**

**STATE.....PROSECUTION**

**VERSUS**

**F.O.O.....SUBJECT**

**JUDGMENT**

1. The subject herein F.O.O. (full name withheld for legal reasons) is a male minor aged 14 years old. He is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the Information dated 4<sup>th</sup> August, 2021 are that on the night of 22/7/2021, at around 0200hrs at South West unit Village, Uriri Location, North East Gem Location within Gem Sub County of Siaya County, he murdered one Shantel Atieno.
2. The subject pleaded not guilty to the Information. The prosecution called eight (8) witnesses to establish a prima facie case against the subject who gave his unsworn testimony denying any involvement in the death of the victim who was also a minor-infant aged two months old.
3. The evidence adduced by the prosecution witnesses is as follows: PW1 **Dorcas Atieno Omondi** testified that the deceased, Shantel Otieno was her two months old daughter. On the night of 22/7/2021, PW1 was at her house and that the family was mourning her deceased father in-law Eric Ogemba Wesonga who had died on 20/7/202. She testified that on the material night, she sat outside with her child Shantel, and when the child slept, PW1 took her into the house to sleep. PW1 then kept checking on the infant and noticed that she was fine so PW1 closed the door behind her and went back to the funeral place where they sat near a fireplace warming themselves from the cold.
4. PW1 stated that at about 2am, she went into her house to breast feed her baby and found the door unlocked and that the solar lamp which she had left on, was off. She stated that she lit the solar lamp and saw a person coming from the net whom she identified as 'junior' and when she inquired from him what he wanted from her house, he responded by saying that he wanted to sleep but because PW1 had entered the house, he was leaving. It was PW1's testimony that she went and lifted her child from the bed to breastfeed her and discovered that the baby's eyes were closed and the body was very loose prompting her to try and open the infant's eyes but there was no response from the baby.
5. PW1 testified that she placed the child on the bed and went to call Pauline Awino, her child's paternal aunt who came and told her to take the child out which PW1 did and when her sister in law examined the child, she told PW1 that the child was dead. PW1 then took the child and placed her in the house and the child started bleeding from the nose. She further testified that she observed that the child's thighs were wide open. The family called the area chief on phone.
6. PW1 testified that she knew the subject, 'junior', who used to go to her home and play with her in-laws. She testified that the subject 'junior' lived with his aunt, Rose. It was her testimony that she had known him for long since she was married in that home, a period of about seven months. PW1 was shown the subject who was attending court proceedings virtually from Kisumu Children's Remand Home and she identified the subject online by saying "**ni huyu**".
7. She stated that the police arrived at the scene, took the body of the infant to Yala Mortuary in the company of her husband. She later went to record her statement. She stated that her child was buried on the following Tuesday after her death.
8. In cross-examination by Mr. Okanda advocate for the subject, PW1 stated that before she took the child to sleep, she sat with her outside in a tent. She stated that she was far from the fire place. PW1 stated that when the child's aunt took the child from her, she discovered that the child was dead and returned the child into PW1's house. PW1 further stated that when she picked the child, she discovered the child was not responsive though she was not bleeding.

9. PW1 responded that she had dressed the child and covered her and that when she went to breastfeed her, she found the child covered the same way she had left her. She further stated that the child was asleep when she took her to sleep in the house as it was cold outside. PW1 reiterated that she went to check on the child at 2 am. It was her testimony that the police arrived at 9 am and took photographs of the child though she had not seen the said photographs in court.

10. PW1 stated that she met 'junior' coming from the bed and that he was lifting the mosquito net. She further stated that according to the postmortem, the child was strangled. She further stated that she had told the court the truth. PW1 stated that at the funeral, they were only family members. She further stated that it was a mistake for Felix Junior to go and sleep in her house.

