



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 17 OF 2010**

REPUBLIC.....STATE COUNSEL

VERSUS

CHIZI KOMBO.....ACCUSED

**J U D G M E N T**

The accused namely **CHIZI KOMBO** faces a charge of **MURDER CONTRARY TO SECTION 203 AS RED WITH S. 204 OF THE PENAL CODE.**

The particulars of the charge are that

***“on 1<sup>st</sup> day of August 2010 at Gona “A” village Bofu sub-location in Kinango District within Coast province murdered GURE KOMBO”***

The accused entered a plea of not guilty to the charge and the trial commenced on 8/2/2011. The prosecution led by **MR. ONSERIO** learned state counsel called a total of eight (8) witnesses in support of their case. **MR. MAUNDU** advocate appeared for the accused.

The brief facts of the prosecution case were that on 1/8/2010 the accused was seen walking towards a dam within the village with her son age 1½ years (the deceased) tied to her back. Upon reaching the said dam it is alleged that the accused threw the child into the dam thus causing his death by drowning. Fellow villagers rushed to the scene and removed the dead child from the dam. Police were called to the scene and arrested the accused.

Upon completion of police investigations, the accused was charged with this offence of murder. At the close of the prosecution case the accused was ruled to have a case to answer and was placed on her defence. She gave an unsworn defence in which she denied having murdered her child.

The offence of murder is defined in S. 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”.***

What this definition means is that in order to prove a charge of murder the prosecution must prove the

following facts.

- 1. The death of the deceased and the cause of that death.**
- 2. that it was the accused who caused that death by an unlawful act or omission and lastly**
- 3. That the unlawful act or omission was done with malice aforethought.**

In this particular case the death of the minor deceased is not in any doubt. The prosecution witnesses who were fellow villagers all testify that they saw and identified the body of the deceased. **PW4 CHARO MWAYA** told the court in his evidence that it was he who removed the dead body of the child from the dam. He identified the body as that of Gure Kombo a child whom he knew well. Similarly **PW3 KOMBO GURE** who is the biological father of the dead child told the court that on the material day he went to the dam in question and found the dead body of his infant son lying beside the dam. Finally on this point **PW6 SERGENT MICHAEL ODUOR** is the scene of crime officer. He produced in court photographs of the dead child **Pexh 2** which photographs leave no doubt at all about the death of this child.

On the question of the cause of death the matter is not so clear cut. **PW1 CHIBWAGE CHOMO** and **PW2 NYAMVULA KIUGE**, both of whom were eye witnesses told the court that they saw the child being thrown into the dam. Indeed the evidence of **PW4** is that he retrieved the dead body of the child from the dam. The implication therefore is that the deceased met his death as the result of drowning. However **PW6 DR. ISAAC CHOME** the pathologist who conducted the autopsy on the body of the deceased told the court that he did not see any evidence of death by drowning. The evidence of **PW6** is that the cause of death was “strangulation”. He told the court that he came to this conclusion after noting that the deceased’s neck bones had been dislocated. There is therefore uncertainty with respect to the cause of this child death- was it by drowning as the prosecution claims or by strangulation as per the medical expert opinion? Indeed **PW6** clarified that if the child had died as a result of drowning there would have been foam around his mouth which he did not see. Instead **PW6** said he noted the dislocated neck bones and blood on the tip of the child’s penis. How, when and by whom was this child strangled? No evidence is adduced to explain the dislocated neck bones. **PW6** told the court that he was unable to conduct an examination on the internal organs of the child because at that time Kinango District Hospital did not have the requisite equipment to conduct such an internal examination. This means that vital organs like heart, liver and lungs were not examined. Such an examination may have helped settle this confusion as to the cause of death. i.e. did the child inhale water or not. Based on the evidence placed before me, I find that a crucial element of the offence of murder i.e. the cause of death remains unproven beyond a reasonable doubt.

Even assuming that the cause of death had been conclusively proven (which thus court has found not to be the case) the prosecution must prove that it was the accused who with malice aforethought caused the death of the deceased. The medically certified cause of death of the child as per the post mortem report produced as an exhibit **Pexh 1** is “strangulation – displacement of cervical bones”. **PW1** and **PW2** told the court that they saw the accused throw the child into a dam full of water. Neither eye-witness saw the accused strangle the child. Indeed there is no evidence that the accused at any time manhandled and/or strangled the child. The question arises as to whether the child was already dead at the time he was placed in the water. There is no evidence to clarify this point. **PW1** and **PW2** merely state that they saw accused carrying the child tied to her back. Neither has clarified whether the child was alive or dead by that time. As a court, I find it puzzling that the accused would put the child’s body in the dam and then remain at the scene screaming and crying. She was obviously in distress like one mourning the child. Would accused kill her child and then proceed to mourn him in such a manner.

The question of the accused's state of mind at the time of this incident is in my view of great relevance. The accused was on 23/8/2010 assessed to be 17 years old. She is therefore a minor and has actually been held at a juvenile remand facility during the pendency of her trial. It is obvious that she is a victim of underage marriage. **PW7 CORPORAL MARTHA MUNDIA** who was the investigating officer stated in court as follows

***As the investigating officer I was puzzled by the accused's behaviour. I wanted her to be mentally assessed to see if she was insane or sane***

The investigating officer herself has raised a red flag about the mental status of the accused. Yet she did not take the accused for psychiatric evaluation as required **before** charging her in court. It is only at the instance of this court that the accused underwent a psychiatric evaluation on 10/2/2011 a full six (6) months after she had first been arraigned in court. **PW8 DR CHARLES MWANG'OMBE** who conducted this evaluation found the accused mentally fit to plead. However, there is a serious question as to what was the accused's state of mind at the time of her arrest. This court takes judicial notice of the very common condition in new mothers known as "post-partum depression". **PW8** a psychiatrist told the court ***"I am aware of post-partum depression. It affects women who have recently delivered a child. It is caused by hormonal changes"***. In any case of a suspected homicide of a child by its own mother, the prosecution has a duty to consider and rule out post-partum depression. This is because this condition obviously affects the capacity of an accused to form the requisite *mens rea* for the offence of murder. The failure of the prosecution to consider and investigate this aspect is in my view a serious omission. The accused was a mother of a young child and therefore fit the profile for this condition. The failure to ensure mental evaluation at the time of her apprehension is therefore a serious omission in the prosecution case.

Based on the foregoing, I find that this case was poorly investigated. The cause of death remains uncertain. As a result it is uncertain whether the accused actually killed this child by drowning as the prosecution alleges. My conclusion is that this charge of murder has not been proved against the accused beyond all reasonable doubt and I hereby acquit her of the same. The accused is to be set at liberty forthwith unless she is otherwise lawfully held.

**DATED and delivered in Mombasa this 6<sup>th</sup> day of September 2011**

**M. ODERO**

**JUDGE**

**In the presence of**

Ms Mwangi holding brief for Mr. Maundu for accused

Mr. Onserio – for state

Mutisya – court clerk.

**M. ODERO**

**JUDGE**