



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Criminal Case 28 of 2005

REPUBLICPROSECUTOR

VERSUS

ALICE CHELANGAT CHEWEN.....ACCUSED

JUDGMENT

The accused, Alice Chelangat Chewen was charged with **Murder contrary to Section 203 as read with Section 204** of the **Penal Code**. The particulars of the offence were that on the 3rd July 2005, at Sosiot trading centre in Kericho district, the accused murdered Karen Chepngetich (*hereinafter referred to as the deceased*). The prosecution called a total of ten witnesses in its bid to establish the charge of murder against the accused. After the close of the prosecutions case, the accused was put on her defence. She gave unsworn statement. She denied that she had anything to do with the death of the deceased.

The facts of this case as can be reconstructed from the evidence adduced by the prosecution witnesses are as follows: the deceased was the sixteen year old daughter of the accused and PW9 Ezekiel Kipkemoi Koech. The deceased was a form one student at Cheribo secondary school. She was a day scholar. She used to live with her parents at Sosiot trading centre. The accused was a petty trader at Sosiot market, whilst the father of the deceased operated a small restaurant at Sosiot trading centre. The prelude to the events that later transpired that are material to this case occurred on the 2nd July 2005. On that day, at around 3.00 pm, PW9 was informed by a neighbour that the deceased was sick. At that time PW9 was at his place of business. PW9 went home and found the deceased in the house. The deceased told him that she had headache. PW9 took the deceased to Sosiot health centre where the deceased was attended to by PW8, Priscilla Chemutai Tanui, a nurse attached to the said health centre. According to PW8, the deceased complained that she had headache.

PW8 observed that the deceased had fever. She diagnosed that the deceased could have been suffering from malaria because she was shivering. She however did not conduct any tests to determine whether the deceased was suffering from malaria. She prescribed quinine, fansidar and paracetamol tablets to the deceased. The deceased was required to take the said drugs for a period of three days. The book which PW8 prescribed the drugs to the deceased was produced as *prosecution's exhibit No. 2*. PW8 recalled that the deceased had been escorted to the health centre by a person who identified himself as her father. After prescribing the drugs to the deceased, the deceased and her father left the health centre. PW8 did not see the deceased alive again.

On the same day at about 11.00pm, while PW1 Daniel Rop was at Sosiot trading centre, he

was approached by the accused and requested to take the deceased to Kericho district hospital. PW1 was a taxi operator. He recalled that he drove his motor vehicle to the house of the accused where the deceased boarded his motor vehicle. PW1 recalled that the deceased was accompanied by the accused, PW9 and a sister to the accused. PW1 took the party to Kericho district hospital where the deceased was attended to by the medical officers at the hospital. PW1 testified that when it took too long for the deceased to be attended at the hospital, he left the hospital and returned back home.

The deceased was received at the hospital by PW2 Charles Maiyo, a clinical officer based at the said hospital. He recalled that the deceased was brought to the hospital at about midnight on the night of the 2nd July 2005. He recalled that the deceased complained of abdominal pain. When PW2 examined the deceased, he saw that the deceased had vaginal bleeding. PW2 diagnosed that the deceased was pregnant and at the time of her admission, she had a threatened abortion. PW2 admitted the deceased and prescribed a drug to prevent abortion. When PW2 inquired from the deceased if she had attempted to procure an abortion, the deceased denied that she had done such a thing. PW2 recalled that the deceased was admitted at Ward 5 at the Kericho district hospital.

At Ward 5, the deceased was attended to by PW7 Ezekiel Nyabuti, a nurse attached to the said Ward. He testified that when the deceased was admitted at the said ward, he examined her admission documents and saw that the deceased had a threatened abortion. PW7 examined the deceased and confirmed that indeed she had a threatened abortion. He recalled that the deceased was with the accused and another man whom he could not identify. PW7 performed a vaginal examination of the deceased and realised that the membrane had ruptured. He saw liquor draining from the womb. He also realized that the foetus was about to be expelled. He advised the accused to wait so that the said foetus could come out spontaneously.

