



**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE NO.2 OF 2005**

REPUBLIC

.....

PROSECUTOR

~VRS~

CHARLES ANUNDA INZOFU

.....

ACCUSED

JUDGMENT

The accused Charles Anunda Inzofu faces a charge of murder contrary to section 203 as read with 204 of the Penal Code. It is alleged that on the 7th day of December 2004 at M Village, N Location of Bungoma County, he murdered one BI. The accused pleaded not guilty to the charge.

This case was heard by more than one judge. Lady Justice Wanjiru Karanja heard PW1, PW2 and PW3 while Justice Mbogholi Msagha heard PW4 and PW5. I took over the case and heard the PW6, PW7, PW8 and PW9 and also the defence case. Section 200 of the Criminal Procedure Code was complied with by the judges as required.

The facts of this case are that the accused and one FK sired a baby boy as a result of an incestuous relationship. The baby namely BI is the deceased in this case. The Bukusu customs do not allow such a child to stay with any of the parents or even to be breastfed. The baby was born in hospital on 21/11/2004 and was not breastfed. The mother of F(PW5) was awaiting for the adoption of the baby which plans did not work. She took the baby and went to stay with it at her sister's home fearing the effects of the bad omen if she took it to her own home. PW5 took the baby who was only two weeks old to the mother of the accused (PW1) on 5th December 2004. PW1 and her son the accused were reluctant to take responsibility but PW5 nevertheless left the baby with them. PW1 was also reluctant to stay with the deceased and she asked her son the accused to decide what to do with his baby. The accused took away the baby and its clothings and when he returned home, he said the baby had been accepted at Bungoma District Hospital for safe custody. It was on 04/01/2005 that the remains of the deceased together with the clothes were found in a bear hole in the farm of a neighbour. The accused was arrested and charged with the offence before this court.

PW1 is the key witness in this case. She told the court that she received the baby from PW5 and stayed with it for a few days before the accused took it to Bungoma District Hospital. It later turned out that the baby was indeed killed and thrown into a bear hole. The remains were discovered a month later. The doctor formed an opinion that the cause of death was cardiac arrest due to strangulation. The evidence of PW1, PW2 and PW5 who are parents of the accused and FK PW4) the mother of the baby was that it was bad omen for people who are related by blood to sire and bring up a child. Such children according to Bukusu customs to which the witnesses and the accused belong must either be adopted or disposed of in whichever manner in order to keep the family safe from any impending calamities. The mother PW4 said she did not even look at the baby after birth and did not breast feed as instructed by her parents. She was only told that it was a baby boy who was named BI. This shows that the family of both the accused and Fwere determined to keep away the deceased to prevent any calamities befalling them. The accused squarely belonged to the same school of thought based on traditional beliefs.

The accused in his sworn testimony told the court that he took the deceased to his aunt, one R who volunteered to stay with it as he (accused) went back to Lodwar where he was working. He further said that his auntie is now deceased having died in 2007 while the accused was in remand. He denied murdering the deceased. He further said that before he took the baby to his auntie, he had taken it to Bungoma District Hospital.

The defence of the accused is not convincing that he took the deceased to his auntie to look after it. The aunt of the accused is a sister to his own mother. It would be expected that accused's mother would have known or been a part of those arrangements given her close blood relationship with her sister. The accused should have told his mother the truth if he was taking the baby to the aunt. There was no good reason to lie to her that the deceased was to be under the care and custody of Bungoma District Hospital. The accused further said that his aunt died while he was in remand. He gave no reason why he never told the police that his aunt had the custody of the deceased immediately before it was found dead. The investigating officer would have recorded a statement from the auntie. She died much later after accused had

stayed in remand for about three years. When the accused's mother testified, the issue of taking the deceased to his auntie did not arise in cross-examination. The defence of the accused was an afterthought.

From the evidence of PW1, it is clear that the last person who was seen with the deceased alive was the accused. He took the deceased from PW1 and said he was taking it to Bungoma District Hospital where it would be looked after. The truth is that hospitals do not take custody of babies whose parents are alive. Their duty is to treat the sick. Any arrangements of adoption would have to be made by the relevant department or body through the High Court. The evidence of PW1 was not challenged in cross-examination and it completely dislodged the defence of the accused.

PW3 and PW7 who saw the remains of the deceased in a bear hole in someone's farm. PW6 a police officer was led to the scene by the two witnesses. The remains were examined by the doctor who confirmed that the cause of death was cardiac arrest due to infanticide. The evidence of PW3, PW6 and PW7 confirm that the deceased was thrown in the bush. The doctor confirms that the baby was killed before it was thrown away in a hole where one could not easily see it. The time of death was estimated to be about one month before discovery of the remains. This period coincides with the date that the accused took the baby from PW1 to allegedly give it to hospital authorities.

In this case, there is no direct evidence that any one saw the accused kill the deceased before throwing it away. However, I find that the facts in this case point the guilty at no one else but the accused in the murder of the deceased. I have analysed the facts in the foregoing paragraphs that the deceased was believed to be a bad omen customarily in both the house of its mother (PW4) and the father (accused). The parents of PW4 and the accused (PW1, PW2 and PW5) testified very strongly on the matter and none of them was ready to stay with the child. PW4, the deceased's mother was warned not to set her eyes on the baby after birth to avoid any consequential calamities. PW5 took the baby to the mother of accused PW1 when it was only two weeks old. PW1 was not ready to have it and she told her son to take his baby. The accused was working in Lodwar and was not in a position to look after the baby. The accused too was afraid of the bad omen. PW1 gave the baby to the accused in good health towards the end of November 2004. (The accused gives the date as 28-11-2004). The baby was discovered dead a month later. The clothes which PW1 parked for the baby were found intact and produced in court as exhibits. PW1 identified the said clothes. PW2, PW6 and PW7 who found the remains of the deceased also identified the clothes found next to the remains. The deceased did not go into the hands of any other person. I have considered and rejected the defence of the accused that his auntie took the baby to take care of him.

I find that the circumstantial evidence is overwhelming and points the guilty to the accused persons. It is my finding that the prosecution have proved that the accused was responsible of the act which caused the death of the deceased.

On the issue of malice aforethought, the accused took the baby from his home and killed it before damping the body in a bear pit about one kilometer from home. The act of the accused was planned and executed without any provocation. The killing was therefore premeditated. The accused knew for sure that his well thought act would cause the death of the deceased. The evidence of PW1 on the how the accused took the baby purporting to take it to the hospital for care and the subsequent discovery of the remains is evidence of malice aforethought. The prosecution have proved beyond any reasonable doubt that the accused had malice aforethought when he killed the deceased. I find him guilty of murder as charged and convict him accordingly. I sentence him to suffer death in the manner authorized by the law.

**F. N. MUCHEMI
JUDGE**

Dated, Delivered and Signed at Bungoma this 27th day of October, 2010. In the presence of the Appellant, his counsel Mrs. Chunge and the State Counsel Mrs. Leting.

**F. N. MUCHEMI
JUDGE**