



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

HIGH COURT CRIMINAL CASE NO. 6 OF 2004

REPUBLIC PROSECUTOR

VERSUS

JAMES KIRAGU MAINA ACCUSED

J U D G M E N T

James Kiragu Maina (hereinafter referred to as the Accused) is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 30th November 2003 at Ihara village, Kiburu in Kirinyaga District within central Province he murdered A M K . The prosecution has called five witnesses whose evidence was briefly as follows:

C N K (P.W.1) who is currently 16 years old got married to the Accused in June 2003. At that time she was already 6 months pregnant and the Accused was not responsible for the pregnancy. She gave birth on 14th September 2003 to a son whom they named A M K . After a while the child fell sick and P.W.1 asked the Accused for money to take the child to hospital but Accused did not give her any money. P.W.1 went to her brother who gave her money and she took the child to Hospital.

On the morning of 30th November 2003, P.W.1 went to the River leaving the child with the Accused. She came back from the River and found Accused outside the house repairing his bicycle. On entering the house she noticed that the child was “snoring” in a strange way. She took the child went out with him and on removing the cap from his head noted that one side of the head was swollen. She inquired from Accused as to what had happened to the child, but the Accused did not respond. The Accused’s brother A M M (P.W.2) and his wife J W M (P.W.3) whose house is near that of Accused, heard P.W.1 crying and quarreling with the Accused. They went to the house of the Accused and noted that the child was still alive though very weak. P.W.1 and P.W.3 took the child to a nearby private clinic but were referred to Kerugoya Hospital. At Kerugoya Hospital the child was examined and pronounced dead. P.W.1 reported the matter to Baricho Police Station and was asked to go back to the station with the Accused. On the 1st December 2003, Inspector Josphine Wambua (P.W.4) who was then attached to Baricho Police Station recorded the statements of P.W.1, 2 & 3 and thereafter arrested the Accused.

On 4th December 2003 Dr. Paul Mbalu who was then attached to Kerugoya District Hospital performed a postmortem examination on the body of the child and noted that externally there was a depression on the right parietal skull and that there were depressed comminuted fractures which resulted in intra cerebral haemorrhage and brain damage. Dr. Mbalu whose report was produced by Dr. Abraham Gatangi was of the opinion that the cause of death was severe head injury due to blunt trauma. On the 7th January 2004, Dr. Abraham Gatangi examined the Accused and found his physical and mental status normal.

The Accused was subsequently charged with this offence. The accused gave a sworn defence in which he explained that he married P.W.1 knowing that she was pregnant. She later delivered at Karatina Hospital and he paid the hospital bill of Kshs.3,000/=. He maintained that they never had any quarrel or disagreement over the baby.

He testified that on the material morning P.W.1 went to the River leaving him to take care of the baby. The baby then started crying he took the baby and started swaying him in order to pacify him. He explained that he was seated next to the bed as he was swaying the child. He testified that the baby just suddenly stopped crying. He did not know whether the child was knocked by the bed. It was only when his wife later came that she asked what was wrong with the baby and showed him the side of the baby's head which appeared to have been hit. His wife was taken to hospital with the baby, whilst he took his bicycle and went to his place of work to look for money. He was however told to wait. His wife later came back and informed him that the child was in critical condition. The next day he learnt that he was required at Baricho Police Station. He collected P.W.1 from her Aunt's house and they went to Baricho Police Station and Accused was locked in. The Accused swore that he never killed the child. Mr. Wambugu who appeared for the Accused urged the court to find the Accused not guilty as no evidence of malice aforethought was established nor was any murder weapon produced.

The State Counsel Ms Ngalyuka however submitted that the Accused had the opportunity and time to commit the offence and that his conduct betrayed him. From the evidence that has been adduced, it is apparent that there is no direct evidence linking the Accused with the commission of the offence. There is however undisputed evidence that on the material day P.W.1 left the baby under the care of the Accused at around 6.00 a.m. when P.W.1 left the house to go to the river, and that when P.W.1 came back she noted that the baby was breathing in a strange way and had injuries on his head.

In the case of **Mkendeshwo v/s Republic [2002] 1 KLR 461**, the court of appeal held that

: “In criminal cases, the burden is always on the prosecution to establish the guilt of the Accused beyond any reasonable doubt and generally the Accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the Accused to explain matters which are peculiarly within his own personal knowledge.

The evidence Act (Cap 80) section 111 provides that in criminal cases an Accused person is legally duty bound to explain, of course on a balance of probabilities matters or facts which are peculiarly within his knowledge. The section is silent on what would happen if he fails to do so but section 119 entitles a court to raise a rebuttable presumption of fact from the circumstances of the case.”

In this case the Accused having been left to take care of the baby and the baby having been found shortly thereafter spotting an injury and there being no evidence of any other person having had access to the baby, what happened to the child resulting in the head injury was a fact within the peculiar knowledge of the Accused alone

The accused in his defence stated that he only swayed the child to pacify him and stop him from crying. He maintained that the child never fell down and that he did not know whether the child may have been knocked by the bed. The explanation that the child may have been knocked accidentally on the bed without even the Accused who was holding the baby realizing is untenable. Indeed this theory was inconsistent with the opinion of Dr. Abraham Gatangi (P.w.5) whose opinion was that the injuries could only have been caused from a fall at a height of about 8 metres or if the baby fell down hitting the side of the bed.

The extent of the injury noted on the deceased i.e. depressed comminuted fractures on the skull were also inconsistent with an insignificant knock on the bed which the person carrying the baby would not even notice. It is evident that the Accused person did not speak the truth as to what happened to the child, and the court is entitled to infer a rebuttable presumption of fact that the Accused was responsible for the

injuries sustained by the baby. This coupled with the conduct of the Accused in leaving the child in the house and taking no action to take the child to the hospital provided inculpatory facts which were not only incompatible with the innocence of the Accused and incapable of explanation upon any other hypothesis than that of his guilt, but also excluded any other co-existing circumstances which could weaken or destroy the inference of guilt (**Rex v/s Kipkering Arap Koske and another [1949] EACA 135**). I am satisfied that the circumstantial evidence leads to the inexcusable conclusion that the injuries which led to the death of the baby was a result of an act or omission on the part of the Accused.

Although there was evidence that the Accused was not the biological father of the baby, this was not sufficient to lead to the conclusion that the Accused had malice aforethought and intended to cause the death of the baby. I find that the Accused's actions were not premeditated. I would concur with the assessors' opinion that the Accused is guilty but find Accused person guilty of manslaughter and not murder.

The upshot of the above is that the Accused is found guilty of manslaughter contrary to section 202 of the Penal Code as read with section 205 of the Penal Code. The Accused is accordingly convicted of this offence under section 323 (3) of the Criminal Procedure Code.

Dated signed and delivered this 27th day of April 2005

H. M. OKWENGU

JUDGE