11. PW2 Bonface Omondi Wasonga, a matatu driver and resident of Awangtar testified that PW1 was his wife and that the deceased Shantel Atieno was their first born child. It was his testimony that on 22/7/2021 at about 2 am, they were in their home, in a funeral of their late father who had been buried on 20/7/2021 and they were staying for 4 days in accordance with Luo customs. He testified that he was with his wife, mother and aunts. PW2 testified that at between 1-2 am, his wife took the child to sleep in their house. He testified that she had been checking on the child and returning and when she went to breastfeed the child, he heard her saying, "*junior unafanya nini kwa hii nyumba?*" -Junior what are you doing in this house? and then she called PW2's sister Pauline.

12. It was his testimony that when he checked, he saw 'junior' leaving his house. PW2 testified that the house was near where they were sitting outside, about 10 meters. He further testified that there was very bright moonlight and they had lit fire outside. He stated that Junior then stood outside. PW2 testified that his wife called Pauline to go help check on the child and Pauline stood out and told her to bring out the child. He stated that he moved nearer to find out what was happening and when his sister Pauline checked the eyes and body of the child, she said the child was dead. He testified that the child was bleeding from the mouth and her private parts.

13. PW2 testified that at that moment, the subject Felix was standing nearby and when he heard that the child was dead, he ran away. He stated that he instructed his wife-PW1 to return the child to the house and he proceeded to Felix's aunt, Rose's house where he explained to her what Felix had done to his child. He further testified that he went to report to the Assistant of the Area Chief who in turn informed the Chief. It was his testimony that the Chief arrived at their home in the morning and informed the police who visited the scene and took away the body of the child to Yala Mortuary. He testified that he identified the child's body to the doctor for postmortem.

14. PW2 testified that he knew the subject Felix who had been living with his aunt in their neighborhood. He stated that he had known the subject for 2 years and that the subject Felix used to live with his aunt during school holidays. PW2 identified the subject Felix virtually on the screen by pointing at the subject on the screen at Kisumu Children's Remand Home.

15. In cross-examination, PW2 stated that when the police arrived, they locked the house and stayed around to wait for the Criminal Investigation officers. He further stated that it was his wife who returned the child to the house. When shown the statement that he recorded with the police, PW2 stated that the distance from where they sat to his house was about 20 metres. He emphasized that he only estimated the distance but did not measure and was thus not certain of the actual distance. PW2 reiterated that there was bright moonlight and fire outside and that he saw the subject Felix very well using the moonlight.

16. It was his testimony that his wife was also at the fireplace and she was holding the baby while outside. He stated that the child was asleep when his wife took her to the house to sleep and that she was neither dead nor bleeding. PW2 stated that he did not go with his wife to check on the child. He further stated in cross-examination that his wife went to check on the child at various intervals and found when the child was okay. He stated that he saw his wife as she went to check on the child and returned on several occasions though he did not go with her.

17. PW3 Pauline Awino Wasonga testified that on 22/7/2021 at 8 pm, they were at their home gathered outside following the death of their father. She stated that they were with PW1, PW2, their mother and their other siblings. She stated that PW1 and PW2 who are husband and wife sat on one chair.

18. It was her testimony that PW1 had a small two months old child, so she took the child to the house and went to check on her severally. PW3 testified that the last time PW1 went to check on the child, she uttered saying, "***huyu Junior ameua mtoto wangu,***" –"***this junior has killed my baby***" and called out on PW3. She testified that she went and found the child appearing dead. She stated that they placed the child outside and removed her clothes and she saw blood oozing from the mouth and nose.

19. PW3 testified that she returned the child to the house and placed it on the beddings, not on the bed since the child was dead. She stated that she saw 'junior' standing at the door then he ran away. It was her testimony that she saw 'Junior' emerge from the house of PW1 and PW2 when PW1 entered the house. She stated that their brother, PW2 and mother went to the scene and saw what had happened. It was her testimony that they remained at the scene and that her brother went to report to the local administration.

20. PW3 testified that he knew 'Junior' because 'junior' lived with his aunt Rose, a neighbor, during school holidays. She testified that she found 'junior' at their home during the funeral of her father and that she heard their children calling him 'Junior, Junior'.

