



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 76 OF 2009**

**REPUBLIC.....STATE**

**VERSUS**

**J K L.....ACCUSED**

**RULING**

The accused **J K L** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

***“On the 17<sup>th</sup> September, 2009 at Kapala Village in Molo District of the Rift Valley Province, murdered V C”***

The accused pleaded ‘Not Guilty’ to the charges. His trial commenced on 13/11/2013 before **Hon. Lady Justice Roseline Wendoh** who heard the first seven (7) prosecution witnesses. Following the transfer of the trial Judge to Meru High Court I took over the matter and heard the final witness. A total of eight (8) witnesses testified for the prosecution.

The deceased ‘V C’ was a toddler aged about 1½ years old. The accused was the child’s step-father. **PW3 E C L** told the court that she was the mother of the deceased child. **PW3** explained that although the accused was her husband he was not the biological father of the child.

On 17/9/2009 **PW3** woke up at 7.00am and went to cultivate her shamba. She left her baby in the care of the accused in their house. At 10.00am **PW3** returned home. There she met her mother-in-law **S N PW5** who informed **PW3** that her child was dead. Police came to the scene and removed the body to the mortuary. At the conclusion of police investigations the accused was arrested and charged with the offence of murder.

The prosecution having closed its case this court must now analyse the evidence on record with a view to determining whether a prima facie case has been established sufficient to warrant calling upon the accused person to defence the charge.

In the case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] E. A** a ‘prima facie’ case was defined as follows

***“It may not be easy to define what is meant by a ‘prima facie case’ but at least it must mean one on which a reasonable tribunal properly directing it’s mind to the law and the evidence could convict if no explanation is offered by the defence”.***

In this case the fact of the deceased’s death is in no doubt whatsoever. **PW1 DAVID BEIT** the Chief of Teget area told the court that upon receiving news that a child had been injured he rushed to the scene. He found the body of the dead child lying there and he observed a swelling on the face.

**PW2 JOSEPHINE CHEROTICH CHEMUIGO**, a neighbour also confirms having seen the dead body of the deceased. **PW3** who was the mother of the child confirms that she went to the mortuary where she identified the dead body of her child to the doctor before the autopsy was done. All these witnesses who knew the deceased child very well identify her as ‘V C’.

**PW8 DR. MAGDALENE MUNYAO**, who was the MOH at Molo District Hospital testified regarding the autopsy examination that was conducted on the body. **PW8** told the court that this autopsy was conducted on 24/9/2009. The body was found to have

Bruises on the head and back

Teeth marks on the face

Upon an internal examination the doctor noted that the stomach had been perforated and the gastric contents were leaking. The cause of death was opined to be '**subdural haematoma and gastric perforation**'. **PW8** produced as an exhibit the duly filled and signed post mortem report **P. exb 1**.

Upon cross-examination by **MR. NYARIBO** for the accused it became evident that this post mortem report was not conclusive. Although the cause of death was indicated, the doctor failed to mention what factor(s) could have led to the subdural haematoma or the perforated stomach.

**PW8** was not the actual doctor who performed the autopsy. She was producing the report on behalf of her colleague a '**Dr. Wambui**'. It's only the said '**Dr. Wambui**' who could have given a definite explanation of remarks on the cause of death. As it stands it is not clear from this post-mortem report whether the death of the deceased was due to homicide or due to some other natural cause.

Be that as it may the accused had been charged with the murder of the child. In order to prove the charge the prosecution must adduce evidence to prove beyond reasonable doubt that the death of the deceased resulted directly from an unlawful act or omission on the part of the accused.

There was no witness to the actual events leading up to the death of the child. **PW1** and **PW2** were only alerted after the fact and both arrived at the scene to find the child already dead.

**PW3** and **PW5** the mother and grandmother of the deceased respectively, state that on the material day they both left the homestead early to go to the farm. They left the child in the care of the accused. Upon returning from the farm, the two witnesses found a crowd gathered in their homestead. They found that the child was already dead. No witness saw the accused assault or injure the child in any manner whatsoever.

There being no direct evidence to implicate the accused, the prosecution is seeking to rely on circumstantial evidence to prove his guilt. In **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2010]eKLR** the Court of Appeal held as follows

***"It is settled law that when a case rests entirely upon circumstantial evidence, such evidence must satisfy three tests***

***i. The circumstances from which the 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 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".***

In this case suspicion fell upon the accused because the child was in his company when she met her death. However, in the case of **SAWE Vs REPUBLIC [2003] KLR 364**, it was held that

***"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt".***

The fact that the child had been left in the care of the accused is not alone sufficient to prove his guilt. The prosecution is required to prove the commission of an act or indeed an omission by the accused which directly led to the death of the deceased. No such evidence has been tendered in this case.

In Criminal Law the onus lies strictly with the prosecution to prove each element of the charge beyond reasonable doubt. To call upon the accused to defend himself with the evidence available would be tantamount to shifting the burden of proof and requiring the accused to explain how the child died. The accused is under no obligation in law to prove his innocence.

As unfortunate as the death of an innocent child is, I find no evidence upon which said death can be attributed to the accused. The witnesses told the court that upon being questioned the accused told them that the child had fallen off the bed. This is a feasible explanation for injuries seen on the child. The prosecution did not carry out investigations in order to rule out this possibility of accidental death.

I find that the evidence on record does not show a '**prima facie**' case. If the accused elected to keep silent in his defence the evidence available would not be sufficient to support a conviction.

Based therefore on the foregoing I enter a verdict of '**Not Guilty**' and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Nakuru this 13<sup>th</sup> day of October, 2017.**

Mr. Obutu holding brief for Mr. Nyaribo

Mr. Chigiti for Accused

**Maureen A. Otero**

**Judge**