



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 61 OF 2007

LESIT J.

REPUBLIC.....PROSECUTOR

VERSUS

DAVID KABIRITHU NKAROTHIA.....ACCUSED

JUDGEMENT

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 5th October 2007 at Kathurumu Village in Igembe murdered Evans Munene.

The main witness for the prosecution case was PW 1 Penina Kauni Stephen. An issue was raised at the beginning of the trial whether she could testify against the accused. The learned judge who started this case and heard the first three witnesses ruled that the question of whether the evidence of PW1 was admissible should be considered during the submissions in the case. Neither the counsel for the accused nor the state made any submission on the competence of PW 1 to testify against the accused person who is her husband. Section 127 of the Evidence Act deals with the issue of competence of parties and spouses. Under section 127(3) that section stipulates as follows:-

“(3) In criminal proceedings the wife or husband of the person Competency generally. Dumb witnesses. Competency of parties and spouses. 3 of 2006, 2nd Sch. CAP. 80 Evidence 4 8 [Rev. 2009 charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged– (a) with the offence of bigamy; or

(b) with offences under the Sexual Offences Act; or

(c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.

The current case concerns a child or issue of the marriage between the accused and PW1. In the circumstances the consent of the accused for PW1 to be called as a witness in the case against him is not by law required. PW1 was therefore a competent witness in this case.

The facts of the prosecution case are that the deceased was a son of the accused person and at the time of his death he was only 21 days old. Penina Kauni PW1 was the wife of the accused. She told the court that she left her baby sleeping in the same bed where the accused was also sleeping. She said that the accused had been unwell and had slept for 15 days without leaving the home. Penina testified the incident took place at 6 pm when she went out of the house briefly. That she then heard the accused calling her to go back to the house and breast feed the baby. Penina said that when she went into the house she found the baby lying on the bed with the neck cut.

PW2 Winfred Kanya was also at home within the same compound on the material day. She is a sister of Penina. Winfred said that at the material time she knew the baby was sleeping inside Penina's house and that she saw the accused person holding a panga and standing at the door of the house. She said that she left to go and fetch water. She was not present when the incident happened.

PW3 was Claire, a mother of PW1 and 2. Her testimony was that she had prepared some porridge that evening and that when she offered it to the accused the accused declined. Claire testified says that there after she heard screams and then the words "**baby of PW1 and the accused had died**". Claire stated she saw the accused person ran away from the scene.

PW4 was a sister in law of PW6, the father of Penina and husband of Claire. She was the first one outside the family to answer the screams after the deceased had been slain.

PW5 Martha Kawira said that she was at home outside the house of Penina washing her feet when Penina went to look for firewood. She said that she heard the accused call Penina back to the house to breast feed the baby. That when Penina entered the house, she came out immediately thereafter screaming and asked the accused what he had done to the baby. Martha said that instead of answering the question, the accused merely walked away.

PW6 was the father of Penina. He said that he had employed the accused to graze his cattle and to tend the miraa plants. He said that he was living in his home. That in the course of time the accused and Penina his daughter fell in love. That they got their first baby. PW6 said that he demanded to meet the parents of the deceased. That when he demanded to meet those parents the accused person left his employment and started working for someone else. He however continued living in Penina's house in PW6 home. He said that the parents of the accused only came when the accused person fell ill. PW6 talked of some negotiations having taken place and some gifts having been brought as the parents of the accused declared their sons interest in marrying his daughter. He said that when the 2nd child was born the accused person was the one who killed the baby.

Stephen admitted in his evidence that the accused person was poisoned and as a result of that poisoning he underwent surgery and was sick for two months. Stephen said that the accused had been working elsewhere when the incident took place. That when he came home on the day it happened he collapsed at the gate of his home. PW6 said that it was he who took him to hospital. Stephen testified that he was in the process of investigating who poisoned the accused when the incident in question happened.

PW7 was a brother of Penina. He was only called home after the incident had occurred and he therefore saw nothing.