PW7 recalled that the accused requested him to remove the foetus but he declined and reiterated that the foetus would only come out naturally. From his examination of the deceased, PW7 was of the opinion that the deceased had attempted to procure an abortion. He was of the firm view that the membrane was ruptured by someone who intended to put into process the abortion. He testified that after about an hour or so, the deceased complained of severe abdominal pain after which she was taken to the examination room upon which she was able to deliver the foetus. PW7 recalled that he handed the foetus to a relative of the deceased. Thereafter, the deceased expelled the placenta. The deceased was taken back to the ward to recuperate. PW7 recalled that when he examined the deceased, he saw that there was minimal bleeding. At about 8.00 am, when he was reporting off duty, he realised that the deceased had absconded from the hospital. He made the necessary report. After two days, he learnt that the deceased had died.

PW9, the father of the accused corroborated the testimony of PW1 and PW7 as relates to the circumstances under which the deceased was taken to hospital. He testified that during the night of the 2nd July 2005, the health condition of the deceased deteriorated. He decided to have the deceased taken to hospital. The deceased told him that her headache had worsened. PW9 was not aware that the deceased was pregnant. It is only when the deceased was admitted at the Kericho district hospital that PW9 was made aware that the deceased was actually pregnant and had a threatened abortion. He recalled that the deceased was admitted at Ward 5 at the said hospital where she was put on a drip. At about 5.00 am, he left the hospital after informing the accused that he had gone home to get clothes for the deceased. PW9 was however surprised at about 7.00 am when he saw the deceased and the accused at home. PW9 inquired from the accused whether the deceased had been discharged from the hospital in view of her condition. The accused told PW9 that the deceased had been discharged from the hospital after the accused had been advised to buy her some drugs. PW9 recalled seeing the accused with three packets of drugs. PW9 believed the information that he had been given by the accused. He went on with his normal business after he had confirmed

the condition of the deceased appears to have improved.

The condition of the deceased however worsened on the night of the 3rd July 2005. PW9 explained that he was woken up at about midnight and told that the condition of the deceased had taken a turn for the worse. He recalled that he made attempts to secure a motor vehicle to take the deceased back to hospital in vain. A decision was made to take the deceased to the house of her grandfather, PW6 John Chewen. PW6 testified that the deceased was taken to his house by the accused and her sister at about midnight. He realised the condition of the deceased was serious. He asked the accused if she had given the drugs to the deceased. The accused confirmed to him that the deceased had taken the drugs that were prescribed to her. PW6 advised the accused to let the deceased sleep in his house so that she could be taken to hospital on the following day. The deceased's condition deteriorated and about 5.00 am, she died.

On the morning of the following day *i.e.* on the 4th July 2005, PW9 went to the office of PW5 Jonah Koech, the Assistant Chief of Sosiot sub-location to obtain a burial permit so that he could bury the deceased. PW5 had earlier received information that the deceased had died due to suspected attempt to procure an abortion. PW5 declined to issue a burial permit and instead advised the police to investigate the matter. The police visited the house of PW6. They collected the body of the deceased and took it to Kericho district hospital where a post-mortem was performed by PW4, Dr. Athanasias Kasera Ochieng.

PW4 testified that he performed a post-mortem on the body of the deceased on the 8th July 2005. He recalled that the body of the deceased was severely pale. The main finding was in the genital area. He observed that there was blood oozing from the vagina. There were lacerations on the vagina; the uterus was extended – about 16 weeks. There were remnants of conception in the uterus. As a result of his examination, he formed the opinion that the deceased had died due to post abortal hemorrhage. The post-mortem report was produced as *prosecutions exhibit No. 1*. PW4 testified that he did not see any tools that may have been used to procure the abortion.

