REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.114 OF 2007

REPUBLIC…….……
PROSECUTOR
VERSUS

FLORIDA CHEROP KIPKURUI…….……1ST
ACCUSED

PETER SIMON EKAI *Alias* NGAI…….……..……..2ND
ACCUSED

JUDGMENT

The first accused, Florida Cherop Kipkurui is jointly charged with a man she lived with as her husband, the 2nd accused, Peter Simon Ekai *alias* Ngai, with the murder of their two year old son, Fredrik Kiplangat Ekai (the deceased) between 29th October and 3rd November, 2007 in Laikipia West District.

The prosecution called evidence to the effect that although the accused persons had separated and were living apart at the time of this incident, the 2nd accused would visit the 1st accused at her parent\'s home. On the evening of 29th October, 2007, it was the prosecution case that the 1st accused left carrying the deceased to go and fetch her mother's goats. The deceased had been playing with 15 years old P.W.5, J.C.K, 12 years old P.W.4 R.K and 9 year old P.W.4, M.C, who witnessed the 1st accused leave with the deceased. Three days later the 1st accused and the deceased had not returned home.

The matter was reported to the area Assistant Chief, P.W.10, Joseph Lorey who was also the 1st accused person's neighbour. On 3rd November, 2007 together with the 1st accused person's father, P.W.2 Richard Kirui and the sister P.W.3 Jane Chepkoech, the Assistant Chief went to the house of P.W.7 Peter Kagunda where the 1st accused had been seen. The 1st accused explained to the Assistant Chief that the 2nd accused had killed the deceased by strangulation.

The Assistant Chief arrested the 1st accused and Peter Kagunda. Both were taken to Rumuruti Police Station where the 1st accused was re-arrested and detained while Peter Kagunda was released after recording a statement. The 1st accused repeated to P.W.9 IP. Julius Mugambi, the arresting officer, that the deceased was killed by the 2nd accused person. She volunteered to take IP. Mugambi and some of the witnesses to the thicket where the body was disposed of. The decomposed body of the deceased was retrieved from a shallow grace covered with twigs and leaves.

Post mortem examination on the body was conducted by Dr. Kiuria and the report produced under the provisions of **section 77** of the **Evidence Act** by Dr. Fredrick Kariuki. According to the report, the body was totally decomposed. There was a piece of cloth tied tightly around the neck and the head partially separated from the body. In the doctor's opinion, the deceased died as a result of strangulation evidenced by the piece of clothing on the neck.

In her unsworn defence, the 1st accused reiterated that the 2nd accused strangled the deceased. That he beat her up and warned her not to report the incident to anyone. The 1st accused left to go and fetch water and upon her return, 2nd accused had disposed of the body in the thicket. She concluded her testimony that the 2nd accused had returned home drunk on the day of the incident.

For his part, the 2nd accused denied those allegations and attributed the reasons for his being implicated in this crime to a family difference between him and the 1st accused parent's who did not approve of their marriage for the reason that he is a Turkana and the 1st accused a Kalenjin. That the 1st accused person's family had implicated him in another offence (of stealing a bicycle) for which he was sentenced and served two years imprisonment. After serving that term, he only met the 1st accused once at Rumuruti where he gave her Kshs.1,000/=.

That, in summary, is the entire evidence presented at the trial by the prosecution and the defence. It is apparent from it that there was no eye witness to the murder of the deceased. The evidence of the prosecution witnesses is purely circumstantial.

A conviction can be based on circumstantial evidence if the evidence irresistibly points to the accused person(s) and also if there are no co-existing factors or circumstances that would weaken or destroy the inference of the accused person's(s') guilt. See **Republic** V. **Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke** vs. **Republic** (1958) EA 715.

The circumstantial evidence in this trial are as follows:

i) the deceased was only two years of age and the son of the accused persons and therefore under their care and protection;

ii) on 29th October, 2007 at about 6p.m., the 1st accused left with the deceased;

iii) three days later, the 1st accused was traced but without the deceased;

iv) the 1st accused led the police to the thicket where the body of the deceased was retrieved;

v) the 1st accused told the witnesses that the deceased had been strangled by the 2nd accused;

vi) the 2nd accused had disagreed with the 1st accused and separated.

