



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**HIGH COURT CRIMINAL CASE NO. 27 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AJK.....ACCUSED**

**JUDGMENT**

The accused AJK is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that; ***On a date between 28<sup>th</sup> August 2017 and 3<sup>rd</sup> September 2017 at [particulars withheld] location in Cheptais Sub-county within Bungoma County jointly with another not before court murdered JKJ.***

The deceased JKJ was the son of the accused AJK and his wife LC and was born in 2016. At time of death he was 1 year 5 months old.

The accused and deceased mother C separated in 2017 and she left the matrimonial home. She left the child in the care of accused and his mother JNN.

On 28.8.2017, Pw2 JN left the child with accused to take care of him as she was going to the farm at 10.a.m. When she came back at 1 p.m. she did not find the accused or the child present. Accused came later that day and on inquiry he told the mother J that he had left the child with one C and that he will go for the child. Accused disappeared for 2 days and when he came back and was asked about the child he promised to bring the child in the evening. He did not come back.

On 2.9.2017 J (Pw2) noticed that accused was in his house. He informed the uncle MO Pw1. He came and they arrested the accused and asked him the where about of the child. He told them the child was at home of Kiptir. He then elected to lead them there. He lead them and they passed the home. He requested to be untied. They suspected he wanted to escape and took him to police. At the police station he said he had given the child to another lady who does business in Kitale. He said the lady's telephone contact was in his phone which was in his house. They called the mother (Pw2) to look for the phone in his house. While searching for the phone they discovered fresh soil in the house. Police were called and on checking found the body of the child in a gunny bag and buried under the bed. Police called a doctor who exhumed the body and conducted a post-mortem on the body.

Dr. Dickson Muchana Pw11 a consultant pathologist stationed at Kakamega hospital performed the post mortem on body of the deceased. Upon examination he found deceased had bruises on the neck and the finger nails and tongue were black. Upon opening he saw the deceased had an injury in front bone of the neck. The airwaves were filled with foam. From the examination, he formed opinion that the cause of death was due to strangulation. He estimated that death had occurred about 10 days before the examination.

Pw6 LCM the wife of the accused and mother of the deceased, testified that they separated with accused on 12.1.2017 leaving the child with accused to be taken care of by the grandmother J. On 3.9.2017 she received information that deceased had been found buried in the house. On 5.9.2017 she went with police to the house where the body was exhumed. They had separated for 3 months and he also was informed that he had married another wife.

Pw9 S NO. [xxxx] Sgt. Philip Ripis the Investigating Officer was instructed by OCIO Chief Inspector James Owuor to accompany him to the scene of murder.

On arrival they found the scene had been sealed off by police officers from Cheptais Police Station. In the house of accused they found a heap of soil under the bed. They suspected the child was buried there. They obtained a court order on 4.9.2017 and on 5.9.2017 proceeded to the house and exhumed the body of the deceased. A post mortem was done at scene the body was wrapped in a lessa and put in a polyethene paper. After investigations accused was charged with present offence.

The accused upon being placed on his defence gave sworn evidence . He testified that he was the father of the deceased whose mother LC

had gone away. On 31.8.2017 his mother Pw2 J left the child with him and went to the farm. He then left the child with his girlfriend called Cherop and went on duty as a boda-boda rider. He later called his mother Pw2 who told him Cherop had left with the child. On 1.9.2017 he was informed that Cherop had not come home. He went to her home but did not find her. He came home and broke into his house. The mother then called the uncles who came and took him to the police station. While at the police station, he was informed the child had been found buried in the house. He does not know where Cherop is to date.

Mr. Sichangi for the accused filed written submission. He submitted that the prosecution did not invest in apprehending the woman called Cherop to shade light on the fate of the deceased minor. He submitted that the prosecution only led evidence that the deceased was found in accused house, and that therefore it must be the accused who committed the offence.

The accused is charged with the offence of Murder contrary to section 202 as read with Section 203 of the Penal Code, which provides;

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

The ingredients of the offence of murder which must be proved by the prosecution are:

- 1) *The fact and cause of death of the deceased.*
- 2) *The unlawful act or omission that causes the death.*
- 3) *That the death was committed with malice aforethought.*
- 4) *That it is the accused who committed the unlawful act or omission causing the death.*

Pw11 Dr. Dickson Muchana who performed the post mortem on the body of the deceased found on external appearance that the body had bruise on the neck and upon opening found that the airways were filled with foam and injury on neck bone. He therefore formed opinion that cause of death was due to strangulation. He then confirmed the fact and cause of death.

