REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 182 of 2005

REPUBLIC…….....……RESPONDENT

VERSUS

JULIANA HENRETAEGWA…….....……APPELLANT

JUDGMENT

The Appellant was tried before the Resident Magistrate at Wundanyi and convicted of the offence of infanticide contrary to section 210 of the Penal Code and sentenced to seven years imprisonment. She has appealed against both the conviction and sentence. She listed a total of 10 grounds of appeal in her supplementary petition of Appeal but her counsel Mr. Buti argued them together and summarized them to three main grounds. The first one was that no prima facie case had been made out to require the Appellant being called to enter her defence. The second ground was that the learned trial magistrate erred in basing the conviction of the appellant on theories not canvassed at the trial and lastly that the learned trial magistrate shifted the burden of proof to the Appellant. I will start with the second one.

Mr. Buti took a critical view of the learned trial magistrate's findings that the Appellant dropped the child on realizing that it had died and that she tied the umbilical cord around its neck. As there was no evidence to support those findings Mr. Buti, basing himself on the Court of Appeal decision in **Okethi Okale & Others – Vs – Republic [1965] EA 555,** submitted that those were theories the learned trial magistrate conjured up which this court should not allow to stand.

The third ground of shifting the burden of proof is tied up with the first one and I will therefore handle them together.

The first and main ground of appeal was that at the close of the prosecution case no prima facie case was made out against the appellant to warrant her being called to enter her defence. Mr. Buti submitted that the Appellant should have been acquitted at that stage and that calling upon her to enter her defence was a fundamental error which caused a failure of justice. He relied on the case of **Murimi – Vs – Republic [1967] EA 542** and submitted that in those circumstances the learned trial magistrate shifted the burden of proof to the Appellant.

Mr. Buti also submitted that even if he is overruled on those grounds, taking the case as a whole there was at the end of the day still no evidence to support the conviction of the Appellant. He said that no one witnessed accused kill her child. The evidence of PW1, PW2 and PW3 did not suggest that any of those witnesses saw accused kill the child. As regards the evidence of PW4 Dr. Kilonzo who examined the appellant and performed the post mortem examination on the body of the deceased Mr. Buti urged me to ignore it. He said that that evidence was inconclusive. At one stage the doctor said that the deceased was a full term baby and at another stage he described him as a term baby. He wondered if those terms were being used interchangeably.

The other criticism Mr. Buti had of Dr. Kilonzo's evidence was on the cause of death. He said the doctor did not come out clearly on the cause of death. He is recorded as having said that "the cause of death was due to cardio respiratory failure and also strangulation cannot be ruled out." According to Mr. Buti that is inconclusive and vague. Mr. Buti could also not understand how air could be found in the lungs and stomach of the deceased.

On the basis of those submissions he urged me to quash the conviction but if I don't then I should interfere with the sentence. He said that the sentence of seven years imprisonment was harsh. The Appellant, he said has reformed and should be given non-custodial sentence so that she can pursue her university education.

On his part Mr. Monda, the learned state counsel, submitted that the appeal has no merit and should be dismissed. He said that though the learned trial magistrate made some unfortunate remarks in his judgment those remarks did not occasion a failure of justice and should therefore be ignored. Although there was no eyewitness to the commission of the offence, he said that there was sufficient and cogent circumstantial evidence to support the conviction. The Appellant did not deny giving birth and the doctor found that this was not a case of a still birth but a full term baby. The evidence of the Appellant that the child was a premature should therefore be rejected.

Mr. Monda was firm that before the Appellant was put on her defence the prosecution had established a premature case against her. The case of **Murimi – Vs – Republic** he said is distinguishable as the trial magistrate in that case called evidence *suo moto* which incriminated the accused.

On sentence Mr. Monda said the Appellant is lucky to have escaped with a mere seven years imprisonment when she could have been sentenced to imprisonment for life. He urged me to dismiss this appeal in its entirety.

I have considered these submissions. As I am duty bound, this being the first appeal, I have read the lower court record and reevaluated the evidence as a whole. As correctly admitted by Mr. Monda there was no eye witness evidence against the Appellant. The conviction of the appellant was based exclusively on circumstantial evidence.

In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilty. It is also necessary before drawing an inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy that inference. See **Mwangi – Vs – Republic [1983] KLR 522.**

In this case it is not in dispute that the Appellant gave birth to the deceased child. That she admitted herself. What is in dispute is whether or not she killed her child or the child died in the course of or immediately after birth. That narrows down the evidence against the Appellant to that of the doctor who performed the post-mortem examination on the body of the deceased child.

The Appellant said in her unsworn statement that she was sleeping alone with one and half year old child. At about midnight she felt what must have been labour pains. As she was not yet due to have a baby according to her she dismissed that and went out of the house to a pit latrine. She gave birth and as she struggled to get back to the house she slipped and fell down and lot consciousness. When she came to she found herself lying beside the baby whom she soon thereafter discovered was dead.

Against that evidence is that of Dr. Kilonzo PW 4 who performed the post mortem examination on the body of the deceased child who opined that "The cause of death was due to cardio respiratory failure and also strangulation cannot be ruled out."

I agree with Mr. Buti that Dr. Kilonzo's evidence was inconclusive as to the cause of death. In respect of strangulation it is clear to me that the doctor was not sure of that. He surmised that strangulation could

not be ruled out. He did not say what caused the cardio respiratory failure. Anything could have happened during the course of the birth like this one which was in a pit latrine at about midnight. The doctor did not also say that the umbilical cord was tied around the neck. He said it was "attached to the neck." I do not know how that could have been possible.

Taking all these factors into account I find that the evidence in this case fell far short of irresistably pointing to the guilt of the Appellant and incapable of explanation upon any other hypothesis than that of guilty. I accordingly allow this appeal quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 4th day of April 2006.

D. K. MARAGA

JUDGE