PW8 was the Investigating Officer in this case. He visited the scene one day after the incident, and drew a rough and later on a fair sketch of the scene which he produced as Exhibit 1. He also took possession of the murder weapon from the OCS, which was Exhibit 3. He had a blood sample of the deceased baby taken for analysis. PC Limo sent the blood sample, together with the murder weapon for analysis. The Government Analyst's report was also produced in evidence. The report confirms that the blood found

on the murder weapon ie. panga matched in group with the blood sample taken from the deceased.

PC Limo produced all the exhibits including the postmortem report on the deceased. In the postmortem report the doctor's opinion was that the cause of death was respiratory arrest due to cut on the trachea. PC Limo testified that the accused in this case surrendered himself to Kiutine Police Post on the 5th October 2007, after running away from the scene immediately after the incident. PC Limo informed the court that he collected the accused from Kiutine Police Post and that after the investigation he decided to charge the accused with the offence.

The accused person gave a sworn defence. In his statement the accused acknowledged that he had been employed by Stephen Barata. The accused also acknowledged that he had married his employers daughter, Penina PW1. The accused acknowledged that they had two children with Penina. The accused admitted that he used to live within his employer's compound, in a house which he shared with Penina.

Regarding the day in question, the accused person stated that he was in the shamba looking for feeds for the cows when he heard screams for help. He said that it was his wife Penina, and his sister-in-law Winfred Kanya who were screaming. The accused stated that he went home to check and asked his wife why she was screaming. The accused stated that in response Penina asked him how he could ask her why she was screaming when he had killed Evans. He stated that when he heard that he went straight to Kiutine Police Post and reported the matter. He said that he did not check on the child because he heard his mother-in-law saying that he should be stoned to death. The accused stated that at Kiutine Police Post he was told to go to Maua Police Station which he did. He said that after reporting to the police, they accompanied him to Winfred Kanya's house where he found the body of his son. He stated that he carried the body to the vehicle and eventually he was charged for this offence.

The accused stated that he had been poisoned with either porridge or miraa. He said that he had taken the porridge at his sister-in-law PW2's house. The accused alleged that the old man i.e. Stephen Barata PW6, requested him to give him time to investigate who poisoned him. He said that he was still waiting for that report when the incident occurred.

I have carefully considered the evidence which has been adduced. I have also considered the submissions made by both Mr. Omari the learned Counsel for the accused, and Mr. Kimathi the learned State Counsel.

The accused is facing a charge of murder contrary to section 203 of the Penal Code. The prosecution must prove that the accused person, by some act or omission actuated by malice aforethought, caused the death of the deceased. Section 206 of the Penal Code sets out circumstances that need to be proved in order for Malice aforethought to be established. That section provides as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause the death of 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.

Mr. Omari submitted that the prosecution did not discharge the defence of alibi raised by the accused in his sworn evidence. Mr. Omari also urged the court to consider the issue of the poisoning of the accused a few months before the incident in question in this case and find that the charges against the accused were fabricated in order to fix the accused and prevent investigations by PW6 into the poisoning saga.

Mr. Kimathi on his part urged the court to find that the evidence adduced by the prosecution proved the case beyond any reasonable doubt. Mr. Kimathi urged the court to find that the fact that the accused had been poisoned before this incident does not exonerate him from the offence neither does the poisoning amount to provocation.

The prosecution's case was that the deceased had been left sleeping on his father's bed where the father who is the accused was also sleeping. That was around 6pm. Penina PW1 testified that after leaving her baby asleep next to the accused person, she went to fetch firewood. She said that soon thereafter the accused called her back to breast feed the baby. She said that she saw the accused standing at the door holding a panga in his hands. When she went into the house she found that the baby's neck had been cut and the baby was dead. The evidence of Penina received corroboration on material particulars. The evidence of PW2 Winfred, PW3 Claire, PW5 Martha, PW6 Stephen and PW8 PC Limo all confirmed that the baby was lying on his parents bed inside the house where his parents were living.