This strangulation would have been caused by another person as the child was only 1 year old.

The second issue is whether it is the accused who strangled the deceased.

Pw2 JN testified that on 28.8.2017, she left the child with the accused and went to the farm. This fact the accused admitted in his evidence that his mother left the child with him on the material day. When Pw2 came back from the farm, he found both the accused and child not at home. He was therefore the last person to have been seen with the deceased alive.

Pw1 MKO, the uncle of the accused testified that accused's mother called him and informed him that accused had come home after disappearing with the child. He went there. He and other people knocked accused's door but he refused to open. They forced the door and entered. They found accused inside the house. They asked him about the whereabouts of the child. He told them the child was at home at Kipkir and offered to lead them there. He led them past the home and they suspected he wanted to escape. They took him to the police station where the accused told them the child was with another lady at Chwele. That is when they got information about discovery of shallow grave in accused's house.

Pw9 Sgt. Philip Rupis gave evidence on how they visited the house of the deceased. In the bedroom they saw a heap of soil and next to it a jembe. They suspected the child would be buried there. They went to Sirisia Court in Misc. Application 27/2017, obtained orders of exhumation. On 5.9.2017 they removed the soil and found the body of deceased who was wrapped in a lessa and had started decomposing. A post mortem was conducted at the scene and established the cause of death as due to strangulation.

The accused defence is that he left the child with one Chebet who was his girlfriend and was not aware how the child died. None of the witnesses saw the accused strangling the child. The prosecution is relying on circumstances which show commutatively that it is the accused who killed the deceased. In short prosecution relies on circumstantial evidence to prove guilt.

Circumstantial evidence can be led to prove a fact and it will be evidence as any evidence. In **Musili Tulo -v- Republic Criminal Appeal NO. 30 of 2013** the court of appeal stated on circumstantial evidence.

***“ Is as good as any evidence if it is properly evaluated and is as usually put it can prove a case with the accuracy of Mathematics.”***

Circumstantial evidence is evidence which form a chain of circumstances or inculpatory focus which, irresistibly point to the accused committing the unlawful act and are incompatible with the innocence of the accused.

In **Republic -vs- Kipkeriny Arap Koskei and 2 Others 1949 EACA 135** the court of appeal for Eastern Africa explained on circumstantial evidence.

***In order to justify a conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon one other reasonable hypothesis than that of his guilt and the burden of proving facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shift***

*to the accused.*

In **Omar Mzungu Chuwera -vs Republic Criminal Appeal No. 56 of 1998**, the court stated:

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

**1) The circumstances from which an inference of guilt is to be drawn must be cogently and firmly established .**

**2) Those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused.**

**3) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within one human probability the crime was committed by the accused and no one else.**

What then are the circumstances the prosecution is relying on to establish the guilt of the accused?

The Prosecution established through the evidence of Pw2 the mother of the accused that the deceased was with the accused on 28.8.2017. The fact the accused admitted in his evidences. He was therefore the last person seen with the deceased alive. The prosecution established that the accused disappeared from the home and the child was never seen since then. Prosecution established that when accused was seen at home, he was asked about the child and lied that he was at home of Kiptir, he offered to lead them to the home but changed his mind. He again lied that the child was with another lady at Chwele.

Finally the prosecution established that the body was recovered in his house under the bed on a shallow grave, and that the accused had been apprehended from the house where the body was recovered.

In **Sawe -v- R 2003 eKLR** the Court of Appeal considered what the prosecution must prove to obtain a conviction based on circumstantial evidence it stated:

**“ In order to justify on circumstance evidence, the inference of guilty the inculpatory facts must be incompatible with the innocence of the accused and incapable explanation upon any other reasonable hypothesis than that of guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving these facts to the exclusion of any other reasonable hypothesis of innocence remain within the prosecution. It is a burden which never shifts to the party accused.”**

The circumstances proved by the prosecution, firstly that he was the person last seen with the deceased alive; he disappeared from home; when he was apprehended in his house, he lied on the whereabouts of the child; and fact that body was recovered buried in his house from where he had been apprehended all form a chain of circumstances which irresistibly point to the guilt of the accused. I find that the circumstances form a chain with no intervening or co-existing circumstances weakening the link. I find the accused explanation on the disappearance a lie and reject it.

I am therefore satisfied that the prosecution has established its case beyond reasonable doubt. I find accused guilty of the offence of murder contrary to Section 202 as read with Section 203 of the Penal Code and convict him accordingly.

**Dated at Bungoma this 29<sup>th</sup> of October, 2020.**

**S.N RIECHI**

**JUDGE**