



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CRIMINAL CASE NO. 4 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

GILBERT KIPTOO.....ACCUSED

JUDGMENT

1. **GILBERT KIPTOO SAINA** (*the accused*) faces a charge of murder Contrary to **Section 203** of the **Penal Code** as read with **Section 204** of the **Penal Code** that on 14th December 2012 at **TIMBILI** village in Songhor Location of **NANDI** County, he murdered **FC** (deceased).

He denied the charge.

2. **EDNA CHEROT** (PW1) recalls that on **14th December 2012** at **6.00pm** she was at home in **TINDERET** in the company of her 3 months old child **FC**. The accused had left in the morning and returned home drunk – PW1 heard him coming home while shouting in a drunken state.

3. When the accused (who was her husband) entered the house, he found the child lying down who PW1 had put her to sleep.

The accused appeared aggressive, so PW1 asked him what had happened.

Accused said he had been assaulted, and when PW1 inquired who had assaulted him, he picked the sleeping baby, and announced that he would kill her.

4. The accused held the baby by the neck and begun pressing it, while repeating that he wanted to kill her. He squeezed the baby's throat until the mouth was wide open, then said he would smash the baby down. PW1 could not bear it and feared for her life, so she rushed out and hid in a neighbour's toilet. She heard a smashing sound and knew the accused had done the worst, so she got out of the toilet and ran off.

5. On the way, PW1 met a fellow church member named **JOSHUA** and told him

“Please go to my house and check for me if my baby is alive, bring the baby”.

6. The neighbour proceeded to the house but did not return. However another neighbour by name Jane and another woman informed her that the baby was dead. They urged her to accompany them to the house, saying police had come and all would be well. She obliged and found police who took the baby’s body to the mortuary. She then called her relatives from her ancestral home. When post mortem was conducted she identified the body to the Doctor, and she observed that the baby had a cracked skull at the back of the head.
7. PW1 explained that the accused had taken her to live with him as his wife, and they had been together for 9(nine) months. Further that at the time of the incident, there was no one else within the compound but the accused had an uncle named **EZEKIEL** who lived nearby. She further stated that they had not quarrelled on this day.
8. On cross examination PW1 stated that she was not aware of any differences between the accused and his uncle **EZEKIEL** although on the day he returned home drunk, he claimed that **EZEKIEL** had assaulted him yet the said **EZEKIEL** had conned him.
9. She also clarified on cross examination that when the accused got into the house, he found the baby sleeping in their bed and he lifted her from the bed. She requested him to give her the baby to feed but he declined, and he said he would kill her.
10. After the incident she got married to someone else saying;

“I got married elsewhere because accused killed my baby.

EZEKIEL KIPTOO BITOK (PW2) testified that he was at his home on 14.12.2012 at about 6.30pm when he heard people shouting

“He has killed a baby, he has killed a baby.”

11. He rushed to the direction of the noise to see what was happening, and found a crowd of about 60 people within the accused’s home. The accused had been dragged outside and beaten by the crowd. PW2 entered into the house and found the baby lying on the floor dead. He rang the chief (**JAMES MUTAI**) and informed him about the incident. He stated:

“I entered the bedroom and saw the baby lying on the floor, blood was flowing from the ears and nose.”

He confirmed that the accused was his nephew, and as far as he knew, had lived in harmony with his wife (PW1). He denied ever having differences with the accused.

12. On cross examination he stated that earlier in the day he had met the accused who was drunk and was shouting along the road.

PW3 (**CPL MOSES KURIA**) who took over the investigations from **PC JAFRED MAKARAYA** produced the post mortem form (as agreed by the defence counsel) which showed that the child had bruises on the face, multiple bruises around the neck, a fracture of the skull. The cause of death was asphyxia and head injury.

13. The accused in his unsworn defence confirmed that PW1 was his wife and the deceased child was his. He had left home in the morning, returned, then left again to go drinking with his friends. According to the accused, he got completely drunk and could not even tell what time he got home. He went to sleep, and cannot tell what happened because when he woke up, he was at the police station. When he asked police why he was there, he was informed that he had killed his child (much to his shock).

He concluded his evidence thus.

“I do not know what happened as I was too drunk. I had not disagreed, with my wife or the child.”

14. There is no dispute that the minor met her violent death on the date in question, and the injuries as noted by the Dr. were consistent with what PW1 described i.e strangulation, and smashing of the child.

The defence counsel argues that the prosecution has not established malice aforethought, and that in any event the accused was too drunk to even know what he was doing.

15. Both PW1 and PW2 confirmed that the accused was drunk – but the question is was he so drunk as to be totally unable to account for his actions.

Section 13 of the Penal Code sets out circumstances that would constitute the defence of intoxication, because intoxication per se is not an automatic defence to any criminal charge.

16. **Section 13(2)** intoxication shall be a defence to any criminal charge by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and;

- a) the state of intoxication was caused without his consent by the malicious or negligent act of another person or
- b) the person charged was by reason of intoxication insane, temporarily or to otherwise, at the time of such act or omission.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise, in the absence of what he should not be guilty of the offence.

17. The defence counsel submits that accused was in a state of mind that he did not know that what he was doing was wrong.

18. In this instance there was the presence of motive – he actually got to the house, picked the sleeping baby and said he was going to kill her.

PW1 pleaded with him to give her the baby to feed but he refused and begun strangling the child, even as she gasped for air.

19. It would have been different if he just walked in and without provocation or prompting, picked the baby and proceeded to strangle it. This situation is easily distinguishable from that which prevailed in the case of **NZUKI V R [1993] eKLR** where there was complete absence of motive, and the accused simply took a knife and viciously stabbed the deceased several times. Here the mens rea was made clear that he intended to kill the child and he announced that.

20. The mens rea was made complete with his immediate actions rea of picking the child, strangling her and then smashing her head – that cannot even be reduced to manslaughter it was a malicious and wicked intent which was made complete by the actions.

The evidence presented by the prosecution proves the charge and the accused’s defence of intoxication (while I acknowledge he was drunk) was not an excuse for his actions. It is rejected and I return a finding of guilty as charged.

H. A. OMONDI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21st DAY OF FEBRUARY 2019