21. It PW3' testimony that from the house of PW1 to where they sat was about 10 metres, like in the court room. She further testified that there was bright moonlight and lamps were lighting. She identified 'Junior' virtually on the screen.

22. In cross-examination by Mr. Okanda Advocate, PW3 stated that when she went to find out what had happened, she entered the house of PW1 & PW2 and picked the child, and took her out. She stated that she removed the child's clothes and took her outside. It was her testimony in cross-examination that the child was warm but not sweating and that she thought that the child had worn more clothes that is why she removed the extra clothes. She stated that it had been cold outside. She further stated that Dorcas was besides the fire not next to the fire place. It was her testimony that she took the dead child into the house and laid her on the floor not on the bed. She stated that the house had a curtain and was a one room.

23. PW4 Pamela Akinyi Odhiambo a resident of Alwar testified that the subject minor was her son. She stated that she was aware that he was facing a murder charge. She stated that the subject minor was born in 2006.
24. It was her testimony that on the 22/7/2021 at 6.00 am, she was at Alwar. She stated that the subject had gone to his aunt's home at Uriri. PW4 testified that at 6.00 am when she opened her door after hearing a dog bark, she got out but never saw anyone. She stated that she went to the river to fetch water and left her daughters at home. PW4 testified that her husband sent one of their daughters to go buy milk from the shops nearby and their daughter then called PW4 saying 'Junior' had come but that he was shaggy. She testified that she inquired from 'Junior' why he was shaggy and why he had come that early and further questioned him if he had made any mistake at his aunt's place but he denied. She testified that she made tea and gave him to take but he looked very worried and was just standing and panicking. PW4 testified that she asked the subject minor 'what is wrong with you?' but the subject said nothing.
25. PW4 testified that as she prepared to leave for a funeral, she saw many people go to her homestead including her husband's sister Rose asking for 'Junior'. She testified that the subject had left and was followed and arrested while running away. She stated that she spoke to Rose asking her what had happened and Rose told her that 'Junior' had defiled a two months old baby at a funeral place in the neighborhood and killed the baby.
26. It was her testimony that she recorded her statement at Akala Police Station where she spoke to Junior and asked him what had happened, but the subject said nothing had happened. It was her testimony that she saw Junior at 8 am that morning and that at 6 a.m. when she opened her door upon hearing dogs bark, she never saw junior.
27. PW4 testified that the people that Rose came with looked for Junior and arrested him after failing to get him from the neighbourhood. She stated that the subject was traced on his way to Kambare. She further stated that they brought the subject to his home under arrest. It was her testimony that when she spoke to Junior-the subject near the road, he denied defiling or killing the baby. She further stated that the OCS Akala arrived and took the subject into custody. She stated that she told the police what they recorded as her statement. She also identified the subject, Junior on the screen whom she reiterated was her son.
28. PW5 Charles Odhiambo Origi, a bicycle repairer and a resident of Gem Agor testified that the subject was his son and PW4 was his wife and the subject's mother. It was his testimony that on the 22/7/2021 at 8 am, he was at his home when he got out to go to the toilet when he saw the subject approaching. He testified that the subject had gone to his aunt's home.
29. He further testified that the subject was dirty and his clothes were also dirty and had also shaved 'box' style. PW5 testified that it was during school holidays so the subject liked going to stay at his aunt's home. He testified that he had refused the subject from going to his aunt's place but the subject could hide and go even when he returned him home. He stated that the subject did not heed to what PW4 told him.
30. PW5 testified that when the subject arrived home, PW5 asked him where his clothes were to which the subject responded by stating that his aunt would bring them the following day. It was his testimony that he left for work and after two hours he saw boda boda riders go to his workshop asking for his son, the subject. He testified that he told them that the subject was at home where they proceeded to but they found when the subject had left.
31. It was the testimony of PW5 that they were informed that the subject had defiled and strangled a baby. He stated that the subject was traced and arrested and the OCS Akala came and took him away. He testified further that he later went and recorded his statement with the police. PW5 identified the subject, his son, on the screen.
32. In cross-examination, PW5 reiterated that the subject was his son and that the subject used to visit his aunt Rose since he was in Standard One. It was his testimony that the subject schooled from Rose's home in Class One and used to visit her from time to time during school holidays. He stated that his daughter also lived with Rose. He further stated that Rose had no child of her own so she loved staying with his children and that it was not because of the subject's bad character that he wanted him to return home but because Rose had no job and income to sustain the children.
33. PW6 Rosemary Achieng Odhiambo resident of Uriri sub location testified that the subject was her nephew. It was her testimony that on the night of 22/7/2021, PW2 went and told her that F.-the subject had strangled his child. She testified that at 6 am, the Chief went for her and they went to PW2's home and afterwards, they proceeded to the home of the subject where and had him arrested. It was her testimony that she lived with the subject earlier on but at the material time the subject had visited her during school holidays. She testified that she was the one who led the people to arrest the subject at his home which was also her home.
34. PW7 No. 224930 CPL Juma Ali based at Gem -Yala DCIO's office testified that his duties were driving and investigations. It was his testimony that the Investigating Officer was PC Stanley Njenda and that PW7 was part of the team that investigated this case. He stated that he took the Investigating officer to the scene of crime.
35. PW7 testified that on the 22/7/2021 at around 10.00 hours, they were instructed by DCIO Gem Chief Inspector Mbarani to accompany Police from Akala Police Station to the scene of Murder at Uriri sub-location where they found the body of the deceased Shantel Otieno Omondi wrapped in a blanket and kept at a corner of the house. He testified that the compound had many people because the child's relatives were still mourning the death of Mr. Wasonga, her grandfather.
36. It was his testimony that they moved the body to Yala Level 4 Hospital Mortuary. He further testified that they did not see any physical injuries on the child apart from blood oozing from her nose and that they recorded statements of witnesses present and moved to the station.
37. PW7 further testified that on the same day at night, they received a phone from Akala Police Station that a suspect F.O. the subject herein had been arrested by members of the public at Aluor where he had run to. He further testified that at the time of the incident, F. was living

