

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Case 4 of 2002

REPUBLIC.....PROSECUTOR

VERSUS

PHILLIP O. ADALLA.....ACCUSED

RULING

The Accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 22nd day of July 2001 at about 10.30 p.m. at Voi Railway Quarters within Taita Taveta District of Coast Province he murdered Ian Omuyoma (the deceased).

The prosecution case is that the Accused was married to the mother of the deceased (the wife). The two had matrimonial problems and the Accused frequently beat the wife. After a quarrel on the 22nd July 2001 the wife left the Accused and their child in their house and went to seek Accused's brothers assistance to get her belongings and the child from their house and go away. The brother advised her not to go that night. She did not want to wait until the following day. So she went to Voi Police Station and reported the matter and sought police help. She returned with police to their house only to find the door latched. When she opened and entered she found their child dead. The Accused whom the police had met on their way to the house with the wife and who had accompanied them was then arrested and later charged with this offence.

At the close of the prosecution case Mrs. Ogoti, counsel for the Accused, submitted that the prosecution has failed to make out a prima facie case against the Accused to require him to be called upon to defend himself. She said that the wife having not been called there is a large gap in the prosecution case. She contended that there is no evidence to show that the Accused was left in the house with the child, or that he went there. On malice aforethought Mrs. Ogoti submitted that there is nothing to suggest that Accused had any reason to kill the child.

Mr. Monda, learned state counsel, on his part submitted that although there was no eye witness to the murder the circumstantial evidence adduced in this case points to the guilty of the Accused. He said that the Accused was left in their house with the deceased child and soon thereafter the child was found having been strangled to death. He submitted that the wife could not be called as a prosecution witness due to the provisions of Section 127(2) of the Evidence Act which renders a wife an incompetent witness against her husband.

Nobody saw the Accused kill the deceased. The prosecution's star witness PW1 testified that on the 22nd July 2001 while seated with a friend outside his house at Railway Quarters at Voi he heard someone knock the next house. He thought it was the owner of the shop who was knocking and did not bother, and continued talking with his friend. He then saw a man walking away from the neighbouring house. After about 20 minutes he saw police come to the neighbours house with a man and a woman. He said the man is the one he had seen walking away. Although he had only seen his back he said he was the one he had seen walking away and that as there was clear moonlight he had seen him well.

PW1's evidence cannot be relied upon. Apart from the fact that he only saw the back of a man who was walking away there was nothing unusual which would have aroused his curiosity to make him keenly observe that man. He did not give any description of the man he saw walking away to be matched with that of the Accused.

Apart from the evidence of PW1 there is no other evidence linking the Accused to the murder of the deceased. The other witnesses who testified are mainly police officers who went to the scene after the murder. I agree with Mrs. Ogoti that there is no evidence at all to even suggest the reason why the Accused would have wanted to kill the deceased. Granted he had problems with his wife, the mother of the deceased, but that is no reason why he would want to kill their child.

In the circumstances I find that the prosecution has failed to make out a prima facie case against the Accused to warrant him being put on his defence. I therefore acquit him under section 210 of the Criminal Procedure Code and order his immediate release unless otherwise lawfully held.

DATED and delivered this 21st day of March 2006.

D. K. MARAGA

JUDGE