



REPUBLIC.....PROSECUTION

=VERSUS=

ELLIE FURAHA CHIVATSI.....ACCUSED

JUDGEMENT

The accused **ELLIE FURAHA CHIVATSI** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge are that:

“On the 2nd day of September 1996 at about 2.00 p.m. at Peleleza village in Ukono Location murdered FIONA MCHAMWIKU MWARABU”

The accused pleaded **‘not guilty’** to the charge. This is one very unfortunate scenario where the trial of the accused has taken an inordinately long period of time to conclude. The trial initially commenced before **HON. PAMELLA TUTUI** – Commissioner of Assize and was commenced in the presence of assessors (as was by then a legal requirement) on 30th May 2000. The Hon. Tutui heard a total of twelve (12) witnesses and on 29th November 2002 made a ruling that the accused would be placed on his defence. Thereafter Hon. Tutui left the Judiciary. **HON. JUSTICE KHAMINWA** then took up the case which started **‘de novo’**. She selected assessors afresh but did not embark on the case hearing due to her transfer out of Mombasa. On 29th November 2006 the accused before **HON. JUSTICE MARAGA** stated that he did not wish to proceed with this trial as he had already been sentenced to death in another murder case in Nairobi. The Honourable Judge directed that the hearing must nevertheless proceed. Thereafter the accused totally declined to appear in court. At each mention the court would be informed that the accused had refused to board the prison van to come to court. This went on until 3rd December 2009 when **MR. KAMOTI** Advocate succeeded in persuading the accused to come to court for the hearing of his case. The case then took off before me on 3rd December 2009. **MR. MONDA** learned State Counsel prosecuted the case on behalf of the State. Once again the accused declined to attend court for his trial insisting that he wanted to be represented by a different lawyer. This went on from 21st April 2010 to 11th July 2011 when the court ordered that a new lawyer be assigned to take up the case. **MR. ATANCHA** came on record and once again had to persuade the accused to come to court for his trial. All these factors which included the actions of the accused himself served to contribute to the inordinate delay in the finalization of this case. As I stated earlier this is a matter of much regret.

The prosecution case in brief was that on 2nd September 1999 **PW2 A.J** who was a househelp was at the home of her employer in Likoni carrying out the household chores as usual. The deceased **‘Fiona’** the minor child of her employers was also in the house. The accused who was her employer’s brother then accosted the witnesses and pulled her into a room where he proceeded to rape her at knife-point. He thereafter locked her in the bed-room. All this time she had no idea where the child was.

PW4 JOHN WESLEY MWARABU was the father of the deceased child. He told the court that he arrived home from work at about 8.30 p.m. and found the door wide open which was unusual. **PW4** was informed by his wife **‘Joyce’** that their child was missing. He together with neighbours launched a search for the child. Later they discovered the body of the child lying dead in her bed-room with burn marks on

the wrists and blood oozing from her nose and mouth. A further search revealed the maid **PW2** greatly traumatised cowering in another bed-room. The accused had disappeared. The family took the body of the dead child to the mortuary and took **PW2** for medical attention. The accused was later arrested in Nairobi where he had travelled after the incident.

At the close of the prosecution case the accused was placed on his defence. He gave an unsworn defence in which he denied having either raped **PW2** or killed the deceased. The accused claims that on the material day he travelled from Likoni to Nairobi and by the time he left he had not seen the child at all.

This court now must analyze the evidence on record with a view to determining whether the prosecution has proved this charge of Murder against the accused beyond a reasonable doubt.

The offence of Murder is defined in Section 203 of the Penal Code as follows:

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

This definition gives rise to three crucial ingredients of the offence of Murder.

- 1) The fact of death of the deceased and the cause of that death
- 2) Proof that the death of the deceased was caused by an unlawful act or omission on the part of the accused – the **‘actus reus’** of the offence.
- 3) Proof that such unlawful act or omission was committed with malice aforethought – the **‘mens rea’** of the offence.

The fact and cause of death of the deceased child are not in any doubt. **PW4** the father to the child and **PW3** a neighbour both testified that they recovered the body of the deceased lying dead in a bed-room in her parents’ home. **PW1** the househelp told the court that she too saw the body of the deceased. All these witnesses who knew the deceased well identify her as **‘Fiona Nchamwiku’**.

