



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CRIMINAL CASE NO. 22 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

ENNOCK TUIKONG MASAI.....ACCUSED

JUDGMENT

1. The accused **Enock Tuikong Masai** faced two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was initially charged alongside one **Mildred Katunyi** in whose case the State entered a nolle prosequi. Mildred Katunyi was later to become **PW1**.

Particulars of the offence were that on the 21st day of March, 2010 at Katome village in Lwandanyi location within Bungoma district jointly and unlawfully murdered unnamed infants.

2. The accused pleaded not guilty and the matter went to full trial where the State called a total of 9 witness who testified as follows:-

PW1 Mildred Kitunyi wife of the accused testified that on the 10th of March, 2010 at around 9.00 a.m. she gave birth to two twin boys prematurely which did not go well with the accused. On 21st October, 2010 she went to the river at about 6.00 p.m to fetch water leaving the babies in the company of the accused and their 4 year old daughter. On returning back she did not find the children and the accused told her that in his custom they did not like twin boys and that he would either kill one child or himself which made the witness talk to a neighbor one Moses **PW2** who in turn spoke to the accused and on **PW2** asking the accused the whereabouts of the children said he had buried the children at his fathers. The witness then informed her mother and together they informed the chief who went with the Administration Police and on asking the accused led them to a pit latrine within the shamba. The chief ordered the accused to remove the children and bury each in its separate grave but the accused refused stating that in his custom such children are thrown away. She further stated that the police were later to remove the children from the pit latrine and both the accused and the witness were arrested.

In cross examination the witness said she gave birth at 6 months to premature babies. She further said that what the accused said is that he could not keep the twins not that he had killed them.

PW2 Moses Misikhu Nyarami stated that on 21.01.2010 in the evening he met the village elder who asked him whether he knew of the death of accused twin boys. He went to the home of the accused and **PW1** told him that the babies were dead but she did not know whether they had been buried. He went to the shamba where he found the accused who denied that the children were dead. The chief of the area

later informed him that the accused had buried the children without a burial permit. The chief and his officers arrested the accused who was later released and on 24th March, 2010. The babies were retrieved from a pit latrine next to the home and the accused and his wife arrested.

PW3 Lucy Chemtai a farmer and traditional midwife stated that on 10.3.2010 at about 9 p.m **PW1** sent for her she rushed and found **PW1** outside the house struggling to give birth. She had given birth to the 1st child and the witness helped her with the second child. The two were twin boys and they cried at birth. She assisted **PW1** to the house and put her on the bed with the babies. Later she learnt that the children had died.

PW4 Janet Kisachi mother of **PW1** she learnt that her daughter **PW1** had given birth to twins but a few days later she learnt that the children had died and had been buried.

PW6 Nancy Mangoli sister to **PW1** she met the accused on her way from school on 14.3.10 at about 6 p.m. he informed her that **PW1** had given birth to twin boys and he was not happy. The witness informed **PW5** that the children had been killed.

PW7 Moses Etyang Emong village elder of Katome village. On 14.3.2010 the deceased informed him that his wife had given birth to twins. He encouraged accused to register their birth and accused asked for time as he was yet to name them. 10 days later accused informed him that he had buried the children as they had died. Accused said he had not received a burial permit. Later he learnt from a neighbor that the babies had been thrown in a pit latrine. The witness called the chief who came with administration police saw where the child had been thrown and arrested the accused and the wife. Two days later police came and removed the children.

PW8 Senior Sergeant Joseph Githu Ibau Deputy OCS Lwakhakha police station. He recalled receiving a call from one Ronald Wanjir chief of Lwandanyi who informed him of the twins who had been born prematurely and had been buried in a pit at a construction site. He went to the scene and met the accused and **PW1** whom he arrested for interrogation. He later released **PW1** and charged the accused. He learnt from the accused that his wife had given birth to premature children one child died within 2 hours and another 4hours and the accused buried them after informing **PW7**. Accused assured him that he had buried the children in separate graves however a day later the press called and informed him that the public had exhumed the bodies. He arrested both the accused and his wife. Post mortem results showed the children were born full term. The two were later charged but the case of **PW1** who was a 2nd accused was withdrawn.

In cross examination he said he did not believe the accused as the accused lied about the maturity of the children and the circumstances with which they died and where he had buried them.

PW9 Dr. Mansur Ramizan of Bungoma District Hospital produced a post mortem report on behalf of Dr. Osundwa whose handwriting and signature he was familiar with. He gave the following details;

1st post mortem for infant marked "A" – male child a few days old internal appearance – both lungs collapsed and there was hemothorax.

