



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

**AT NAKURU**

**CRIMINAL CASE 160 OF 2003**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**LINET KWAMBOKA NYABUTO.....ACCUSED**

**JUDGMENT**

The accused, Linet Kwamboka Nyabuto, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 22nd of November 2003 at Jogoo Mau Summit, Molo, Nakuru District, the accused murdered Alijah Ogembo Zacharia (hereinafter referred to as the deceased). The accused pleaded not guilty to the charge. At the hearing of the case, the prosecution called seven witnesses who testified on its behalf in support of the charge.

PW1 Jane Kwamboka testified that on the 22nd of November 2003 at about 10.00 a.m., as she was inside her house at Jogoo farm, Mau Summit, Molo, she heard a child cry behind her house. She went to investigate. She saw the accused holding a child who was about one and a half years old. Upon inquiring from the accused why the child was crying, the accused informed her that the child was hungry. PW1 bought a glass of tea for the child from a nearby kiosk. PW1 did not see accused again until the 28th of November 2003 when she was informed that the accused had killed a child. She testified that at the time she saw the child, the child appeared to be in good health. She conceded that she was not present when the accused was alleged to have killed the child.

PW2 Samuel Onditi, a resident of Jogoo Farm testified that he was in his house on the 28th November 2003 at about 11.00 a.m. when he heard people screaming. He went outside to investigate. He saw some women escorting the accused. The women were screaming that the accused had killed her child. The accused was being beaten by the women. PW2, who prior to the material day knew the accused, accompanied the accused to Mau Summit Police Station where a report of the death of the child was made. PW2 later accompanied the police to the bush where he saw the dead child. The child was lying on its stomach. The child appeared to have been strangled to death. PW2 was not certain if the child died as a result of a fall. PW2 admitted that he had not witnessed the accused killing the child.

PW3 Grace Mokeira, a resident of Mochorwe Molo testified that she was the mother of the accused. According to PW3, she resided at the farm at Mochorwe, whilst the accused, who was her first born child lived together with her other three siblings aged fifteen, thirteen and twelve respectively at Jogoo where they used to go to school. PW3 testified that she left the children under the care of the accused who had delivered a child out of wedlock. PW3 stated that she was not happy when the accused became pregnant and delivered the child. In her opinion the accused was too young, at sixteen years, to bear a child. PW3

further wished that the accused could finish her schooling. After the accused delivered the child, PW3 requested her to return to school but the accused refused. PW3 testified that the father of the accused did not live with them but rather resided and worked in Nairobi. She testified that on the 26th of November 2003 at about 9.00 am. She was informed by her other children that the accused had run away with her young child called Robson Elijah (the deceased). PW3 did not see the accused and the child until the 29th of November 2003 when she was informed that the accused had been arrested and taken to the Mau Summit police station for killing the child. PW3 admitted that she did not know the father of the child of the accused. She denied that she had neglected the accused and her children by leaving them to survive by their own devices at Jogoo Farm. She testified that she left adequate food for the accused and her other children. She further testified that she always brought foodstuff to the accused and the other children from Mochorwe when she visited them at Jogoo. PW3 further testified that prior to the accused becoming pregnant and delivering the child, she used to live with her grandmother. PW4 Dr Zablon Bett testified that on the 5th of December 2003 he performed a post-mortem on the body of Alijah Ogembo Zacharia at Molo District Hospital. He examined the body of the deceased and noted that the deceased was about 75 cms in height. He was well fed. Post-mortem changes had taken place. There were maggots and the body had changed to a bluish colour. There was a ligature mark on the front side of the neck. The skin had peeled on the front side of the neck. The lungs had become congested. There was a lot fluids in the lungs. PW4 established the cause of death of the deceased to be asphyxia due to strangulation. The post mortem report was produced as prosecution's exhibit No. 1. When PW4 was recalled later during the trial, he testified that on the 4th of December 2003 while working at Molo District Hospital, he examined the accused and determined that the accused was mentally fit to stand trial. He also established that the accused was seventeen years old at the time of examination. The duly filled P3 form was produced as prosecution's exhibit No. 2. PW4 did not see any injuries on the body of the accused.

