



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.67 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

VIVIAN CHEPKEMOI.....ACCUSED

JUDGMENT

The accused, **Vivian Chepkemoi** is charged that on 9th August, 2009 at Milima Farm Mau Summit, Molo District she murdered her two (2) year old son, **Brian Kipkemoi** (the deceased). The accused who was twenty (20) years old at the time of the incident lived with her elder sister, **P.W.1, Irene Chemutai (Irene)** who also had young children.

On 8th August, 2009 at about 8p.m., the accused collected a pair of trousers for the deceased from Irene's house and went to spend the night at a relative's home in the neighbourhood where there was a patient. The next day, 9th August, 2009, the patient died. That morning, the accused went to Irene's house, packed a bag and left with the deceased to go to the *shamba*. The accused and the deceased spent the night of 9th August, 2009 at the home of **Regina and Peter Tanui**, both of whom confirmed that the accused was with the deceased at the funeral throughout the day.

It is the prosecution's case that at some stage in the evening, the accused was seen without the deceased. When asked by Irene where the deceased was, the accused explained that he was at the house of a neighbor called Mary. While found sleeping alone at the funeral, the accused told relatives that the deceased was at Irene's house with her children. Irene and some relatives became suspicious and decided to confirm the whereabouts of the deceased. A visit to both Mary's and Irene's homes made it clear that the deceased was not in any of the homes.

After being beaten by Irene and upon further interrogation by **P.W.4, Julius Arap Simoto**, the accused led those involved to a church latrine where the body of the deceased, was found and retrieved by the police.

According to **P.W.5, Dr. Wambui Kinyanjui**, who conducted the post mortem examination on the body of the deceased, there were multiple bruises on the head, especially on the forehead, back, hands and legs. The doctor also noted strangulation marks on the neck. She concluded that the death of the deceased was caused by hypoxia due to strangulation.

The accused was arrested and charged with **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**.

In her unsworn defence, the accused person explained that on 10th August, 2009, she went to Total

Petrol Station to sell potatoes leaving the deceased behind playing with Irene's children. She learnt, on her way back home that the deceased had disappeared. She confirmed this when she returned home. She was detained by two men who demanded to know from her where the deceased was. They did not believe her version that she had left the deceased with Irene's children. The body was after 14 days discovered in a pit latrine and was retrieved by the police. In brief, the accused denied involvement in the death of the deceased and raised the defence of *alibi*.

I have considered the evidence presented by the prosecution witnesses and the defence of the accused person. There is no doubt from the medical report that the deceased died of the strangulation and that the body was dumped in a pit latrine. However, there is no direct evidence as to who strangulated her. Indeed, the prosecution case against the accused person is purely circumstantial. It is to the effect that the deceased was only two (2) years of age; that from 8th through to 9th August, 2009, the deceased was in the company of the accused; that on the day the deceased disappeared, the accused gave contradictory versions regarding his whereabouts; and that the accused led the villagers and the police to the pit latrine where the body was recovered.

It is now settled beyond debate that a conviction can be based on circumstantial evidence if such evidence points irresistibly to the guilt of the accused person and if there are no co-existing factors that may weaken or destroy the inference of guilt. See **Republic V. Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke V. Republic** (1958) EA 715.

The question to be determined therefore is whether the totality of the evidence presented by the prosecution and given the defence of *alibi* raised on by the accused, the evidence points irresistibly to the accused person as the person who, with malice aforethought caused the death of the deceased. The court, in considering that question must at the same time consider if there were co-existing circumstances which may weaken or destroy the inference of the accused person's participation in the death of the deceased.

Of the six (6) prosecution witnesses, three (3) were relatives and neighbours of Irene. Irene and all of them confirmed seeing the accused with the deceased throughout on the 8th and 9th August, 2009. But on 9th August, 2009 at 9p.m., **P.W.3, Peter Kipkosgey Tanui (Peter)** found the accused person sleeping in his kitchen. The next morning at 5a.m., Peter's wife, **P.W.2, Regina Chelagat Tanui** returned home and found the accused and the deceased still sleeping in the kitchen. Peter had breakfast and left. Regina attended to her sheep but when she returned shortly, she did not find the accused and the deceased. But thirty (30) minutes later, the accused returned carrying the deceased. The accused took breakfast and left for the funeral. That was at 8a.m.

But when she arrived at the funeral one hour later at 9a.m., Regina noticed the accused did not have the deceased. Regina left the funeral at 2p.m. but when she returned, she did not find the accused. The accused returned at 7p.m. again without the deceased. She explained that the deceased was with Irene's children.

But when Irene came at the funeral, the accused stated that the deceased was at Mary's house. It was confirmed that the deceased was neither at Irene's nor Mary's houses. Irene and the other relatives became suspicious and Irene began to seek the truth by beating the accused and also seeking diplomatic intervention of **P.W.4, John Arap Simoto**. Ultimately, the accused volunteered to lead them to the pit latrine where the body was retrieved.

From the foregoing, it is plain that contrary to her *alibi* defence, the accused was all along, on the day in question with the deceased. From the evidence on record, I come to the conclusion that she was the last person who was with the deceased. Although it is a cardinal principle of criminal law that the burden is upon the prosecution to prove beyond any reasonable doubt the crime charged, **section 111** of the **Evidence Act** shifts the evidential burden to an accused person to offer a reasonable explanation on matters peculiarly within the accused person's knowledge. That burden is discharged 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 the offence. See **Douglas Thiongo Kibocha V. Republic**, Criminal Appeal No.335 of 2006.

Having found that the accused person was the last person seen with the deceased alive and in view of the age of the deceased, who was under the care of the accused and having also considered the accused person's *alibi* defence which has been displaced by the circumstantial evidence, I come to the conclusion that the accused caused the death of the deceased. The next question is whether there was malice aforethought. There was evidence that the accused person was irresponsible towards the deceased and could leave him with Irene for several days. But there was no evidence that the accused person considered the deceased a burden or that she did not like him. Whatever happened on the 10th August, 2009 that drove the accused person to take the deceased child's life, only the accused alone can explain.

But it is plain from the medical evidence that the deceased was strangulated before being dumped in the pit latrine. That was a manifestation of the accused person's intention to cause the death of the deceased.

I come to the final conclusion that the charge of murder has been proved beyond any doubt, find the accused person guilty and convict her accordingly.

Dated, Signed and Delivered at Nakuru this 21st day of November, 2011.

W. OUKO
JUDGE