REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO 1 OF 2008

REPUBLIC.....PROSECUTOR

Versus

S N.....OFFENDER

JUDGMENT

INTRODUCTION

The offender

[1] The offender was a minor aged below or just about fifteen (15) years when she got pregnant and gave birth to a baby boy. Even at the time of her arrest in 2007, she was fifteen years old. She was arrested for allegedly infringing the law and committing a heinous act of murdering her two months' old son, BW. When she gave testimony, she was about 22 years. Except those which do not apply to this case, all protections under the Children Act and peremptory commands regarding children in international law will apply to her as she committed the crime when she was a minor. She testified that she dumped her baby in a pit latrine because life had become unbearable. She could not get a job to sustain her and the baby. The father of the baby, one D, had abandoned her and fled. She was all alone and did not have anybody to help her.

The charge

[2] The Offender was charged with MURDER Contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that:

> ***S N: On the 21st day of November, 2007 at [particulars withheld] in Bungoma North District within the Western Province murdered B W.***

[3] She pleaded not guilty and the case proceeded to full trial.

Evidence by prosecution

[4] The Prosecution called four witnesses. PW1 knew the offender as she was living with his neighbour one J S1. On 28.11.08 at around 5pm, one J S2 (PW2) came to his house so that they could go to [particulars withheld] to look for market for their building blocks. Before they had left, JS1 came and informed PW1 that his granddaughter S N had left his house on 21.11.08 and returned on 23.11.08 without her baby. They parted ways. PW1 and PW2 left for [particulars withheld]. On reaching [particulars withheld] PW1 saw the offender in a certain home. He talked to her and she informed him that she was working there as a house help. He enquired about the

child and she said that some mama was taking care of the baby. He asked the employer to allow her permission since they needed to go home with her. On further interrogation, the offender admitted that she had thrown the baby in a pit latrine belonging to one M. She led them to the pit latrine. They then decided to report the matter to the police station. They found M already at the Kimilili Police Station and had made the report. The body was then retrieved from the pit latrine.

[5] PW2 corroborated the evidence of PW1. His evidence corrected PW1's evidence on the year the events he described took place. PW1 had said it was 2008 while PW2 said it was 2007. He knew the offender for a year for she was living with his neighbour one J S1. The offender had a small baby in 2007. On 22.11.2007 at around 6pm one W informed him and PW1 that he had heard that the offender had thrown away the baby on 22.11.2007. So, PW1 and PW2 set out for [particulars withheld] to look for market for their building blocks and also look for the offender. The uncle of PW2 Mr M showed them the home where the offender was working. They found her there. After talking to the employer, they left with the offender for the police station. They found M making the report. The body was then retrieved and taken to the mortuary. That offender remained at the station.

[6] PW3 was the Investigation Officer. PW3 interrogated the offender who told her that she had thrown the baby in a latrine but it had been rescued and given him to a certain lady at [particulars withheld]. She totally refused to show the IO where the baby was. On returning to the station she received Mr M who assisted the police in locating the whereabouts of the body of the deceased baby. It was retrieved from M's pit latrine.

[7] PW4 was a doctor. He produced the Post Mortem Report on baby B W. The Report found that the cause of death was drowning from waste and faeces in the latrine.

The Defence

[8] The offender told the court that she became pregnant and gave birth to a baby boy when she was a minor. Then, life very became difficult and went out to look for a job to sustain herself and the child. Several prospective employers declined to employ her. The father of the baby one ,D had abandoned her. Her life was full of problems. In amidst all that, she decided to kill the baby and so dumped him in a pit latrine. She told the court that she was only fifteen years old when she was arrested and charged. She asked for the court's forgiveness.

THE LAW

Confessions

[9] I have decided to start with the subject of Confessions because of the nature and character of the defence evidence. Confessions are dealt with under Part III of the Evidence Act, and are generally inadmissible unless they are made in court before a judge. But recording of confessions particularly by the court still presents serious legal complications and arguments. The court needs to warn itself and the offender of the making of the confession before it acts on that confession and convicts on it. That is why the Evidence Act envisions a court being satisfied that there is no possibility of any influence, threat, coercion or a form of inducement or expectations on the part of the offender. Under section 186 of the Children Act, the question of confession of guilt is even more profound if the infringement of the law was by a child. I should think, in all the circumstances of this case, the prosecution evidence should be water tight for the court and to the required standard. That is the safeguard which the law has designed to protect and promote the tenets of criminal justice; the principle of innocence, the principle against self-incrimination, the principle against shifting the burden of proof, the principle of proof beyond any reasonable doubt and so on and so forth. I will, therefore, proceed to juxtapose the confession within the framework I have set out.