with his aunt Rosemary Odhiambo at Uriri. It was his further testimony that the DCI Gem collected F. and took him to Akala Police Station where he was charged with the offence. PW7 testified that he did not know the suspect prior to this date.

38. In cross-examination, PW7 stated that they never saw any physical injuries on the deceased baby after examining the body and that they did not look at the baby's genitalia. He further stated that there were no physical injuries to the neck and that the body was placed in a blanket and kept at a corner of the house. He further stated that they asked police officers whom they found at the scene and also spoke to parents of the baby who told them that the body was on the bed before being removed. It was his testimony that the child was in a dress and wrapped in a blanket. He further stated that they did not establish whether those are the clothing that the baby wore when she was found lifeless and that neither did they dust the clothes but that they took finger prints of the subject.

39. PW7 stated that they never looked for any rope, that the bed was well done and that there was a mosquito net on the bed. He further stated that the incident took place at night. It was his testimony that there was movement and that the scene could have been tampered with but they took the body to the morgue for postmortem because they saw blood oozing from the nose.

40. PW8 Paul Oloo a medical officer with a Bachelor of Medicine and Bachelor of Surgery degree from the University of Nairobi testified that he is in private practice but used to work at Yala sub county Hospital.

41. It was his testimony that he conducted the postmortem on the body of the deceased on the 22/7/2021 at Yala sub-county mortuary at 12.30 pm. He testified that there was no clothing, the age of the deceased was 2 months, with a height of 61 cm. He noted that the body was well preserved.

42. PW8 testified that externally, there were blood clots in both nostrils and on the upper lip and that there was ligature mark on the mid part of the neck, gaping of the anal opening of 1.5cm, no bleeding, no bruises, no tears noted.

43. He further testified that the external genitalia were normal with no bruises, bleeding or tears. However, the vaginal canal was open, 1cm with no hymen noted. He stated that there were no other signs of external injuries.