After deceased's cause of death had been determined, PW10 PC Robert Mutai was assigned to investigate the case. According to PW10, his investigations revealed that the accused had assisted the deceased to perform an abortion. He further testified that if the accused had not made the decision to abscond with the deceased from the hospital where she had been admitted, the deceased would probably not have died due to excessive bleeding after the said abortion. PW10 confirmed the view of PW5 when he testified that the accused behaved suspiciously during the entire period from the time the deceased was taken to hospital to the time the deceased met her death. He recalled that he conducted a search at the house of the accused but was unable to find tools that could have been used to procure the said abortion. He later drew a sketch plan of the respective distances between the residence of the accused and the Sosiot health centre.

PW10 was of the opinion that the accused avoided to take the deceased to Sosiot health centre when her condition worsened because she was aware that it would be discovered that she had assisted the deceased to procure an abortion. The sketch plan was produced as *prosecution exhibit No. 3*. The photographs of the scene where the body of the deceased was retrieved from were taken by scenes of crime officer called PC Charles Rotich. The said photographs were however spoilt in the process of being developed. A letter confirming the said fact was produced as *prosecutions exhibit No. 4*. PW10 testified that the death of the deceased was unnecessarily caused by the negligence of the accused.

When the accused was put on her defence, she denied that she had assisted the deceased to procure an abortion. She testified that she learnt of the pregnancy of the deceased when the deceased was admitted at the Kericho district hospital on the night of the 2nd July 2005. She

denied that she had absconded with the deceased from the hospital on the morning of the 3rd July 2005. She testified that she left the deceased while she was in the Ward when she went to purchase some drugs from a pharmacy. When she returned to the ward, she found the deceased missing from her bed. She decided to look for the deceased. She found her at home. She testified that it was the deceased herself who had absconded from the hospital. She recalled that when she inquired from the deceased why she had absconded from the hospital, the deceased told her that her condition had improved. She testified that she was not negligent, neither had she encouraged the deceased to procure the abortion. She recalled that when the condition of the deceased worsened on the night of the 3rd July 2005, she made efforts which eventually proved to be fruitless to take the deceased to the hospital. She denied that she had been involved with the death of the deceased.

This being a criminal case, it is the duty of the prosecution to establish the guilt of the accused to the required standard of proof beyond reasonable doubt. The onus of proving the guilt of an accused person is on the prosecution. This burden does not shift to the accused. The accused is under no obligation to prove her innocence. Her duty is restricted to raising reasonable doubt on the prosecution's case. This court is required to evaluate the evidence adduced by the prosecution witnesses, and the defence offered by the accused, so as to reach its determination whether the prosecution has established the guilt of the accused.

In the present case, it is the prosecution's case the accused assisted the deceased to commit a felony by procuring an abortion. It is further the prosecution's case the accused acted negligently when she absconded with the deceased from the Kericho district hospital where she was being treated after she had procured an abortion. The prosecution established that the deceased was a sixteen year old daughter of the accused and PW9. The deceased lived with her parents at Sosirot trading centre. She was a form one student at Cheribo secondary school. At the material time, the deceased was about four months pregnant. It is apparent from the evidence of the prosecution witnesses, that PW9, the father of the deceased, was not aware at the time that the deceased was pregnant. When the deceased told PW9 that she had a headache at 3.00 pm on the 2nd July 2005, PW9 did not suspect that the illness of the deceased could be pregnancy related. Indeed, the information PW9 gave to PW8, the nurse in charge of Sosirot health centre, was to the effect that the deceased had headache. PW8, relying on the information given to her, diagnosed that the deceased as suffering from malaria. She prescribed malarial tablets to the deceased.

When the condition of the deceased worsened on the night of the 2nd July, 2005, she was taken to Kericho district hospital by the accused and PW9. It is at that moment that PW9 learnt that the deceased was pregnant. Although the accused stated that she was unaware of the condition of the deceased, it was clear from the evidence adduced by the prosecution witnesses and particularly the evidence of PW2 and PW7 that the accused had knowledge the deceased was pregnant and had in fact attempted to procure an abortion. PW7 testified that the accused pleaded with him to complete the threatened abortion. PW7 declined to accede to the request of the accused. PW7 upon performing a vaginal examination of the deceased determined that someone had deliberately perforated the membrane at the cervix to induce abortion. The observations of PW7 were confirmed by PW4 when he performed the post-mortem on the body of the deceased. He observed lacerations in the vagina of the deceased. PW4 formed an opinion that the cause of death of the deceased was due to post abortal haemorrhage.