MUST PROVE BEYOND ANY REASONABLE DOUBT

[10] This is a criminal case. The prosecution must prove every element of the offence *beyond any reasonable doubt* for a conviction to ensue. The law requires that, the prosecution establishes both guilty state of mind to commit the crime of murder, and the actual wrongful deed of murder (i.e. physical component of the crime) that was committed by the offender.

Actual wrongful deed of murder (*actus reus*)

[11] In honour of the innocent baby who died in this case, I wish to say the least; it is most outrageous for a human being to inflict such hurt upon an innocent child aged two months. Drowning a human being in waste and faeces in a latrine is the most deplorable and beastly act a person can do. Commission of such act could not have been attended by any possibility of reason or humanity. It was much misanthrope only comparable to barbarism of the yore whose avowed design of talent was to cause sore mischief and extreme barbarities upon innocent persons. But the question remains; was this heinous crime committed by the offender?

[12] The evidence offered is largely circumstantial. The law on circumstantial evidence is now well settled. In the case of **REX V KIPKERING ARAP KOSKE AND 2 OTHERS [1949] 16 EACA 135,** the predecessor to the Court of Appeal, Kenya stated:

> *"As said in Wills on "Circumstantial Evidence" 6th edition P.311," in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the offender, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."*

[13] To the above principles, a third one was introduced by the decision of the same Court in the case of **SIMON MUSOKE v [1985] EA 715** when it quoted with approval the judgment of the Privy Council in **TEPER v R [1952] AC 480** at page 489 that:

> "*It is also necessary before drawing the inference of the offender's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."*

[14] PW1 and PW2 gave an account as to how the offender showed them the latrine into which she had thrown baby B. The latrine belonged to one Mr M. M was, however, not called as a witness. But the evidence of PW1 and PW2 confirmed that the body of baby B was retrieved from the pit latrine belonging to Mr M. PW3 also confirmed that fact. Medical evidence by PW4 made a confirmation that baby B died of drowning in waste and human faeces from a latrine. This evidence leads to irresistible conclusion that it was the offender who threw that deceased into the pit latrine. The confession by the offender now finds its place and confirms what the prosecution had already proved. I find that the prosecution has proved beyond any reasonable doubt that it was the offender who threw the deceased in a pit latrine from which act the baby died. I have found that there is a chain of circumstantial events which enable the court to record an irresistible conclusion that the offender committed the wrongful deed of murder he is charged with. Was the unlawful act committed with criminal intent?

Guilty state of mind (*mens rea)*

[13] The Prosecution must establish that the offender had the intention to kill the baby. That is where the offence of murder lies. The unlawful act was done by the offender but was there the necessary state of criminal mind to commit murder on the part of the offender? That is what the Penal Code refers to malice aforethought. The prosecution, through medical evidence produced by PW4 established two important things; 1) that the offender was of sound mind and fit to stand trial; and 2) that the offender was fifteen years old when she committed the offence. She is not,

therefore, covered under section 14 of the Penal Code. She had capacity to know that she ought not to do the act. The medical assessment (PEXB 2), recorded the historical examination of the offender. It made a finding that the offender was under stress when she got pregnant and after giving birth as she had no fixed abode, no parental care and guidance, no income or any person who could offer help. The Report also observed that the offender was aware of the options of giving baby B for adoption except she did not know the procedure to follow in order for the baby to be adopted. But in spite of all the stress, the Report observes that, the offender had the ability to pre-plan events with no notable lapses or delusions.

[14] I do not think, the problems she faced would lawfully justify what she did. Without medical evidence that the stress impaired her judgment, her troubled condition does not offer a feasible defence to the infringement of the law charged. But her age at the time of the commission of the unlawful act and the other factors of her life style are certainly important factors which will be considered during mitigation.

[15] The medical evidence and that of the other witnesses, provides the legal sense to the confession by the offender that she wanted to get rid of the baby in order to lessen her troubles. I find that the Prosecution has proved beyond any reasonable doubt that she pre-meditated to kill the baby by throwing her in the pit latrine. She was well aware the baby would die. She had no intention of the baby surviving whatsoever. She, with malice aforethought caused the death of baby B W by the unlawful act of throwing him into a pit latrine. I, therefore, find her guilty for the murder of baby B W.

Dated, and signed at Bungoma this 18th day of October 2013

F. GIKONYO

JUDGE

Read, signed and delivered in open court at Bungoma this 23rd day of October 2013

H.A.OMONDI

JUDGE