PW5 Police Constable Francis Kimaiyo Taiget (P/F No. 60666) testified that on the 28th of November 2003 while at Mau Summit Police Station he received information from PW2 that there was a body of a child which had been abandoned in the bush in the vicinity of Jogoo village. PW5 accompanied by the OCS David Chekoiyo went to the scene. They found a partially decomposed body of a child. The accused was present at the scene. So was PW2. The mother of the accused, PW3 was also present. The body of the deceased was identified by PW3. There were visible injuries on the neck of the deceased. The neck appears to have been bruised. The body was clothed. There was a head scarf, shirt, trouser and one lessa which had been tied on the child. No weapon which could have been used in the killing of the deceased was found at the scene. The body of the deceased was collected and taken to Molo District Hospital where a postmortem was performed by Dr Bett (PW4). PW5 established that the deceased was the child of the accused. The body had been found about fifteen kilometres from where the accused resided. PW5 was present when the post mortem was conducted on the body of the deceased by PW4.

PW6 Peris Kemunto a resident of Total, Mau Summit area testified that on the 27th of November 2003 at about 6.30 p.m. she saw the accused without her child. He asked the accused where the child was. The accused answered that the child was playing with other children nearby. On the following day, PW6 again saw the accused standing at the shopping centre without her child. PW6 became suspicious. She questioned the accused closely. The accused owned up to the fact that she had killed the child and thrown it to the bush. PW6 knew that the child of the accused was aged about one year and eight months. When PW6 had extracted this information from the accused, he informed her aunt (PW7). PW6 and PW7 accompanied the accused to the place where the accused had said she had abandoned the deceased child. The accused led PW6 to the place where she had left the body of the deceased. PW6 saw the body of the deceased covered with a piece of cloth. PW6 then made a decision to report the matter to the police. The police went to the scene and took the body away. PW6 saw that the body of the deceased had been eaten by ants.

PW6 testified that she had known the accused for about two years prior to the incident. She was not certain as to the date the child was killed. She testified that the body of the deceased was found about five kilometres from her parents home. PW6 reiterated that she used to see the accused with the child when she came to visit her aunt at the Total trading centre. She admitted that she did not know the relationship between the accused and her mother. She did not know if the accused had been chased away by her mother. PW6 conceded that she, with the assistance of members of the public, roughed up the accused in

order to get information on the whereabouts of her child. PW6 testified that she did not see the accused kill the child. She further testified that she had seen the deceased on the same day that the accused informed her that she had killed the deceased. She reiterated that the accused showed them where she had dumped the body of the deceased after killing him. PW7 Irene Nanjuka Obwocha, an aunt to the accused testified that on the 28th of November 2003 she was asleep in her house when she was woken up by PW6 and informed that the accused had killed her child. PW7 went to where the accused was standing and inquired from her if the information given to her by PW6 was correct. The accused answered in the affirmative. The accused offered to take PW7 to the place where she had dumped the body of the deceased. PW7 did not go to the scene. However PW6 accompanied the accused to the scene. PW6 later told PW7 that the body of the deceased had been found in the bush as indicated to them by the accused. A decision was made to report the matter to the police at Mau Summit Police station. PW7 reported the matter to the police and later accompanied the police to the scene where the body of the deceased was lying in the bush. PW7 did not see any visible injuries on the body of the deceased. She testified that after the recovery of the body of the deceased, the accused was arrested. PW7 testified that the accused did not tell them when the deceased was killed. PW7 reiterated that he had not seen the accused kill the child. She further testified that when she had gone to the scene where she was informed the body of the deceased would be found, she had been accompanied by PW6, one Felistus and one Serah. PW7 testified that she had not seen the body of the deceased. Neither did she know the age of the deceased at the time of his death. She confirmed that the accused used to live alone with her younger siblings at Jogoo area whilst her mother live at their farm at Mochorwe. PW7 confirmed that the mother of the accused was very unhappy when the accused became pregnant and later delivered a child. She testified that although the mother of the accused was unhappy, she did not hate the child of the accused.

After the close of the prosecution's case, and after evaluating the evidence adduced by the prosecution, this court reached a finding that sufficient evidence had been adduced by the prosecution to enable this court to put the accused on her defence. In her unsworn evidence, the accused testified that she used to live alone with her younger siblings at Total trading centre. On 20th of November 2003, she did not have any food in the house. At 10.00 a.m. she made a decision to go and look for food. She was with the deceased. She went around Total trading centre looking for maize but she could not find any. After walking aimlessly for a long time she decided to go to an open field and sleep as she was tired. The child also slept.