PW1 DR. K.N. Mandalya is the pathologist who performed the autopsy examination on the body of the deceased. He confirms that the body was that of a female child. He noted five electrical burn marks on the left side of her abdomen and armpit. He formed the opinion that the cause of death was **“cardio respiratory failure due to electrocution”**. **PW1** filled and signed the post-mortem report which he produces in court as an exhibit **Pexb1**. This was an expert medical opinion which was not challenged nor controverted at all by the defence. It is clear therefore that the deceased child met her untimely and unfortunate death due to electrocution.

Following on this finding the next question is whether sufficient proof has been adduced to show that it was the accused who caused the death by electrocution of the deceased. **PW2** was the only witness in the house with the child. She was not able to confirm to court exactly how the child came to meet her death. **PW2** in her evidence dwelt on the rape (or defilement) committed against her by the accused. Whilst I have no reason to doubt what **PW2** has told the court about the horrendous ordeal she underwent, it is curious that no report was made to police about this rape. Though the court is told that **PW2** received medical attention no P3 form in respect of her injuries was produced in court. This is an anomaly in the prosecution case which remained unexplained. Even after the accused was arrested in Nairobi there is no evidence that he was ever charged with an offence of rape at all. Why would this be so yet the victim was available and was ready to tell her story?

Be that as it may **PW2** told the court that she had no idea where the child was during this time. All she can state is that the child was with her in the house at the material time. She did not see the accused with the child and certainly she did not see the accused kill the child using an electric wire. All that **PW2** can say in regard to the child was:

“I asked him [the accused] where the child was. He warned me not to ask about the child”

The next thing **PW2** mentions is hearing the child’s mother Joyce enquiring from the accused about their whereabouts and accused replying that she and the child had gone to the shops. After this the parents of the child together with **PW3** a neighbour launched a manhunt for the child all over the estate. Again it is curious that nobody thought to check the bed-rooms of the house. Indeed **PW3** the neighbour whom Joyce (the child’s mother called when she got home to find her house locked) told the court that he and Joyce actually entered the house and sat in the living-room. Whilst there they both questioned accused about the whereabouts of **PW2** and the child. In my view the most logical thing at that point would have been to search the bed-rooms. Yet **PW3** states in his evidence ***“Joyce did not go to the child’s bed-room. She did not go to any bed-room. I do not know why”*** Why this obvious reluctance to search the bed-rooms? After all they were already inside the house. Why leave the house to search outside? It is almost as if they all feared to search the bed-rooms – this is very puzzling.

PW3 goes on to testify that one Jimmy a relative to the family came by. **PW3** claims that the accused called this Jimmy aside and whispered to him. Jimmy then told them that the accused had done something bad and suggested that the doors to the bed-rooms be broken. It is only then that **PW2** was found cowering in one room and the child Fiona dead on the bed in another room. The said **‘Jimmy’** was not called to testify in this case. He was a crucial witness as it was only he who could enlighten the court on what the accused had told him and why he felt it was necessary to search the bed-rooms. Failure to call this **‘Jimmy’** to testify leaves a gap in the prosecution case and breaks the chain of evidence. **PW3** did not hear what accused may have told **‘Jimmy’** thus this remains pure conjecture.

Even if this court were to presume that the accused revealed to this **‘Jimmy’** where the child’s body lay – it is still not proof beyond a reasonable doubt that it was the accused who killed the child. The allegation that some electric wire was found inside the accused’s bedroom is also not proof of any wrongdoing on his part. The prosecution here seeks to rely on circumstantial evidence to nail the accused. However in order for circumstantial evidence to suffice it must **provide the only possible explanation** of how this death occurred. This standard has not by any means been met. The deceased was a young child aged about 4 years old. It is a distinct possibility that being a playful and/or inquisitive child she may have been playing with the electric wire and so unwittingly electrocuted herself. This has not been unknown to happen. This is a possibility which has not been ruled out by the prosecution.

As I have stated earlier there exist several gaps in the prosecution case. The investigating officer who would have been best placed to fill these gaps by explaining the reasons why he decided to charge the accused was not called to testify. The State were given more than ample time to bond this witness. This again was a serious omission which was fatal to the prosecution case. This court is left in the dark as to exactly what happened on the material day. There is no tangible evidence to prove that it was accused who caused the death by electrocution of the deceased. Tragic as the child’s death was I find no proof that it was the accused who was guilty of the **‘actus reus’** that led to her death. Thus this crucial ingredient of the charge of murder remains unproven. I find that the prosecution have failed to prove this case beyond a reasonable doubt and I therefore acquit the accused of this charge of Murder. The accused is to

be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 18th day of May 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Atancha for Accused

Mr. Tanui for State