



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 91 OF 2011**

**REPUBLIC.....STATE**

**VERSUS**

**S K M.....ACCUSED**

**JUDGEMENT**

The accused **S K M** 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 night of 18<sup>th</sup> December, 2011 within Nakuru County murdered T N N”***

The accused pleaded ‘**Not Guilty**’ to the charge. His trial commenced before **Hon. Lady Justice Helen Omondi** on 25/2/2013. The Honourable Judge heard the first three (3) prosecution witnesses. Thereafter I took over the hearing and heard the remaining four (4) prosecution witnesses. A total of seven (7) witnesses testified for the prosecution.

The brief facts of the case were as follows. The accused was a step-father to the deceased who was a boy-child aged about 4 years old. The accused was cohabiting with the mother of the child whose name was given as ‘**R N**’.

**PW7 C M K** who was a sister to the accused told the court that on 17/12/2011 at 3.00pm the accused and his wife brought the child to her house as they were on their way to Mai Mahiu town. **PW7** stayed with the child but she noted that he appeared unwell. **PW7** told the court that the child was trembling and appeared anxious and was nose bleeding. She put the child to bed and he slept. Later the accused returned from town and collected the sleeping child and took him home.

**PW1 F K K** an uncle to the accused told the court that on 18/12/2011 he was woken up at 1.00am by the accused’s mother. They told him there was a problem at the house of the accused. **PW1** went there and found the child lying dead on the bed with blood oozing from his nose. **PW1** phoned the Assistant Chief who also came to the scene. The accused who was present in the house was arrested and taken to the police station. The accused was later charged with the murder of the boy.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied the charge. This court must now analyze the evidence on record and make a determination as to whether this charge of murder has been proved beyond reasonable doubt.

The offence of murder is defined by Section 203 of the Penal Code in the following terms

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

In order to prove their case the prosecution must adduce evidence sufficient to prove beyond reasonable doubt the following ingredients of the charge

1. Proof of the fact as well as the cause of death of the deceased.
2. Proof that the deceased met his death due to an unlawful act or omission on the part of the accused

3. Proof that said unlawful act or omission was committed with malice aforethought

In this case the fact of the death of the young child is not in any doubt. Several of the prosecution witnesses testified that they went to the house at about 1.00am and saw the dead body of the child lying on the bed. **PW5 CORPORAL JAPHETH MWIHA** was the police officer who went to the scene the next day at about 11.30am. He stated that he saw a boy aged 4-5 years lying on his back on the bed with blood oozing from his nose. **PW5** removed the body to Naivasha mortuary and also arrested the accused. **PW5** told the court that whilst at the scene he drew a sketch plan which he produced in court as an exhibit **P. exb 2**. All the witnesses who knew the child gave his name as 'T N N'.

**PW4 DR. JULIE OLUOCH** told the court that her colleague **DR. MAUNDU** conducted the autopsy on the body of the child. The doctor noted+ that the deceased's lungs had collapsed, were congested and filled with fluid. The cause of death was opined to be '**cardio pulmonary arrest secondary to strangulation**'. **PW4** produced as an exhibit the duly filled and signed post-mortem report as an exhibit **P. exb 1**. This was expert medical opinion evidence which was not challenged by the defence.

Having proved the fact as well as the cause of death the prosecution is required to go further and tender evidence to prove that it was the accused who strangled the child to death.

There was no eye-witness to the events leading up to the death of the child. **PW7** only told the court that the child had been in her custody earlier that day by which time he was alive but appeared to be unwell. Later the accused came and took the child back with him to his house.

The only other person who would have had valuable information regarding how the child met his death was 'R N' who was the child's mother since she lived in that same house. Being the wife of the accused this lady was not a compellable witness. The court was informed that she declined to come and testify in the matter.

The prosecution is therefore left to rely on circumstantial evidence in order to prove its case. Circumstantial evidence is that evidence which though not direct points at the accused with a degree of certainty as the perpetrator of the offence.

In the case of **KARIUKI KARANJA Vs REPUBLIC 1986 KLR** the Court held that

***"In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with the innocence of the accused and in capable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution"***.

Similarly in **OMAR CHIMERA Vs REPUBLIC Crim Appeal No. 56 of 1998**, it was held

***"It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy 3 tests. The circumstances from which the inference of guilt is sought to be established must be cogently and firmly established.***

***i. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused***

***ii. 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 no one else"***

In this case the evidence of **PW7** was that the accused was the last person seen with the child while he was alive. However there is no proof of any wrongdoing on the part of the accused. He simply picked up the child from the house of **PW7** and took him home. Nobody knows what happened after the accused left with the child. There is no evidence to show whether the child was dead or alive when they got home. The only other person who may have been able to solve this riddle was the child's mother who as stated earlier declined to testify in this case.

In law the burden lies always on the prosecution to prove its case beyond reasonable doubt. At no time does the law ever require an accused to explain any fact. The accused has no obligation to explain to the court what happened to the child after he picked him from **PW7**.

The doctor's report indicates that the child was strangled. There is no evidence that it was the accused who strangled the child. Aside from accused the child's mother also lived in that house. The possibility that it may have been she who strangled the child has not been ruled out.

**PW1** told the court that when he arrived at the scene he asked the accused

***"M are you the one who did this ....."***

The accused denied that it was he who killed the child. **PW1** went on to state in his evidence

***"He (accused) said he didn't know, that it was not him who did that, that something fell from the roof and hit the deceased....."***

Thus accused never made any admission of any wrongful act on his part.

From the circumstances of this case there certainly exists a strong suspicion that it was the accused who killed the deceased. However this court cannot render a decision on the basis of suspicion alone. As was stated in the case of **PRAVIN SINGH DHALEY Vs REPUBLIC** **Crim. Appeal No. 10 of 1997**

*“For our part we suspect this appellant most likely had something to do with the death of his wife. But suspicion alone however strong it may, cannot take the place of solid and affirmative proof required on the part of the prosecution”*

That is precisely the situation in this case. Whilst there exists a suspicion that the accused may have killed the deceased, the prosecution have failed to prove this fact beyond reasonable doubt. The circumstantial evidence tendered does not meet the required test, I have no option but to accord to the accused the benefit of doubt. I therefore 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 otherwise lawfully held.

**Dated and delivered in Nakuru this 24<sup>th</sup> day of November, 2017.**

Ms Kembo holding brief for Ms Alwala.

**Maureen A. Odero**

**Judge**