Cause of death – cardio pulmonary arrest due to burns most likely due to infanticide

2nd post mortem for infant marked "B" – female child a few days old. Cause of death cardio pulmonary arrest secondary to chemical burns.

In cross examination he stated both babies were well grown and were identified by J I and M M had well grown scalp, had been born maturely. That chemical burns may have been caused by acidic chemical.

3. The court found the accused to have a case to answer at the close of the prosecution case. He gave a

sworn statement as follows. He is Enock Toikong Masai of katomei. On the 14th March, 2010 his wife had a miscarriage. He had left the house at lunch time and returned at 9 p.m when he heard children crying he learnt that the wife was 6 months pregnant and had a miscarriage. Rushed to get a vehicle 5 km away when his wife called and said the 1st child had died and as he returned she called and said the 2nd one had also died. On returning he found both his wife and her mother who had wrapped the children in cloth and a blanket in order to be buried. They waited upto to 6 p.m. He consulted his father in regard to customary requirement. Since there was a pit that had been dug between 91 and 94 he dug the walls of the pit and placed the children and blocked the same with mud and brick as his father had told him not to bury the children on the ground as they may bring a curse to the clan. He then informed his father in-law and quarrel ensued between his clan and that of the wife as his father in-law wanted the children buried separately. His father in-law then reported the matter to the police. His father had insisted that the children were S and S custom was to be followed.

On 28th the police returned asked to see the grave, they removed the bodies and arrested him and the wife alleging that his clan did not accept twin boys which is a he as he is a twin. He did not know ever whether the children were boys or not, as they died.

In cross examination he rejected the evidence of **PW1** that he was unhappy with the children. It was his case that on the 21st the children were already buried. Since the children were born prematurely he did not check on the children but went to get a vehicle. The wife lied to the Police so as to testify against him. In their custom when they get twins they do not inform in laws. He has had other twins who are still alive. Further that he did not register the children as they died. Neither did he bury the children in a toilet. Although it is alleged that he killed the children because they were boys the post mortem indicates they were a boy and a girl.

4. Having considered the evidence the issue for determination is whether the prosecution has proved a case of murder as against the accused to the required standard. The prosecution must prove that the accused killed the children and that in doing so he had the necessary *mens rea*.

5. Did the accused cause the death of the infants?

PW1 in her evidence stated that the day she gave birth the accused was not home. He came the following morning. He enquired if the pregnancy had reached maturity and she answered to the negative. She said further that he asked why she had given birth to twin boys. On 21st October, 2010 she went to the river at about 6 p.m and on returning she did not find the children. That the accused has said in their custom they did not like twin boys and that he would either kill one of the children or himself.

In cross examination she said she gave birth after 6 months pregnancy and the children were premature. **PW2** on his part said that the accused wife (**PW1**) had told him that the babies had died but could not tell whether they had been buried. He also learnt from the area chief that the accused had buried without a permit.

PW3 a traditional mid wife found **PW1** had delivered 1 child she helped with the 2nd and both were twins.

PW7 on his part stated that accused informed him that his wife had given birth to twins. He had not registered them. 14 days later he learnt that the twins had died. He later learnt that the children had been thrown in a pit and he informed the chief. Police removed the children with assistance from public.

PW8 stated that he did investigations, he learnt from press the children had been removed from the pit. Post mortem showed children were full term. He charged the two.

From the above evidence **PW1** is in concurrence with the accused that the children were born prematurely at 6 months. She informed **PW2** her children were dead. She did not witness the accused killing the children. Although she says that she reported to the chief the chief did not testify. **PW3** says

he reported because accused had no burial permit and he threw the children in a pit latrine in a plot where he ought not to have buried them.

There is no evidence that he killed them. The evidence on record suggests otherwise. The children whose post mortem was produced were a boy and a girl who were born full term and were burnt. This report does not support the charge or evidence of the other witnesses.

Indeed there lacks direct evidence linking the accused to the death of the twins. No circumstantial evidence was adduced either.

PW5 the doctor was of the view that if the children had been born prematurely they ought to have been put in a nursery. Could the children then have died due to this status it is very possible.

Having considered the prosecution evidence I find that the same is full of inconsistencies. I believe more the evidence of the accused which in my view is more consistent and likely to be the truth as compared to the evidence of **PW1**.

I therefore find that the prosecution failed to prove its case to the required standard. Consequently the accused is hereby acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at BUNGOMA this 20TH OF DECEMBER 2016

ALI-ARONI

JUDGE.