



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 4 OF 2004

REPUBLIC PROSECUTOR

VERSUS

PRISCILLA NEKESA AMBANI ACCUSED

JUDGMENT

The accused, **PRISCILLA NEKESA AMBANI**, is charged with murder contrary to S. 203 as read with S. 204 of the Penal Code, in that on the 2nd January 2004 at Chepsaita Village, Uasin Gishu District, murdered Masta Ambani. The case for the prosecution is founded on the evidence of ten (10) witnesses who testified to the effect that on the 31st December 2003, the deceased's father expressed to the deceased's grandmother, **JANET NDUMBE MATULI (PW 1)**, his intention to have the deceased join his other siblings born from his marriage to the accused. The deceased was a product of a separate marriage. Therefore, the accused was a step mother to the deceased.

On the material 2nd January 2004, Janet (PW 1) arrived home from the river in the evening and was served food. She asked to be joined by the deceased so that they may eat together but the deceased was not around. She was informed that the child had been taken by his father. She embarked on searching him but all in vain. She then raised an alarm. A night search for the child was not successful. A further search on the following day was also not successful but on the 4th January 2004, a pair of shorts belonging to the child was found. On 5th January 2004, Linet (PW 1) together with the father of the deceased and a brother of the accused were picked up by the police and held at a police station. It was then that she (PW 1) learnt that the dead body of the deceased had been found in a river.

After the burial of the deceased on 10th January 2004, Linet (PW 1) entered the accused's house and found a jacket with spots of blood on a bed. She knew that the jacket belonged to the accused but was occasionally worn by her (accused's) brother. She (PW 1) informed village elders about the jacket and was advised to take it to Turbo Police Station.

LILIAN MUTENYO MATULI (PW 2), the young daughter of Linet (PW 1) was on the material date instructed by her mother to dress up the deceased. She thereafter took him to their grandmother and left him with his father. She had dressed the deceased in a green vest and blue shorts. Later, when her mother enquired about the whereabouts of the deceased, she told her that she had left him with his father. Her mother instructed her to go fetch the deceased so that they may all eat together. She (PW 2) went to the deceased's father and was told that the deceased had been left with the accused. A search for

the deceased began but it was all in vain. Later, Lilian (PW 2) and others were taken to the police station and released. She learnt that the body of the deceased had been found.

The father of the deceased, **ISAIAH AMBANI SIMWA (PW3)** confirmed that the deceased lived with Janet (PW 1) but was taken to his home on the material 2nd January 2004. He gave Kshs. 400/- to the accused to buy clothes for the deceased but they disagreed after the accused said that she would buy clothes for her own two children and not the deceased. He left for his father's home leaving the deceased with the accused so that he (deceased) may stay with the other children. At 7.00 p.m., he returned home and found the accused and her two children. The deceased was nowhere to be seen. The accused told him (PW 3) that she did not know the whereabouts of the deceased. A fruitless search for him began and continued in the night. A pair of shorts worn by the deceased on the material date was later found in a farm but on the 5th January 2004, Isaiah (PW 3) and the accused were taken to a police post by village elders. He was held at a police station from where he learnt that the body of the deceased had been found. He was released after the deceased was buried.

On the material date, **DAVID SIMWA MICHANI (PW 4)**, went to sleep at 6.00 p.m. because he was not feeling well. He later heard that the deceased was missing and joined the search party. The search did not bear any fruit and the matter was reported to the police. The dead body of the deceased was later found in a river a half kilometer away from his (PW 4's) home. He went to the scene and saw the body and during the post mortem, he saw a deep hole on the chest of the body.

BABIDON SOITA (PW 5), was herding cattle near a river on 4th January 2004. He was in the company of **EMMANUEL KUBWA (PW 9)** when they saw the body of the child deceased in the river. They informed their grandfather with whom they returned to the river and showed him the body before it was retrieved and taken away by the police.

JAPHET KUNDU (PW 6) was on the material date at 6.00 p.m. with the deceased, his father and others when the father of the deceased took the deceased to the accused so that the accused would dress him in warm clothes. He (PW 6) thereafter went to his home and later heard that the deceased was missing. He joined the search party but all in vain. After some days, he received information that the body of the deceased was found in a river. He went to the scene and saw the body floating on the river. He noticed that the body had stab wounds on the chest. The police arrived at the scene and took away the body.

Kundu (PW 6) learnt that the accused and her husband had been arrested and locked up. They were suspected of having killed the deceased. He (PW 6) saw a blood stained jacket allegedly belonging to the accused and which was allegedly found in her house.

IP BENSON ONYAPILI (PW 7) of Turbo Police Station was on duty on 5th January 2004 when he received a report that the body of a child had been found in a river. He proceeded to the scene together with his colleagues and found the body. It had a wound on the chest and was that of a boy aged between one year and five years. He retrieved the body and took it to Webuye District Hospital Mortuary. He also learnt that the accused and her husband were suspected and had been arrested and held at a police post. He collected the two from the police post and investigated the matter. In the process, he was handed over a white blood stained jacket (P. Ex 2) allegedly found in the house of the accused. He noted that there was an attempt to wash away the blood stains. He was also handed over a pair of greyish shorts (P. Ex 1) allegedly worn by the deceased prior to his death. He later released the husband of the accused but caused the accused to be charged with the present offence.