I start with the case against the 2nd accused. His only connection to the death of the deceased is, one, that he had separated from the 1st accused after some differences and two, that the 1st accused made a statement that he strangled the deceased. There is evidence on record that there were marital differences between the accused persons which led them to live separately. Other than the deceased, they had another child, Evans Kiptoo. Apart from the evidence of the 1st accused, there was no independent evidence that the 2nd accused was seen at any stage prior to the incident, in the company of the deceased.

A trial court must warn itself of the danger of acting on the evidence of an accused person implicating a co-accused person. This is a similar warning required to be observed in cases of accomplices because of the danger of accused person seeking to serve some purpose of his/her own.

In the case of **Bernard Wambua Mbezi & 2 0thers** V. **Republic,** Criminal Appeal No.226 of 2004, the Court of Appeal said as follows of statements of an accused person implicating a co-accused:

"The learned Judge considered the 2nd appellant's statement as implicating the 3rd appellant with the deceased's murder. Such statement is usually referred to as self-serving and of no evidential value against a co-accused. Before the court acts on such statement it is desirable that it warns itself with regard to the danger of acting on such uncorroborated evidence because of the dangers of a co-accused seeking to extricate himself."

See also **Bakari & Another** V. **Republic** (1987) KLR 173. There was no evidence to lend support to the 1st accused person's statement that the 2nd accused killed the deceased. It follows that the circumstantial evidence against the 2nd accused person is the weakest kind and does not irresistibly point to his guilt. The fact that the 1st accused person was living with Peter Kagunda at the time of the death of the deceased is a factor which weakens any link with the 2nd accused person as having committed the offence.

Turning to the evidence against the 1st accused person, P.W.4 Mildred Chelangat, a child of tender years, who the court (Koome, J) found to be confident, fluent and understood the need of speaking the truth, another child, 12 year old R.K and a 15 year old J.C.K, all gave consistent testimony of how the 1st accused took the deceased who was playing with them and went away with him. Four days later, his decomposed body was retrieved from a shallow grave in the thicket.

Although the burden in criminal cases to prove the charge against the accused person rests with the prosecution, there are circumstances when such burden shifts to the accused person. See **section lll** of the **Evidence Act.** Because the 1st accused was the last person seen with the deceased before he was found murdered, it is incumbent upon the accused person to explain how he met his death. If the court is satisfied with her explanation that she did not cause the death of the deceased, she is entitled to an acquittal.

I have rejected the 1st accused person's explanation that the deceased was killed by the 2nd accused. She has, for that reason failed to discharge the burden on her. She led the police to the thicket where the deceased person's body was buried. The question that arises from that conduct is whether it amounts to a confession and whether it is admissible in evidence.

The answer to that question was given recently by the Court of Appeal in the case of **Douglas Thiongo Kibocha** V. **Republic**, Criminal Appeal No.335 of 2006 where the court said:

"……it is our view that if indeed the appellant led Atola to the recovery of the deceased's

body parts, that was a confession. However, it is a confession which by reason of section lll (1) of the Evidence Act is admissible if given as an explanation to satisfy the evidential burden under the sub-section."

Considering the totality of the evidence that the 1st accused was the last person with the deceased; and that she led the police to the discovery of the body, points to the fact that she either killed the deceased or participated in his death. Her defence that it was the 2nd accused person who killed the deceased is incredible. The alleged threats issues to her by the 2nd accused that she would also be harmed if she reported have no basis. She was for four days free in Peter Kagunda's house. She did not report the incident to anybody until the body was found several days later.

For these reasons, I find no evidence against the 2nd accused person who is hereby acquitted and shall be set at liberty at once unless held for any other lawful reason. The 1st accused is guilty of the offence of **murder** contrary to **section 203** as read with **section 204** of the Penal Code and is accordingly convicted.

Dated, Delivered and Signed at Nakuru this 19th day of July, 2011.

W. OUKO
JUDGE