REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 38 OF 2013

REPUBLIC……PROSECUTOR

VERSUS

F.M Alias M…….ACCUSED

RULING

F.M alias M, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 8th day of March 2013 at Umoja Inner Core Estate within Nairobi County murdered E.M. The accused denied committing this offence. He is represented by Mr. Muoki, advocate.

The prosecution closed its case after calling six witnesses in support of its case. I have examined and analysed evidence of each of the six witnesses. Their evidence is that one M.W, said to be the mother of E.M aged about 1½ to 2 months, went to Umoja Administration Police Post carrying the baby and reported to APC Joycliff Muthoni (PW1) and CPL Erastus Ndegwa (PW4) that her husband, the accused, had picked and dropped the baby to the ground after a quarrel with her and that the baby had sustained serious injuries that led to his death. The two officers observed that the baby M was carrying was dead. Following this report the accused was arrested from the garbage dumping site where he worked and taken to Buruburu Police Station. The body of the baby was taken to the City Mortuary from where the post mortem was carried out by Dr. Oduor Johansen (PW3) on 12th March 2013. The doctor confirmed the death of the baby and formed an opinion that the cause of death was as a result of head injuries due to blunt trauma.

M had reported to Daniel Maina Kirugo (PW2) on 6th March 2013 that the accused had threatened her and their baby. Daniel was the area Chief Umoja. He summoned M and the accused to go his office on 7th March 2013 but both of them did not go as summoned. Daniel said at the time M appeared as though she was under the influence of some substance.

The investigating officer CPL Hesbon Otieno interviewed M on 9th March 2013 and learned that M and the accused had disagreed after which the accused picked the baby and dropped him as a result of which he suffered head injuries.

At the close of the prosecution case, I was urged by the prosecution to place the accused on his defence because the evidence so far presented establishes a prima facie case against him. On the other hand Ms Wadegu holding brief for Mr. Muoki for the accused submitted no case to answer. She faulted the prosecution case as falling far short of the threshold. She submitted that the case for the prosecution does

not meet the legal principle laid down in the **Ramanlal Trambaklal Bhatt v. Republic (1957) E.A 332.** Counsel faulted the prosecution for failure to call crucial witnesses and urged the court to find that the find that the evidence of these witnesses would have been adverse to prosecution case. On this point counsel relied on **HCCR. Case No. 69 of 2012 Alfred Muema Syengo v. Republic** reported in **[2014] eKLR**.

For this court to find that the accused person has a case to answer at this stage of the trial the prosecution must adduce evidence that this court taking into account of the same and law could easily convict the accused even if the defence were to offer no evidence. My careful consideration of the evidence before me leads me to conclude that the case for the prosecution has fatal defects. M.W did not testify. She had reported to the police and implicated the accused. Her report is that they had quarreled with the accused who then had picked their baby and dropped him to the ground as a result of which the baby was injured. This court is being asked to believe this is what happened. The law calls such statement hearsay. The hearsay rule stipulates that:

> **"A statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible. If however the statement is offered in evidence, not to prove the truth of the facts contained in the statement but only to prove that the statement was in fact made it is not hearsay and it is admissible"**

See **Subramanium v Public Prosecutor (1956) WLR 965.**

How could this court believe that what M reported to the police is the truth without her evidence in court? Had she testified, her evidence would have been subjected to scrutiny through cross examination to test its veracity. No other person testified as to what happened to baby E. M. M's evidence is not admissible in court.

I also wish to state that I find the evidence of the Daniel the Chief that M seemed to be under the influence of some substance unbelievable because Daniel is not qualified to give that opinion.

The accused is not expected under the law to prove his innocence. There is no other evidence expected from the prosecution and I cannot understand why M was not called to testify unless the prosecution thought that her evidence would have been adverse to their case or unless it was an oversight on the part of the prosecution. If it an oversight, I dare say that it is a costly one.

My careful examination and analysis of all the evidence leads me to find that although the death of baby E. M has been proved beyond reasonable doubt as having resulted from head injuries due to a blunt force trauma, I have no evidence to connect the accused with any unlawful act or omission that may have led to the cause of those fatal injuries and eventual death of baby E. M. It would therefore serve no purpose to place the accused on his defence. Consequently, I hereby find that the accused F.M alias M has no case to answer and hereby acquit him forthwith. He shall be set at liberty without further delay unless for any other lawful reason he is held in custody. It is so ordered.

Dated, signed and delivered this 19th day of May 2016

S. N. MUTUKU

JUDGE

In the presence of:

Ms Esther Macharia, prosecution counsel

Mr. Muoki, counsel for the accused

Mr. Francis Mburu alias Mofaya, the accused

Mr. Daniel Ngumbi, court clerk