An important aspect of the evidence adduced by the prosecution witnesses was the evidence of PW7 and PW9 who testified that the deceased was removed from the hospital by the accused before she was properly discharged by the medical officers. The prosecution established that the accused discharged the deceased from hospital without the permission of the hospital authorities. Although the accused testified in her defence that it was the deceased who made the decision to abscond from the said hospital, it was clear from the evidence adduced by the prosecution witnesses that it was the accused that assisted the deceased to abscond from the hospital. From the description of the condition of the deceased by PW7 and PW9, it was

improbable that the deceased left the hospital by herself without the assistance of another person. In this case, it was clear that it was the accused that assisted the deceased to abscond from the hospital. This fact was confirmed by the testimony of PW9 who recalled that he was surprised when he saw the deceased and the accused at home on the morning of the 3rd July 2005.

The issue for determination therefore is whether the facts of this case establish to the required standard of proof beyond reasonable doubt that it was the accused that unlawfully caused the death of the deceased. I have carefully evaluated the evidence adduced by the prosecution witnesses and the defence offered by the accused. As stated earlier in this judgment, it was evident, and it can be inferred from the evidence adduced, that it was the accused who assisted the deceased to procure an abortion. The induction of the abortion was done by a person who had medical knowledge. The accused facilitated the said procurement of abortion by the deceased. It is clear from the evidence adduced that the father of the deceased (PW9) was not aware that the deceased had been pregnant at the time. From the evidence adduced, it was apparent that the plan was for the deceased to be admitted to Kericho District Hospital after abortion process had started. The deceased was admitted and managed to successfully abort the foetus. However, the accused discharged the deceased from the hospital before she had sufficiently recovered. It is clear from the testimony of PW4 that the deceased died after losing a lot of blood after the abortion. PW2, PW4 and PW7, testified that had the deceased not been prematurely discharged from the hospital, she would have been attended to by the medical practitioners and would not have died from excessive bleeding.

Although the accused testified that it was the deceased that absconded from the hospital, from the evidence adduced by PW7 and PW9, the deceased could not have managed to walk out of the hospital ward by herself. She was assisted by the accused. PW9 testified that he was surprised when he saw the accused and the deceased on the morning of the 3rd July 2005. He rightly thought that the deceased could not have been discharged from the hospital in her condition. The accused told PW9 that the deceased had been discharged by the doctor. This evidence contradicts the assertion by the accused that it was the deceased who had absconded from the hospital. It was evident that the prosecution established to the required standard of proof beyond reasonable doubt, that it was through the negligence of the accused that the deceased met her death.

The issue for determination is whether malice aforethought was established by the prosecution. **Section 206** of the **Penal Code** defines malice aforethought, *inter alia*, to have been established when:

“Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused”.

In the present case, it was clear that the accused assisted the deceased to procure abortion and thereafter sought to conceal the fact. The accused negligently discharged the deceased from hospital before she could be attended to by the doctors. Having evaluated the totality of the evidence adduced, I hold that the prosecution established to the required standard of proof beyond reasonable doubt that the accused is guilty of the lesser but cognate charge of manslaughter. The accused did not intend to cause the death of her daughter but her action in discharging the deceased from the hospital before she was attended to mean that she unintentionally caused her death. The accused is therefore convicted of manslaughter contrary to **Section 202 as read with Section 205** of the **Penal Code**. The assessors, who assisted this court during the hearing of this murder trial, reached a similar verdict that the accused is guilty of manslaughter. I have no reason to disagree with their verdict.

The accused is so convicted.

DATED at KERICHO this 7th day of November 2007

L. KIMARU

JUDGE