



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 34 OF 2013**  
**REPUBLIC..... PROSECUTOR**  
**VERSUS**  
**DICTION DEHA MWARINGA**  
**C K M.....ACCUSED**  
**JUDGMENT**

The two Accused persons are are charged with the offence of murder contrary to section 203 as read with selection 204 of the Penal Code.

The particulars are that:-

***“On the 15th day of July, 2013 at [Mbwaka] Village Mwaka/Kikomani sub Location Rabai – Kilifi County they jointly murdered a newly born baby (infant)”.***

**Brief Facts**

Elizabeth Menza (PW 1) is a Nursery School teacher as well as a village elder. On 15th July, 2013 it was reported to her by one Hamisi Makosi that a newborn child had been dumped at a pit latrine near Kenya Mining Company Limited premises. She went to the scene and observed blood stains outside the latrine. Upon peeping through the pit latrine she saw the body of a baby wrapped with some piece of clothe. She reported the matter to the area chief who in turn called police. Later they received information that a lady by the name of Catherine who was pregnant was midwifed by the wife of Jimmy and gave birth.

Bibi J N (PW3) testified that on the 14th day of July, 2013 at about 8:30 pm one C K M (the 2nd Accused) had gone to her house for mid wifely services as she was pregnant. She was given the necessary services and gave birth to a baby boy. At about 4:30 am she said that she wanted to go and see one Dena. She later returned with the said Dena who stood outside. The2nd Accused carried away the child whilst in the company of Dena (1st Accused).

A post mortem examination was carried by Dr. Francis Otieno of Coast General Hospital on the body of the infant child, he found a white length of a binding material tightly wound around the neck. He formed the opinion that the cause of death was cardio pulmonary arrest following respiratory failure due to strangulation.

Edward Charo (PW 6) a clinical officer did on the 16th day of July, 2013 examine one Cathrine (Accused No. 2) who was taken to him under the escort of police. He was requested to carry a pregnancy test which he did and found that she had given birth recently. Pregnancy test was positive.

In their defence the two Accused persons denied having committed the offence of murder.

PW 3 is a traditional midwife. On 14th July, 2013 she attended to the 2nd Accused who was pregnant.

2nd Accused subsequently gave birth to a baby boy and left the following day while in the company of 1st Accused.

PW 4 M J N a son of PW 3 was present when the 2nd Accused went for mid wifely services from his mother. He later heard the cry of a new born baby. His brother was sent to buy a razor blade to cut the umbilical cord. Later he heard that a child had been found dumped in a pit latrine.

Though the 2nd Accused denies the offence of murder. There is medical evidence to the effect that she had been pregnant and had given birth to a baby boy.

The examination was carried out on 16th July, 2013 two days after she had presented herself to PW 3 a mid wife. Nobody saw her throw her child into the pit latrine and nor is there medical evidence to the effect that the body of the infant retrieved from the pit latrine was indeed that of her child.

The evidence before the Court is circumstantial in nature. In the *Court of Appeal case of James Mwangi Vs Republic KLR 1983*. It was held,

***“In a case depending on circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the Accused, the guilt of any other person and in capable of explanation upon any other reasonable hypothesis than that of guilt”.***

In the present case, there is overwhelming evidence to the effect that on the 14th day July, 2013 the 2nd Accused gave birth to a baby boy. The said baby boy was in her custody when she left the home of PW 3 (the midwife).

The following day which was the 15th day of July, 2013 the body of a dead boy infant was retrieved from a pit latrine in the neighbourhood. When a pregnancy test was made on the 2nd Accused it tested positive. Though there was no forensic examination done to find out whether the body retrieved from the pit latrine belonged to 2nd Accused child. I am satisfied that the circumstantial evidence adduced against her points irresistibly to her guilt.

She is charged with the offence of murder. Section 203 of the Penal Code provides,

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

***Malice aforethought is defined under section 206 of the Penal Code to be established when there is evidence adduced proving any one of the following circumstances***

***(a) An intention to cause the death or to do grievous harm to any person whether, that person is the person actually killed or not***

***(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether, that person is the person actually killed or not, although such knowledge is accompanied by indifference, whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.***

***(c) An intent to commit a felony***

***(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.***

The victim in the present case was strangled with a piece of clothe before being thrown into a pit latrine. There is no doubt that the intention was to cause death.

I am satisfied that there is ample evidence to the effect that the 2nd Accused gave birth to a baby boy on the 14th July, 2013 and strangled it and threw it into a pit latrine where the body was retrieved the following day.

There is no evidence to the effect that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by lactation consequent on the birth of the child.

But the question is, who was it that, was to bring forth such evidence? It was the prosecution which was to prove that the 2nd Accused was not disturbed in her mind in the manner provided for above.

PW 5 Dr. Francis Otieno carried out a post mortem examination on the infant.

PW 6 Edward Charo a clinical officer conducted a pregnancy test on the 2nd Accused. None carried out an examination as to whether her mind was disturbed at the time.

I am of the considered view that notwithstanding the fact that the offence committed amounted to murder, there are sufficient grounds to reduce it to that of infanticide. There is no sufficient evidence to link the first Accused with the offence of murder but I am satisfied that the 2nd Accused is guilty of the offence of infanticide contrary to section 210 of the Penal Code and she is Convicted accordingly. The 1st Accused is acquitted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

Judgment delivered, dated and signed this **22nd** day of **September, 2015**

**M. MUYA**

**JUDGE**

**22ND SEPTEMBER, 2015**

**In open Court and in the presence of:-**

Learned Counsel for the prosecution Mr. Masila

Learned Counsel for the Defence

Court Assistant Musundi

**M. MUYA – JUDGE**

**Court:**

Mention on 30th September, 2015 for probation officers report and litigation. Notice to issue to Mr. Mwawasi

**M. MUYA – JUDGE**

**22/9/2012**

**6/10/2015**

Before Hon. Justice M. Muya

Court Assistant Musundi

Mr. Masila for the State

**Kioko holding brief Migwi:**

We are praying for a mention on 9th October, 2015.

**Court:**

Mention on 9th October, 2015.

**M. MUYA – JUDGE**

**6/10/2015**

**9/10/2015**

Before Hon. Justice M. Muya

Court Assistant Musundi

Masila for the State

Migwi for the probation

**Mwawasi:**

We are ready with the report

**Court:**

Mention on 23rd October, 2015 for mitigation and Sentence. Notice to issue to Mr. Mwawasi.

**M. MUYA – JUDGE**

**9/10/2015**

**23/10/2015**

Before Hon. Justice M. Muya

Court Assistant Musundi

Masila for the State

Mwawasi for the accused

**Migwi:**

We have already filed a probation report.

**Mitigation:**

The Accused is a first offender. She is remorseful. The incident was ill advised. She is a single mother with two children who depend entirely on her. She is remorseful. A custodial Sentence would have a negative effect. We recombined a non custodial Sentence.

**SENTENCING NOTES**

The Accused was found guilty of the lesser offence of infanticide. I have perused the probation report which I find favourable, but the offence she committed is a serious one. She is Sentenced to four (4) years imprisonment.

**M. MUYA****JUDGE****23RD OCTOBER, 2015**