When she woke up she realised that the child was not waking up. She left the child where she had slept and went to the road. She met PW6 and told her about the condition of the child. PW6 offered to inform her aunt, PW7 so that arrangements could be made to take the child to the hospital. The accused then testified that she was taken to her uncle's house where she was beaten by her uncle. A decision was made to take the accused to the police. A report was made that she had killed the child. The accused was then taken to where the child was. The deceased child was then taken to the hospital mortuary. The accused was then detained by the police. The accused then closed her case.

I have evaluated the evidence adduced by the prosecution and the defence offered by the accused. The issue for determination by this court is whether the prosecution has established to the required standard of beyond reasonable doubt that indeed it is the accused who, with malice aforethought killed the deceased. I am also conscious of the fact that the burden of establishing the guilt of the accused rests with the prosecution and does not, in most cases, shift to the accused. The evidence offered by the accused in her defence can only be considered in the light of the evidence offered by the prosecution. Such evidence offered in defence cannot be used to corroborate the prosecution's case.

In this case, the facts of the case, as presented by the prosecution are as follows:- On the 22nd of November 2003 whilst PW1 was washing utensils in her house at Jogoo farm near Total, Mau Summit she heard a child cry outside her house. She went outside to investigate. She saw the accused with a child of about one and a half years of age. The child was crying. PW1 inquired why the child was crying. The accused told PW1 that the child was crying because it was hungry. PW1 bought a glass of tea for the child from a nearby kiosk. PW1 did not see the accused until the 28th of November 2003, when she was informed that accused had killed the child. On the 27th of November 2003, PW6 saw the accused at the trading centre without her child. PW6 inquired from her where the child was. The accused informed PW6

that child was playing with other children elsewhere. On the 28th November 2003 PW6 again saw the accused without her child. She again made inquiries as to the whereabouts of the child. The accused was uncommunicative. PW6, with the assistance of the members of the public roughed up the accused. The accused then disclosed that she had killed the child and dumped her body in the bush. PW6 then informed PW7, the aunt of the accused.

PW6 and PW7 accompanied by two other women then escorted the accused to the place that she claimed she had dumped the child. The place they were directed to by the accused was a bush. It was about fifteen kilometres from where the accused resided. PW6 saw the body of the deceased wrapped with cloths. It was then decided that a report be made to the mother of the accused (PW3) and later to the police. PW2, PW3, PW6 and PW7 went to the Mau Summit Police Station. The four witnesses later accompanied the police and the accused to the scene at the bush where the body of the deceased was recovered. PW5, the investigating officer in this case, recovered the body of the deceased. The body of the deceased was partially decomposed. PW5 saw the neck of the deceased had bruises. PW6 testified that the body of the deceased had partially been eaten by ants.

PW5 removed the body of the deceased from the scene and took it to Molo District Mortuary where a post-mortem was later conducted by PW4. PW4 established the cause of death of the deceased to be severe asphyxia secondary to strangulation. He examined the body of the deceased and found that there were ligature marks around the neck. The skin in front of the neck had peeled. The post-mortem report was produced as prosecutions exhibit No. 1. PW4 also examined the accused and establish that she was mentally fit to stand trial. He also established the age of the accused at the time to be seventeen years. PW5, after obtaining all the evidence made the decision to charge the accused with the offence of murder.

A piece of evidence that was adduced by the prosecution that is very material to his case is the evidence of PW3, the mother of the accused. She testified that she resided at her farm at Mochorwe and left the accused and three of her siblings on their own at Jogoo Farm. She testified that she had made the decision for the children to reside at Jogoo farm so that the children could attend a nearby school. Although she testified that she always provided for the upkeep of the said children by taking foodstuffs to them, contrary evidence emerged. PW1's and the accused's testimony appear to suggest that PW3 left the accused and her younger siblings to survive on their own in so far as the provision of food was concerned. PW3 was also not happy that the accused had become pregnant and delivered a child while she was at school. In her testimony before court, she stated that she was unhappy because the accused had become pregnant when she was too young. It was her wish that the accused completed her schooling. She further testified that the accused used to reside with her grandmother before she had become pregnant and dropped out of school. In her evidence in defence, the accused denied that she had killed the child. She testified that the child could have died of natural causes. Having evaluated the evidence adduced by the prosecution, it is clear that there is no direct evidence linking the accused to the death of the deceased. The prosecution has however adduced circumstantial evidence to support the charge of murder against the accused. In *James Mwangi –versus- Republic* [1983]KLR 327 at page 331, the Court of Appeal held that:

