REPUBLIC OF KENYA

High Court at Meru

Criminal Case 35 of 2007

REPUBLIC …….……..…..……..PROSECUTION

VERSUS

PETER KIRIMI MWANGI…....…..……ACCUSED

J U D G M E N T

The accused **PETER KIRIMI MWANGI** is charged with murder Contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 23RD Day Of June, 2007 at Ngushishi Location in Meru Central District within Eastern Province murdered MARVIN MUTUMA KIRIMI

The prosecution called six witnesses. The prosecution case was that the accused person was living with a woman who later went away leaving behind a son one Mwenda. The accused then got involved with another woman called Purity and they got a son called Mutuma. The key witnesses were Pw1 AND 2 the parents of the accused. PW1 was his mother she told the court on a day and month she does not recall she gave her son's house keys to Purity and that by the next morning Purity had ran away leaving behind her son Mutuma. PW1 later went to her mother's place and by the time she returned she heard that Mutuma was missing. PW2 was the father of the accused. HIS evidence was that on a day he does not recall his older son reported to him that the accused had gone missing together with his son mutuma. He said that he later saw the accused without Mutuma and he reported to the PW3 the Assistant Chief. PW3's evidence was that he received the report from PW2 that his grandson Mutuma was missing from home. He said that he summoned the accused by letter but he did not go to see him eventually he received another report from PW4 and 5 who lived in a plot at Kwa-Nganga market. They REPORTED that on the 23rd June, 2007 at around 8 pm they smelt a very strong stench from their pit latrine. PW3 called PW6 who retrieved the body of a child from the latrine. According to PW6 the body was later identified by one Purity Nkatha as that of her son Mutuma.

The accused person gave a sworn statement. He said that on 5th May 2007 he handed over their son Mutuma to Purity Nkatha who left with it. He said that Purity had earlier left the child with him at home where he kept him for three days with the help of the mother PW1. HE SAID that when the mother went to care for his grandmother is when he called Purity to collect the child which she did. He said that their son was six months old and maintains that as far as he is concerned his son is still alive in the care of Purity Nkatha.

Mr. mosota represented the accused while Mr. Moses Mungai learned state counsel prosecuted the case on behalf of the state. Mr. Mosota's submissions were that the prosecution had not proved its case beyond a reasonable doubt.

The accused persons faces the case of murder. Murder is proved where the prosecution establishes through evidence that the accused person did an act or omission which led to the deceased death and that at the time the act or omission was committed he was motivated by malice aforethought. The deceased in this case is alleged to be the son of the accused. There is no direct evidence of how the deceased met his death. Neither is there any evidence to establish that the accused committed an act or made an omission which led to his death.

Mr. Mosota submitted that the prosecution was relying on circumstantial evidence as there was no eye witness. Mr. Mungai on his part urged that even though there was no eye witness the circumstantial evidence adduced in this case is well corroborated. In the case of circumstantial evidence the prosecution must pass three tests which are well set out in the case of **ABANGA ALIAS ONYANGO V. REP CR. A NO.32 OF 1990(UR)** at page 5 the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

"**It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

The circumstances from which the inference of accused guilt is sought to be drawn was not cogently established. The prosecution relied on the evidence of PW1 who said she left Mutuma with the accused before going to her sick mother. PW1 did not know what happened next. PW2 on the other hand received a report from his son, not called as a witness that Mutuma and the accused had disappeared. His evidence to that effect was hearsay. PW2 testified that when he next talked to the accused, he told him that Mutuma had gone with the mother. The prosecution did not adduce evidence to show that the accused did not give the child to the mother he claimed. It was very easy to prove that point by calling the person the accused alleged he gave the child to either accept or deny. That was not done which means the accused defence that he gave the child to Purity or his first wife remained unchallenged. The recovery of the child where accused lived was another and I will deal with it later.

The circumstances the prosecution was not definite and did not unerringly pointing towards guilt of the accused. The prosecution left gaps in its case which created doubt that the accused committed any murder at all.

Having failed in the first two tests, the circumstances taken cumulatively could not form a complete chain that could lead to the conclusion that any crime was committed by the accused.

Mr. Mosota urged that crucial witnesses were not called especially the mother of the deceased. There were several witnesses left out. I have already dealt with one, the son of PW2 who told him that Mutuma was missing. The other very crucial witness was Purity. She is the only one who saw the dead body. She was a very important witness. There was no evidence of the investigating Officer and that of the Post Mortem Report. All these were crucial witnesses in this case. They were so crucial that failing to call them created a lacuna in the prosecution case. In **BUKENYA & OTHERS 1972 EA 549** LUTTA Ag. VICE PRESIDENT held:

"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

I find that the evidence adduced by the prosecution was barely adequate to prove its case. An adverse inference as set out in above case is fitting to be made in this case.

Mr. Mosota urged that the evidence was led to the effect that the deceased was six months old and yet the post mortem report reveals that the child examined was 1 year old. Mr. Mosota urged that there is doubt whether the body examined at post mortem was the son of the accused. Mr. Mungai urged the court to go by the post mortem report and find that the body of the deceased was identified by its mother.

The [post mortem report was not produced in evidence I just called for it when I saw that no one was called to produce it. PW2, the father of the accused said that his grandson was six months old when he disappeared. PW5, a neighbor of the accused where they used to live also said it was six months old or so. The accused also claims it was six months old at the time he was arrested for this offence.

It is important to note that PW2 PW5 and indeed PW1 also never saw the body, the subject matter of the Post Mortem form. Only Purity saw it. The Post Mortem says the child was one year. I think a child of six months and that of one year are months different in normal circumstances. Given the accused unchallenged evidence that he gave the child to its mother, and given failure by the prosecution to avail her as a witness, I find that a doubt has been created in my mind whether the body in the PM report was that of Mutuma. The prosecution had the burden of proof, to prove its case beyond any reasonable doubt. I am not satisfied that that burden has been sufficiently discharged.

The result is that the case against the accused has not been proved as required. I give the accused the benefit of doubt and acquit him for this offence under section 306 of the Penal Code.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF DECEMBER, 2012.

J. LESIIT
JUDGE