The accused defence was that the child had been sleeping inside Winfred Kanya's house and that it was slain while inside that house. That evidence has been proved to be untrue. I have considered that PW 1, 2, 3, 5 and 6 were all blood relatives. The accused person in his defence implicates Winfred Kanya as the only person in that home who had a grudge against him. He had no issues with the rest of the witnesses. He therefore did not claim or allege that the other witnesses had any reason to give false evidence against him. The Investigating Officer of the case was also among officers who visited the scene of the incident and took a rough sketch of the scene. In that sketch plan PC Limo laid out the houses in the compound of Stephen PW6 home. That compound had 4 houses. The house indicated as "A" in the fair sketch plan Exhibit 1B, is the house where Penina and the accused lived. That is where the child was found with a cut neck, lying on the parents' bed. The other houses at the compound were for the parents of Penina marked "C" in the plan, the house of Martha the younger sister of Penina marked "B", and the house used by the other children of Stephen marked "D" in the plan.

I find that the prosecution adduced sufficient evidence to prove beyond reasonable doubt that the deceased child was murdered while lying on his parent's bed. I find the evidence of Penina as corroborated by the other witnesses beyond reproach. I therefore find that the accused defence that the child had been sleeping at Winfred Kanya's house was not merely false but PC Limo has shown that Kanya did not have a house of her own in that compound. The accused therefore lied about Kanya having a house there. In the case of **ONYANGO V REPUBLIC CA NO. 32 OF 1990** where the court of appeal expressed itself thus:

“But its basic holdings namely that when an accused person tells an obvious and deliberate lie which is disbelieved, then such a lie is capable of providing corroboration to other independent available evidence.”

I find that the accused lied that Kanya had a house a house at a parents home corroborates the prosecution evidence that the deceased child was found dead inside the house used by accused PW1.

Penina's evidence that she left her baby in her house and soon thereafter the accused called her back while standing at the door of the house while holding a panga, received corroboration from the evidence of Winfred PW2 and Martha PW5. The accused defence that he had been away from his house when the child was slain, and that he came to find the child dead in PW'2 house has also been proved to be untrue.

The correct facts are that it was the accused who was left sleeping next to the baby and that Penina returned to find the child's neck cut.

Section 111(1) and Section 119 of the Evidence Act creates a rebuttable presumption against the accused. These sections provide as follows:-

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

...

119. 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”.

The facts adduced by the prosecution have established that the accused and the deceased were left sleeping next to each other by Penina the child's mother. Since the deceased was last seen alive in the company of the accused person, the accused should give an explanation of how the deceased met his death or how they parted. Bearing in mind that the deceased was a child of 21 days old, the accused has to explain how that baby met his death.

The accused denied that he was sleeping with the deceased at the time in question. He also denied that the child was sleeping on his bed when it met its death. As stated earlier that defence cannot stand, in view of the overwhelming evidence, not only by the family members of Penina the child's mother, but also the evidence of the Investigating Officer PC. Limo. I find that the accused did not rebut the statutory presumption created by these two sections of the Evidence Act. I find that the accused person was left sleeping with the baby and that soon thereafter he called back Penina to the house who found the child dead. No one else had entered that house between the time Penina left the child sleeping with the accused, and the time the accused called Penina back. I therefore find that it is the accused person who cut the neck of the deceased causing instant death to the infant.

I find that the evidence PC Limo established that the accused conduct following this incident was that of a guilty mind. PC Limo's testimony was that the accused surrendered himself at Kiutine Police Post on the same day following the incident. PC Limo collected the accused from the Police Post thereafter. The accused did not deny any of these facts. I find that in running away from the scene after slaying his son, the accused's conduct was that of a person with a guilty mind.

I find that the accused alibi defence has been discharged by the prosecution. I am satisfied beyond any reasonable doubt that it was the accused who cut the neck of the deceased causing his death. I find that the accused has no defence available to him for the offence he committed. Having come to this conclusion I am satisfied that the prosecution has proved its case against the accused person for the offence charged beyond any reasonable doubt. Consequently I reject the accused defence, find him guilty for the charge of murder and convict him accordingly.

Dated signed and delivered this 24th day of March 2011

J. LESIIT

JUDGE.