DR. JOSEPH EMBENZI (PW 8) of the Moi Teaching and Referral Hospital examined the accused and confirmed that she was mentally fit. He complied and signed the necessary P3 form.

P.C JOHN MACHARIA (PW 10) of Turbo Police Station was part of the team investigating this case. He produced the post mortem report complied and signed by a Dr. Dagaye who had already passed away. The said doctor conducted the post mortem examination and signed the necessary report which indicates the cause of death to be asphyxia due to strangulation plus stab wound on the left side of the

chest.

In her defence, the accused denied the offence and stated that she was at home on the material date when her husband left and went to his grandmother's home to celebrate the New Year. She remained at home but at 11.00 a.m. she followed her husband so that she could assist the grandmother with household chores. She found many people at that home. She returned to her home at 4.00 p.m. after going to her mother-in-law's house where she was given vegetables. At 5.00 p.m. she went to obtain milk from a wife of a brother-in-law. She thereafter returned home and made supper. Her brother Stephen arrived and was followed later by her husband. After they took dinner, her husband went back to their grandmother's house. He returned at about 8.00 p.m. and asked the whereabouts of the deceased who was nowhere to be seen. She joined in the search for the deceased but all in vain. On the following day, she gave her husband Kshs. 400/- to proceed to Moi's Bridge and check if the deceased's mother had taken away the deceased. He returned home in the evening in a state of intoxication. On 4th January 2004 he went to Webuye to look for the child but returned home drunk such that his father and brother beat him up.

The accused went on to state that on the 5th January 2004, her husband, her brother and herself were apprehended and taken to Kamasai Police Post from where they were taken to Turbo Police Station. She learnt on the following day that the child had been found dead. On 14th January 2004 she was charged in Court. She contended that she did not kill the child and that he was last with her husband who was released. She prayed for an acquittal saying that she did not know why she was framed.

From all the foregoing evidence by both the prosecution and the defence, it is apparent that there is no dispute with regard to the death of the deceased. It is evident that the deceased was killed by a person who strangled and inflicted serious injury on his chest. As per the post mortem report the cause of death was Asphyxia due to strangulation plus stab wound on the left side of the chest. The deceased was at the time of his death aged two (2) years and was on the material date in the custody of Janet (PW 1) who later handed him over to his father (PW 3) through Lilian (PW 2). Lilian (PW 2) confirmed that she actually handed over the deceased to his father. The father Isaiah (PW 3) did not dispute that the child was handed over to him. He, however, said that he took the child to his wife, the accused, but later found him missing. The accused did not know the child's whereabouts and a search for him commenced.

The search did not bear fruits but after a few days, the dead body of the deceased was found in a river by Babidon (PW 5) and Emmanuel (PW 9). The body was retrieved from the river by IP Onyapili (PW 7) and his team. It was found to have an injury on the chest.

The basic issue for determination is whether the accused was the person responsible for the unlawful act which resulted in the death of the deceased.

The defence raised is a denial and a suggestion by the accused that the person who should be held responsible for the death of the deceased was her husband (PW 3) who was the last person with the deceased. In essence, the accused denied that the child was left behind with her by her husband.

Lilian (PW 2) confirmed that she left the child with his father (PW 3). Kundu (PW 6) saw the child with the father (PW3) when the father alleged that he was taking him (deceased) to the accused who was his step-mother. Kundu (PW 6) did not however confirm that the child was indeed taken to the accused by the father.

The accused indicated that she was not left with the child and that the last time she saw him was when he was at a river at 4.00 p.m. with his aunt. Nobody saw the child at any one time while in the custody of the accused. There was sufficient evidence showing that the child was lastly with the father (PW3) and not the step-mother (accused). It was thus the word of the father against that of the accused in relation to the child's last moments in life. Since there was no direct evidence against the accused, the prosecution was invariably required to rely on circumstantial evidence to link the accused to the offence.

However, the circumstantial evidence is not watertight. The accused was not found in possession of the child's pair of shorts (P. Ex 1). She was said to have been found in possession of a white jacket (P. Ex 2)

which had blood stains. However, there was no evidence to show from whom the blood could have come. It was not established that the jacket had stains of blood belonging to the deceased.

IP Onyapili (PW 7) confirmed that the blood stained jacket was not taken to the Government Chemist for necessary analysis.

As it were, the circumstantial evidence placed before the Court the possibility of there having been two prime suspects i.e. the accused and her husband (PW 3). A brother of the accused was also thought to be a suspect.

If therefore, the suspects were two or three, then the circumstantial evidence available was extremely insufficient and incapable of establishing with the accuracy of mathematics that the accused was to the exclusion of any other person, responsible for the death of the deceased.

Consequently, even though the death of the deceased was caused in a barbaric manner by a person very well known to him, the accused cannot be held responsible for it on the basis of the evidence available herein. She was suspected merely because she was the deceased's step mother who was allegedly not happy with the presence of the deceased in her matrimonial home. Instances abound where step mothers demonstrate dislike for step children by subjecting them to acts of cruelty which at times lead to death. However, suspicion no matter how strong, is not evidence of commission of an offence if unsupported by strong direct or indirect evidence.

Ultimately, the prosecution has failed to prove its case against the accused beyond reasonable doubt. She is found not guilty and is hereby acquitted accordingly.

[DELIVERED AND SIGNED THIS 10TH DAY OF NOVEMBER, 2011]

J.R. KARANJA
JUDGE