44. PW8 testified that Internally, the respiratory system, the upper and lower airways were all normal, the cardiovascular system was normal whereas in the digestive system, the anal canal had an opening of 1.5 cm. He further testified that on examination of the genito-urinary system, he noted that the vaginal canal was open 1 cm with no hymen but no bruises, tears or bleeding.

45. PW8 testified that the head was normal, nervous system was normal, spinal column and spinal cord were normal.

46. It was his testimony that as a result of his examination, he formed the opinion that the cause of death was strangulation. He stated that the cause of death was determined from external examination. He further testified that there was no carbon monoxide poisoning because of lack of any signs of carbon monoxide in the body of the deceased.

47. In cross-examination by Mr. Okanda Advocate, PW8 when shown finding No. (d) on the postmortem stated that there must have been interference with vaginal canal as the hymen was open up to the cervix which was abnormal for a baby. He further stated that the body was not fresh at the time of postmortem so there was no trace of bleeding.

48. It was his testimony in cross-examination that he was never told the condition of the vagina. He further stated that the anal canal was penetrated as well but no bleeding. He stated that he did not take any swabs and that apart from the gaping in the vagina and anal canal, he did not see any sign of sexual penetration.

49. PW8 further stated that he saw ligature marks around the neck. He stated that a rope was used and that blood supply to the brain must have been interfered with although cardiovascular system was normal. It was his testimony that blood supplies oxygen to the brain and when the blood supply is cut off, oxygen is also cut off.

50. PW8 testified that it was possible for one to be strangled and survive. He stated that asphyxia was a mechanism of death not a cause of death. He stated that the history he was given was that the suspect was found running away from the house where the lifeless body of the baby was found. He further stated that there was no evidence of suffocation by way of lack of oxygen due to inhalation of smoke from firewood and that if the child had been exposed to smoke, he would have found discoloration in the airwaves.

### **Defence Case**

51. The subject F.O.O. was taken through a *voire dire* examination and found to possess sufficient intelligence to understand court proceedings and to tell the truth. He however did not understand the meaning of an oath hence he could not be sworn. The subject in his unsworn evidence stated that he did not kill or strangle the child. He admitted to knowing the child Shantel. The subject further admitted that on the 22/7/2021 he was found in the house of baby Shantel. He testified that he had gone to the home at night for a kesho and he told his friend Austin that they go and take a radio from his grandfather.

52. It was his testimony that Austin lived in Shantel's home. He testified that they came with a radio and placed it on the table after which he told Austin that they light a fire which they warmed themselves with until 2 am when he informed Austin that he wanted to enter the house and rest a little bit. It was his testimony that he got into a house, took a seat, placed it at a corner and sat then Mama Shantel entered the house and told him to get out of her house which he did and continued warming himself at the fire place.

53. The subject testified that Mama Shantel then took out the child and removed all her clothing then screamed saying that the subject had defiled and killed the baby. He stated that they started beating him so he ran away into the bushes and after a while he went to his aunt's

house. It was his testimony that the father to Shantel came and told his aunt that the subject had strangled his child and his aunt told him to go to their home which he did.

54. The subject testified that in the morning, motorcyclists arrested him, took him to his home then he was escorted to Akala Police Station and later to Yala Police Station. The court noted the subject was very confident. It was his testimony that if he had done that act, the mother of the child could not have found him in the house and he could not have stayed there warming himself but that he could have escaped.

55. He testified that he escaped into the bushes because he feared being killed by the people who had surrounded him. He stated that he feared for his life. He stated that he stayed in the bushes for a while before he went to his auntie's place who asked him of what he had done to the baby. He stated that his aunt was not a neighbor to Shantel's home and that he stayed at her house until morning. The subject stated that what was said before this court against him was a lie. He reiterated that he did not kill baby Shantel.

