



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE NO. 6 OF 2012

REPUBLICPROSECUTOR

VERSUS

F S CACCUSED

JUDGMENT

1. F S C, the accused herein was charged under Section 203 as read with Section 204 of the Penal Code with the murder of her infant child G F on the night of 5th April, 2012 at **[particulars withheld]** village, Kilifi County. She denied the charge and was represented by Miss Otieno. The prosecution case was as follows.
2. The accused lived at Mavueni with her grandmother S J M (PW1) in the material period. The accused had two children, the youngest of whom was the deceased who was two weeks old. On the night of 5th April, 2012 the family had dinner and slept. On the next day in the morning the accused claimed that the deceased had developed an illness in the night and died, and that she had already buried her. She sought to leave the home with the older child. PW1 restrained her and alerted neighbours and the sub-chief one D M N (PW2).
3. Police were also called to the scene. The accused led the party to a shallow grave in the homestead from whence she proceeded to exhume the infant. The postmortem conducted at the district hospital concluded that the possible cause of death was strangulation.
4. When she was placed on her defence the accused elected to give an unsworn statement. She said that she retired to bed after dinner with her two children on the material night. She realized in the middle of the night that the infant had died. Her parents allegedly buried the child in the night. She did not know the cause of death.
5. There is no dispute that the accused had the care and custody of the infant child on the night she died. The court must determine whether the infant's death was due to an act or omission by the accused.
6. The postmortem results indicated blood congestion in the head and neck of the infant, suggesting strangulation. Evidence connecting the appellant with the death is circumstantial. In order to record a finding of guilt on the basis of circumstantial evidence, the evidence must be of such a nature as to point consistently upon the guilt of the accused. Secondly, there must be no co-existing circumstances to negative such conclusion. (See **Kipkering Arap Koskei & Ano v R (1949) 16EACA 135** and **Musoke v Uganda [1958]EA**).
7. Section 119 of the Evidence Act states:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

In the present case the appellant was the person in physical custody/care of the infant when it died, clearly of strangulation. Who else could have strangled the infant but the accused?

She buried the child surreptitiously in the dead of the night and attempted to flee the home early on the next day but was restrained by her grandmother (PW1). It is not plausible in these circumstances to claim she does not know how the child died or that her parents buried the child at night. This latter statement was not put to PW1 during cross-examination. Yet PW1 said she lived with and cared for the accused and her children.

8. There was no indication of the presence of the suggested “parents” in the homestead. PW1 told the court that the accused told her she buried the dead child at night. This is most unusual as the accused could at the minimum have informed her grandmother of the death in the night, before burial, if indeed she had no role in it. The medical evidence clearly displaces the accused's suggestion that the death was natural rather than caused. And this is consistent with her conduct in burying the child secretly at night and thereafter trying to leave the homestead.
9. Reviewing all the evidence, I have no doubt in my mind that the evidence called by the prosecution overwhelmingly displaces the accused's defence. The accused strangled the infant. However considering all the circumstances of the offence, my view is that a conviction for Infanticide contrary to Section 210 of the Penal Code is more appropriate in this case. I do therefore find such charge proven beyond reasonable doubt against the accused and convict her accordingly.

Delivered and signed at Malindi this **19th** day of **December, 2013** in the presence of the accused, Mr. Okuto holding brief for Miss Otieno for the accused, Miss Mathangani for the State.

C. W. Meoli

JUDGE

MISS MATHANGANI – Treat as first offender.

C. W. Meoli

JUDGE

MR. OKUTO – Accused has another 3½ year old. She is 24 years old and is remorseful. She seeks the court's sympathy.

C. W. Meoli

JUDGE

COURT – Probation report to be availed on 10th February, 2014. Normal mention on 3rd January, 2014 before Deputy Registrar.

C. W. Meoli

JUDGE