



**REPUBLIC OF KENYA**

**IN THE REPUBLIC OF KENYA**

**AT KAKAMEGA**

**CRIMINAL CASE NO. 72 OF 2003**

**REPUBLIC**

**VERSUS**

**SIMON SHISUKANE .....ACCUSED**

**JUDGEMENT**

1. **Simon Shisukane** is charged with the offence of murder contrary to S.203 and S.204 of the Penal Code. It was alleged that on 11.9.2003 at Lunyu Sub-location in Ivihiga Location in Kakamega District within the Western Province, he murdered Imelda Khalunya. He is deaf and dumb but with the assistance of an interpreter, he denied the offence and the evidence tendered was as follows;
2. That the deceased was a 4 year old girl, daughter of PW3, Josephine Khadiagala. According to PW3, aforesaid, PW1, Godfrey Madegwa (her son) and PW2, Lillian Khamali on 11.9.2003, at about 7 p.m. they were all in PW3's house together with the deceased when the accused person allegedly entered the house brandishing a panga, and grabbed PW3. According to PW1, PW3 suffered from high blood pressure and upon being grabbed by the neck, collapsed. That the accused then picked the baby and walked off with her. The witnesses started screaming and went out to look for the accused and the deceased but failed to get either of them. A report was made at Matioli AP post and PW6, **AP Cpl. Henry Mukhobi** received the report from PW3 who told him that one Simon had taken the child.
3. According to PW1, PW2 and PW3, the accused was well known to them because he had married PW3's daughter and that on the material night, they were able to identify him because there was a lamp in the house when the accused person entered it.

4. In any event, the next day, a search failed to yield either the accused or the deceased person. On 13.9.2003, according to PW1, the accused was seen coming out of a forest and he proceeded to his brother's house where he went to sleep. He was apprehended and tied up with ropes and on 14.9.2003, a search party recovered the deceased's body within a hole covered with a stone at a hill within the local forest. PW6 was the one who took custody of the accused person and he was later charged.

5. **PW4, Joseph Madegwa Mutsami**, was present on 16.9.2003 when a post-mortem was conducted on the deceased's body at Kakamega P. G. Hospital mortuary as did PW7, Peter Mukwani Sichero.

6. **PW8, Dr. Jason Amukonyi** performed the Post-mortem on the deceased's body and concluded that the cause of death was cardio-pulmonary arrest secondary to head injury.

7. When he was put on his defence, the accused stated as follows;

***"I do not wish to say anything on the charge. I was in Nairobi at the time of the murder. I deny it. The witnesses all lied."***

8. From the above evidence, the testimony of PW1, PW2 and Pw3 was consistent on what happened on the material night. There is no doubt that they knew the Appellant who was previously married to PW3's daughter. There is also no doubt that they were able to identify him using light from the lamp that was in the room when he broke the door and entered the house. That evidence has not been faulted at all and I see no reason to doubt it either.

9. Further, I have no doubt that the Appellant then picked the hapless 4 year old child who was peacefully sleeping on a bed and proceeded to walk away with her for a reason that is unfathomable.

10. There is no evidence on record as to what happened between the time the baby was taken away (by the accused person) and when her body was recovered three days later. What is not in doubt is that the baby was found dead and according to PW8, the cause of death was a heart attack that was triggered by an injury to the head.

11. The question that I must answer is whether it was the accused person who caused the deceased's death. The evidence on that issue is wholly circumstantial and as I understand it, circumstantial evidence can only be the basis for a conviction if the circumstances if put together create such a conclusion that it could only be the accused person and no other person who had committed the offence for which he is charged. See ***R vs Kipkering arap Koske & Ano. [1949] 16 EACA 15.***

12. In the present case, there is little reason to believe that any other person, upon the accused person angrily snatching the deceased away from her mother's warm house, could have then caused the injuries that eventually led to the deceased's death. He was seen walking away with the baby, he was seen returning from the area where the body was later found and all those facts are inculpatory enough to lead to the only and clearly inescapable conclusion that the accused person is the murderer in this case.

13. Regarding his alibi defence that he was in Nairobi when the offence was committed, I am certain that it is escapist and does not in any way dislodge the strong evidence tendered against him. I will dismiss it as such. He was at the scene and not Nairobi.

14. In the event, I find that when an accused person, breaks into a house, scares every adult away, picks a 4 year old who is later found brutally murdered, then malice aforethought as an ingredient was clearly discernible and the offence of murder has been proved beyond reasonable doubt.

15. I will accordingly convict the accused person of the offence of murder as charged.

16. Orders accordingly.

*Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of March, 2011.*

**ISAAC LENAOLA**

**J U D G E**