

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL CASE NO. 11 OF 2017.

REPUBLIC.....PROSECUTOR

Versus

ENW.....ACCUSED

JUDGMENT

The Accused **ENW** was Charged with offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. Particulars of the offence were; On the 2nd day of March, 2017 in Kimilili Sub-County within Bungoma County, murdered **ENW**.

The case for the prosecution is that Pw1 ENN was the wife of accused; having married in 2005. They had 4 issues of the marriage including the deceased who was 5 years old. On 27.2.2017 she left the matrimonial home after disagreement and went to Nairobi where she was employed as a house maid. She left the children under the care of the accused's mother. On 3.3.2017 she received information that deceased had died. She came home and found the deceased in accused's mothers house. She observed the child and saw she had an injury on the neck, leg, and a fracture on the hip. She reported the matter to police.

Pw2 SimonWafula Wanjala the assistant chief testified that on 3.3.2017 he received information that a child had died at home of accused; and had planned a burial but had not obtained a burial permit. He went there and found the deceased in her grandmother's house. On inquiry he was informed that on 2.3.2017 the accused had gone to sleep with the child at night and he came claiming that the child had fallen down. He observed the body which had injuries on the neck and he became suspicious. He reported the matter to police. He asked both the grandmother and the accused about the death and both maintained deceased had fallen down.

Pw4 DNN. The mother of the accused and grandmother of the deceased testified that she was the one taking care of the accused's children including the deceased. On 2.3.2017 she left the children with her mother. When she came at 6p.m. she found the deceased with her mother lying down. She cooked for them and went to sleep. At night accused called her and informed him the child who was in the kitchen was sick. She observed deceased and found was breathing heavily. As she went to look for money the deceased died. Upon being cross-examined by Makokha for accused, this witness testified that she had seen deceased with witness. Mother called TN and deceased looked unwell.

Pw5 SN a girl aged 12 years testified that on 2.3.2017, she came from school and found ENW (the deceased) and A at the house of their grandmother. Accused who is her father sent her to bring water to bath the children. She bathed them and they went to sleep.

Pw3 Dr. Achinyenza Shikuunza who performed the Post Mortem on body of the deceased on 6.3.2017 testified that the deceased was about 5 years old. Upon examination he found she had injury on the neck, injury on her Sexual organ and blood in the lung cavity, she had a dislocation of spine and signs of lack of oxygen in the lungs. He formed opinion that the cause of death was due to strangulation. When being Cross-examined by Makokha for Accused, the doctor confirmed the neck movement was hyper showing a dislocation, there were bruises on the vagina and hymen was torn.

The accused gave sworn evidence. He testified that on the material day the deceased ENW was with one of her 4 children and ENN. On 2.3.2017 at 12a.m. he was called by TN who told him the deceased was sick. He went and called DNN who came and took the child to hospital but she died on the way. The next day the Assistant Chief came and later police arrested him. He was later charged with present offence.

The prosecution evidence in this case is that the deceased was fine during the day; that it is deceased who took her to his house and later woke up Pw4 to tell her that deceased was unwell and that she later died. The prosecution in their evidence seeks reply on the circumstantial evidence to prove who inflicted the injuries and strangled the deceased. For the prosecution to establish an offence relying on circumstantial evidence, it must prove that the facts proved bad irresistibly to the conclusion that it is the accused who committed the offence.

In this case there is evidence that he deceased was at the material night with one TN a great grandmother who they were sleeping with in the kitchen house.

Pw5 SN the sibling of the deceased aged 12 years testified that at all material time the deceased and other children slept in the Kitchen house with TN. She testified that the deceased was asleep there when accused was called that she was unwell. The prosecution did not call TN who was alleged to have been sleeping in the Kitchen house to testify. Without her evidence, the assertion by prosecution that accused had gone with the deceased to his house is not supported by evidence.

That being so, I do not find that the prosecution has proved the accused did inflict injuries on the deceased as alleged. I do not find that there is sufficient evidence adduced to support an offence of Murder against the accused person. I therefore find the accused **EWN** not guilty of the offence of Murder Contrary to Section 203 as read with Section 204 and acquit him under Section 215 of the Criminal Procedure Code. Accused to be set at liberty unless otherwise lawfully detained.

Dated at Bungoma this 2nd day of March, 2020.

S.N. RIECHI

JUDGE