



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 2 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

C K.....ACCUSED

JUDGMENT

1. The accused herein C K has been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. Particulars of the offence are that C K: *On the 2nd December 2008 in Kakamega East District within Western Province, murdered N M.* Though the accused initially admitted the charge, she did not agree with the facts, when the same were read out to her. The case then proceeded to trial. The case was partly heard by Chitembwe and Lenaola, JJ who recorded the evidence of the Prosecution Witnesses before they were moved on transfer. This court came into the matter at the stage of defence hearing.
2. **PW1 No. 62635 PC James Kiilu** stationed at Kakamega Police Station testified that on the 24/12/2008 at about 4.00 p.m he was on crime stand by duties when he got a report from the Assistant Chief Sisembe that there was a murder at Chavakali area. Accompanied by P.C Oluoch they went to Chavakali where they found the deceaseds body in the accused's house. They took the body of the deceased who was a juvenile to Kakamega Hospital Mortuary.
3. He further testified that they found the deceased's grandfather at the scene and after inquiry established that on 22/12/2008 the accused gave the deceased Kshs. 300/= which money the deceased wasted prompting the accused to discipline the deceased. PW1 also testified that he had established that the accused was the Grandmother of the deceased. He continued to state that the accused was arrested and taken to the Muranda A.P. Camp. He stated further that after the deceased was disciplined she disappeared on the 23/12/2008 and on the 24/12/2008 the report was made. When they went to the scene of crime they found the body lying about 10 meters from the accused's house. The body had no visible injuries. That after the post mortem examination, the Doctor opined that the deceased died out of strangulation. On cross examination PW1 clarified that those who recovered the body found it 10 meters from the accused's house but he found the body in the accused's house.
4. **PW2, S M E** a farmer from [*particulars withheld*] told the court that the accused was his sister and that she was living with the deceased who was her granddaughter. On 23/12/2008 at 6 p.m. he was at home when the accused person went to him and told him that she had a problem with the deceased and that after beating her, the deceased had disappeared. He testified that the deceased was 10 years old. After receiving the report, he decided to look for the child but after one hour he gave up. The next day 24/12/2008 the accused person went to his house again and told him that the child had been found but she was dead. Together with his father E L they decided to make a report to the Assistant Chief Peter Diengwe who gave them an A.P Officer who escorted them to the accused's house where they found the body of the deceased next to the accused's house. He saw the deceased who had no visible injuries, was fully clothed in a white T-Shirt and black Skirt

- which were dirty. He also testified that the accused was interrogated and at 4 p.m. the deceased body was taken to the mortuary. On cross-examination PW2 told the court that the accused lived on the other ridge from him and that one could not hear screams from there. He told the court that the deceased was his cousin.
5. **PW3, was Dr. Dickson Mchana Mwaludungi** a Pathologist for Western Region attached to Kakamega Provincial Hospital. He testified on behalf of Dr. Oreke who was a medical officer, attached to Kakamega P.G.H in 2008. He told the court that he was conversant with Dr. Oreke's Handwriting, signature and expertise in conducting post mortem. He told the court that the postmortem was that for N M done on 29th December 2008 at Kakamega P.G.H mortuary. The body was identified by two witnesses Dishon Muhati and Thomas Shebei. He explained the contents of the report and the Doctors opinion which was that the cause of death was asphyxia secondary to strangulation. He produced the report which was marked as P exhibit 1.
 6. **PW4, Daudi Asibwa** a neighbour to the accused herein told the court that on the 22/12/2009 at about 9.00 p.m. the deceased cried twice from their house and then kept quiet. The following morning they did not see the child. He went and notified their area Assistant Chief. He then went to Shinyalu and when he came back he found many people and on inquiring was told that the deceased had died. He claimed that he lives with the accused in the same compound. He testified that he did not know how the deceased died. He referred to the accused L. On cross-examination he told the court that the deceased and the accused were living normally.
 7. Upon closure of the prosecution case, the court found that from the evidence on record the prosecution had established a prima facie case against the accused who was put on her defence.
 8. The accused testified as DW1 and called no witness. She gave a sworn statement. She told the court that the deceased N M was her granddaughter, a child to her daughter who gave birth at home and left the child with her when the child was 9 months old. That the deceased died at the age of 10 and ½ years. She testified further that the deceased used to steal money, maize and had refused to go to school and so she used to discipline her.
 9. The accused testified that on the day the deceased died she had beaten her on the hands and feet because she had stolen Kshs.300/= though she did not die that day. She said that the discipline was to rectify her and that she did not intend to kill her. That the next morning after breakfast the deceased disappeared and was found dead in the accused's maize plantation. After the deceased's body was discovered, the accused informed her father who in turn informed the Chief and others. She was then arrested by A.P Officers.
 10. During cross-examination the accused testified that she was the one who had taken care of the deceased throughout her life and that she used to pinch her at times because of her thieving habits. She said that on the material day she thought the child had gone beyond normal which made her angry. She stated that she knew PW2 who is her brother and who lives some 500 meters from where she stays. She confirmed that she informed PW2 of the incident and he helped her to search for the child. She also confirmed that she knew PW4 Daudi Asibwa who is her neighbour and told the court that because of the proximity of the two houses, screams from either house can be heard at the other. She claimed that she met PW4 the following day after the incident. She told the court that after she beat the deceased, the deceased slept well but only disappeared the next day after breakfast. The accused did not call any witnesses.
 11. Mr. Elung'ata, counsel for the accused submitted that the prosecution had not proved the case of murder because there was no proof of mens rea on the part of the accused. Further that the accused did not intend to kill the deceased. In the circumstances he submits that the charge of manslaughter would be appropriate.
 12. Mr. Ngetich for the State concurred with the submissions of the defence and added that in light of the evidence on record, the ingredients of the offence of murder were not satisfactorily proved by the prosecution. That however the evidence before court is sufficient to sustain the offence of manslaughter. He prayed that the accused may be found guilty as such and be sentenced appropriately.
 13. The accused person has admitted that she is the one who beat the deceased, but there is no evidence that apart from disciplining the deceased she had any intention to kill her. I agree with both counsel for the accused and the defence that this is a clear case of manslaughter. Accordingly, the accused is acquitted of the charge of murder and in lieu thereof I find the accused guilty of the offence of manslaughter contrary to **section 202** as read with **205** of the **Penal Code**

and convict her accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 19th day of February 2015

RUTH N. SITATI

JUDGE

In the presence of

Mr. Ngetich.....for the State

Mr. Elung'ata.....for the Accused

Accusedpresent

Mr. F. Juma.....Court Assistant