56. In cross-examination, the subject reiterated that his auntie's house was not very near baby Shantel's home. He stated that he had never before slept in Shantel's house. The subject further stated that he did not ask for permission to enter the house and sleep there. He stated that he did not escape. The subject stated that the people held him and slapped him. It was his testimony that the mother of the child took out the child saying the child was dead and defiled. He stated that he ran away when he was surrounded and slapped.

### **The Subject's written submissions**

57. It was submitted that the post mortem report and the testimony of the Doctor, PW8 were inconsistent as the conclusion by the Doctor in the report was that the cause of death was as a result of strangulation whereas his testimony was that strangulation does not automatically lead to the death of a person and that it was possible for one to be strangled and not die as a result. The subject's counsel thus submitted that the nature of inconsistency ought to be determined in favour of the subject as was held in the case of **John Mutua Munyoki v Republic [2017] eKLR**.

58. It was further submitted that the narrative that the deceased was strangled was further betrayed by the testimony of PW1 and PW7 with PW1 testifying that in her observation of the body of the deceased, there was no physical marks suggestive of strangulation whereas PW7 who was the investigating officer told Court that he went to the scene of crime and that there was nothing to suggest that there was any instrument like a rope that was used to commit the alleged crime.

59. It was thus submitted that the only reason for suspecting the subject to have murdered the baby was because he was found in the house at the time the incident was discovered, which was denied by the subject who qualified in his defence by the fact that he was also at the funeral and had gone in the room to sleep when he was discovered by PW1.

60. Counsel for the subject further submitted that the prosecution had failed to discharge the burden of proof that subject had committed the unlawful act which caused the death of the deceased and that the subject had malice aforethought the consequence of which is that they have not placed any material before Court to point to the guilt of the subject.

61. It was submitted that the decision to charge the subject with the offence of murder was purely based on suspicion informed by the fact that he was in the house where the deceased was discovered dead but that suspicion cannot suffice to infer guilt as was held by the Court of Appeal in the case of **Joan Chebichii Sawe v Republic Crim. App. No. 2 of 2002**.

### **Analysis & Determination**

62. The subject F.O.O is charged with the offence of murder. Section 203 defines the offence of murder and requires proof of the following elements beyond reasonable doubt, to establish the offence of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.

63. The first issue for consideration is proof of death. In the instant case, there is no dispute of the deceased's death. This was confirmed by all the prosecution witnesses, more so by the evidence of PW8 who carried out the postmortem on the deceased's body and after the examination, reached the conclusion that the cause of death was strangulation. Accordingly, it is my opinion that the prosecution has satisfied this element beyond reasonable doubt.

64. The next question is whether the death of baby Shantel was caused by an unlawful act or omission. Article 26 (1) of the Constitution guarantees every person the right to life. The postmortem report prepared by PW8 revealed that the deceased's cause of death was strangulation. The doctor also found that there were ligature marks on the neck of the baby which was evidence of strangulation using a rope. Although the defence tried to dissuade this court from believing the postmortem results and even alluded to suffocation of the baby from the carbon monoxide from the smoke produced by the fire which the mother to the deceased was using for warming up at the funeral that night, that theory is unsupported by any evidence on record. Counsel also submitted that asphyxia, according to PW8, could not cause death. PW8 was clear in his report and testimony that there was no evidence of carbon monoxide as that would have been shown by discoloration in the dead child's airways which were clear. The question on asphyxia was raised by the defence counsel in cross examination, on whether it was a cause of death and the doctor was clear that it was a mechanism of death not the cause of death. In the circumstances, I am persuaded beyond reasonable doubt that the deceased baby Shantel died out of an unlawful act.

65. The other question is whether it was the subject minor herein F.O.O. who unlawfully caused the deceased's death. None of the prosecution witnesses actually saw the subject kill the deceased. In essence, the prosecution case was based on circumstantial evidence.

66. In **Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR**, the Court of Appeal stated as follows on reliance on circumstantial evidence:

*“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -*

*“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”*

67. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

*“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:*

*“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 the guilt of the Subject; 9iii) 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.”*

68. In this case, PW1, the first person at the scene testified that she had laid her baby, the deceased to sleep and kept on checking on her regularly. However, that when she went to breastfeed the baby at about 2am, she found the subject coming from the mosquito net and when she asked him, the subject said that he was sleeping but since she had come he would leave.

