REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 99 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

STANLEY MWITI MAIYA.....ACCUSED

JUDGMENT

1. **STANLEY MWITI MAIYA** (***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 charge are that

> **On 08th May, 2015 at Mutuati Township, Kabachi Location in Igembe South Sub-County within Meru County murdered SD**

PROSECUTION CASE

2. On 08.05.2015 at about 06.00 pm, **PW1 GLADYS KAARE** left her 10-month old child **SD** sleeping in the house alone. Upon her return and when she was about 15 metres away from her house, she saw a man running away from her house and she recognized the man as Stanley who used to work at a car wash about 30 metres from her house. In the house, she found her child had been defiled. She escorted the child to hospital 3 days later when her condition deteriorated where she died on 13.05.2015 while undergoing treatment.

3. **PW2 PETER KABA**, PW1's husband who is a cobbler recalled that 08.05.2015 at about 05.30 pm, PW1 left him with their child **SD** and went to the market. That at about 07.30 pm, accused went to collect his shoes and he left him in the house to go and get the shoes for him only to be informed later that accused had defiled the child.

4. **PW3 DR. YVONNE KINYA KINOTI** tendered deceased's P3 form dated 21.05.2015 **PEXH. 1** which shows that the child suffered bruising on vagina, labia majora, both thighs and perianal area, longitudinal tear on anus, the right 8th to 10th ribs were broken. The doctor formed an opinion that deceased died of multiple bruises, fractured ribs, bruising of the genitalia and anus all caused by sexual assault.

DEFENCE CASE

5. In his sworn defence, Accused conceded that he used to work at a car wash before his arrest. He denied the offence. He stated that 08.05.2015, he was with his witness PATRICK MUROKI at Mutuati market where they were buying and selling miraa and even spent the night together and parted ways the following morning.

ANALYSIS AND FINDINGS

6. I have considered the evidence on record. For Prosecution to secure a conviction on a charge of murder, it has to prove three ingredients which are: the death of the deceased; that Accused committed the murder and that he was actuated by malice. (See **Anthony Ndegwa Ngari v Republic [2014] eKLR***)*.

(a) The death of the deceased

7. A postmortem form **PEXH. 2** reveals that the deceased suffered bruising on vagina, labia majora, both thighs and perianal area, longitudinal tear on anus, the right 8th to 10th ribs were broken caused by sexual assault as a result of which she died.

(b) Proof that accused person committed the unlawful act which caused the death of the deceased

8. I have considered PW1's evidence with a lot of curiosity. Whereas she claimed that she had left the child alone in the house, it turned out from the evidence by her husband that the child was left under his care. In an attempt to explain what happened to the child when it was left in his custody, PW2 the child's father stated that he left the child in the custody of a total stranger, accused herein.

9. That accused was left in the house by PW1 is denied by accused and is uncorroborated. PW1 in her evidence did not explain why she concealed information that she had left the child in the custody of the child's father. Worse still, the child was neither taken to hospital nor the matter reported to the police until 13.05.2015 which was 5 days after the event which was the same day that the child died. The casual manner in which the child's mother handled this matter leaves no doubt in the in the mind of the court that there is a possibility that she was trying to cover up her husband. Other than that, PW1's evidence that she saw accused leave her house that night is unreliable for the reason that she did not clarify how she was able to identify a man she saw running in the opposite direction, in the dark, as accused herein.

10. Accused raised the defence of alibi that he was at Mutuati market the whole day on 08.05.2015 with his witness PATRICK MUROKI with whom they spent the night.

11. The Supreme Court of Nigeria in the case of **Ozaki & Anor Vs The State (1990) LCN/2449(SC)** held as follows:

> **"it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability" and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.**

12. Our own Court of Appeal in the case of **Kiarie v Republic [1984] KLR** held THAT:

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

13. I have weighed the evidence by PW1 and PW2 and the prevailing circumstances PW1 alleges to have recognized accused *vis a vis* the defence of alibi raised by Accused as corroborated by his witness and I have found that the alibi introduces into the mind of the court a doubt that is reasonable.

14. Accordingly, and for the reasons set out hereinabove, I have come to the conclusion that the

prosecution case is not so strong against the Accused person as to leave only a remote possibility in his favour which can be dismissed with the sentence that it is possible that he indeed murdered the deceased.

c) Malice aforethought

15. Since the prosecution has failed to prove *actus reus'*, it would be futile for this court to delve into the issue of malice aforethought.

16. Consequently, I find Accused **NOT GUILTY** and order that he be set at liberty unless otherwise lawfully held. It is so ordered.

DELIVERED AT MERU THIS 04th DAY OF *October* 2021

T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Accused - Present

For the Accused persons - Mr. Wamache Advocate

For the State - Ms. Mwaniki