“In a case depended on circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (*Sarkar on evidence – 10th Edition p. 31*). It is also necessary, before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference *Teper –versus- Republic* [1952] AC 480 at page 489.”

In the present case the prosecution has adduced evidence which leads to no other conclusion than that it is the accused who caused the death of the deceased. PW1 saw the accused with deceased on the 22nd of November 2003. The deceased, though crying from hunger, was alive and well. Five days later, on the 27th of November 2003 PW6 saw the accused without the deceased. When PW6 inquired from the accused where the child was, the accused told her that the child was playing with other children. On the following day, the 28th of November 2003, PW6 saw the accused without the child. She became suspicious. She was robust in demanding to be told the whereabouts of the child. It is then that the accused broke down and told her that she had killed the child and dumped the child in the bush. The

accused then led PW6, PW7 and later the police to the place where she had dumped the baby.

According to the evidence of the prosecution's witnesses, the place that the body of the deceased was found was about fifteen kilometres from where the accused resided. The only person who could have known the exact location where the body of the deceased was dumped was the accused. She led the two witnesses and later the police to where the body of the deceased had been dumped in the bush. When post mortem was performed on the body of the deceased, it was established that the deceased had been strangled to death. I have carefully evaluated the evidence and I hold that the prosecution has established, by circumstantial evidence, that it is only the accused person who could have had the motive and the opportunity to harm the deceased. Evidence was adduced how the accused found it difficult to feed the deceased. An instance was when PW1 on the 22nd of November 2003 sympathised with the child of the accused who was hungry and bought him a glass of tea. Maybe by some convoluted thinking, the accused thought she was relieving the deceased from hunger pangs when she strangled him. From the evidence adduced by PW1, the most likely scenario is that the deceased kept crying because he was hungry and to stop him from further crying and causing her distress, the accused strangled her to death. All the circumstantial evidence point to no other person, other than the accused. In the premises therefore I do hold that it is the accused who caused the death of the deceased by strangling him. The issue now left for determination by this court is whether the prosecution established that the accused killed the deceased with malice aforethought. From the evidence adduced especially by PW1, PW3, PW6 and PW7, it is evident that the accused was left by her parents to fend for herself and her younger siblings. I did not believe the evidence of PW3, the mother of the deceased, that she used to avail food for the accused and her younger siblings. During the hearing of this case, I failed to understand how PW3 as the mother of four children who were less than seventeen years, could decide to leave them in a shopping centre and go and reside alone on the farm. Even if the said children were left at the shopping centre so that they could go to a nearby school, the prudent thing for PW3 to have done was to leave the said children under the custody of an adult. In this case, PW3 actually neglected her own children. She did not care if the children got food. Her resolve to neglect the children was perhaps motivated by her unhappiness with the fact that the accused had conceived and bore a child whose father she did not know. These conditions must have pushed the accused, who was barely in her teens, and without any skills to fend for herself, to the wall to the extent that she thought the only way to relieve the pangs of hunger of her child was to silence the child permanently.

In the circumstances of this case, I do hold that the accused lacked the requisite mens rea when she killed the deceased. The circumstances imposed on her by her parents were such that she was pushed to extreme. I therefore hold that the accused is guilty of a lesser but cognate offence of manslaughter. I accordingly convict her. The two assessors who assisted this court during the trial both agreed that the accused unintentionally killed the deceased. One assessor was excluded from the proceedings herein after he failed to attend court during the hearing of this case without any explanation. All the efforts to trace him to attend court were in vain. In the circumstances therefore, I do hold that the prosecution established beyond any reasonable doubt that the accused unintentionally killed the deceased. She is accordingly convicted for the offence of manslaughter.

**DATED at NAKURU this 30th day of June 2005.**

**L. KIMARU**

**JUDGE**