69. PW1 further testified that she noticed the baby’s body was loose and she was unresponsive prompting her to seek help from her sister in-law, PW3 who upon examining the child noticed that the child was dead. PW1’s testimony was corroborated by PW2 and PW3 who were all at the scene of the crime.

70. PW1 further testified that the child’s thighs were wide open when she found her. This was corroborated by PW8, who carried out the postmortem on the deceased’s body and stated that that there must have been interference with the deceased’s vaginal canal as the hymen was open up to the cervix which was abnormal for a baby.

71. PW2 and PW3 both testified that when the subject heard that the child was dead, he ran away. PW4, the subject’s mother testified that on the morning of 22/7/2021, the subject returned home from her auntie’s place looking shaggy and panicking and was unresponsive when asked on what was wrong.

72. From the evidence adduced by the prosecution, it is clear that the subject was the last person must have been the last person to see and be with the deceased prior to her death. PW1’s testimony that she laid the deceased to bed and would regularly check up on her was corroborated by both PW2 and PW3. In his defense, the subject himself testified that indeed he went to sleep in the same room where PW1 found him but that he did not kill the deceased.

73. From the above testimonies, it is clear that it was the subject who was last seen with the deceased baby before she was found motionless. PW1 found the subject emerging from the bed where the baby had been laid asleep and the net was shaking. The subject admitted being in the same house as the baby and it was him alone with the baby when PW1 entered the house.

74. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide any explanation as to what happened. Having been placed at the scene of the incident as the person who was last seen with the deceased before she died, the subject herein has a duty to give an explanation of how the deceased met her death.

75. In the Nigerian case of **Stephen Haruna v The Attorney-General of The Federation (2010) 1 iLAW/CA/A/86/C/2009** the court opined thus:

*“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”*

76. Similarly, in the Indian case of **Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh, JT 2006 (4) SC 16** the court held that:

*“Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”*

77. The subject in this case was thus required to offer an explanation on how the deceased met her death. Sections 111(1) and 119 of the Evidence Act provides as follows:

***“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***

***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:***

***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”***

***“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”***

78. In the circumstances of this case, it is my view that the subject’s defence failed to offer any explanation as to how the deceased might have met her death. His defense, in my mind, amounted to a mere denial.

79. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the subject who unlawfully caused the deceased’s death.

80. Finally, on the question of whether there was malice aforethought on the part of the subject, Section 206 of the Penal Code defines Malice aforethought as follows:

***“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances***

***(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

***(c) an intent to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

81. The Court of Appeal in the case of **Joseph Kimani Njau v R (2014) eKLR**, the Court of Appeal held as follows:

***“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;***

***i) The intention to cause death;***

***ii) The intention to cause grievous bodily harm;***

***iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.***

***It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”***

82. In the instant case, PW8 who carried out the postmortem on the deceased’s body testified that his examination revealed that the cause of death was strangulation. PW8 also noted that there must have been interference with vaginal canal as the hymen was open up to the cervix which was abnormal for a baby. The deceased baby in my opinion seemed to have suffered such a terrible death for a toddler to have her vaginal canal wide open to the cervix and her anal canal too was open. The subject must have intended to cause the deceased grievous harm or death.

83. In the circumstances I am persuaded beyond reasonable doubt that the prosecution also proved this limb of the presence of malice aforethought on the part of the subject beyond reasonable doubt.

84. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the Information of murder against the subject minor F.O.O. beyond reasonable doubt. I record and enter a finding of guilty against the subject F.O.O. as charged. The Court shall make appropriate orders as stipulated under section 191 of the Children's Act, after mitigation and reports filed by the probation Officer and Children's Officer, Siaya County regarding the subject.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF DECEMBER, 2021**

**R.E. ABURILI**

**JUDGE**