



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 25 OF 2017

REPUBLIC.....RESPONDENT

VERSUS

ANNETTE ACHIENG.....ACCUSED

JUDGEMENT

1. The Accused **ANNETTE ACHIENG** is a young lady aged twenty nine (29) years or thereabout. At the time of her trial she was a single mother of two minors aged eight (8) and four (4) years respectively. She had been in a romantic relationship with the father of the deceased who fathered one of her children whom he was supporting while married to the mother of the deceased.

2. When the deceased's mother died leaving two children, his father who testified before me as **PW5** briefly left them with his mother-in-law and when he realized that they were not being taken good care of, as any selfish man decided to take his biological child away aged then one year three months and since he had sired a child with the accused whom he was supporting, she became his city of refuge. The accused agreed to take care of the child on condition that the father would pay rent for the house where they were staying and some basic support.

3. The deceased then moved into the accused's house and was treated as part of her family and child until the 15th day of May 2017 when he died and that is the subject matter of this Judgement, the accused having been charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that, on the 15th day of May 2017 at Maria Estate in Kayole within Nairobi County murdered **PRK**.

PROSECUTION CASE

4. To prove its case against her, the prosecution called and examined nine (9) witnesses. **PW1 MARGARET WAITHERA** attended to the deceased at Arrow Web Hospital Kayole who had been taken there by the accused in a semi-conscious nature. On examination she suspected head injuries which would have been caused from a fall. **PW2 EUNICE KWEYA ANINDO** the grandmother of the deceased attended to post-mortem examination on the body of the same on 15/05/2017 together with **PW3 AGGREY SHIKOBE KWEYA** and identified his body for the said purpose.

5. **PW4 AM** a minor aged ten (10) years at the time and a child of the accused testified having been affirmed and stated that they were living together with the deceased, her brother and mother in their single roomed house. She used to sleep on the sofa set while her brother and the deceased used to sleep with their mother on the bed. It was her evidence that she did not hear of anything the night the deceased died. In cross-examination she confirmed that the accused had never beaten the deceased during the time they were staying together but stated that the same used to fall down while walking. It was her evidence that they used to eat together and there is no day he was denied food. He was part of the family and they considered him as one of them.

6. **PW5 KENNEDY BOKO KWEYA** the father of the deceased and the accused former lover stated that after the death of his wife he spoke with the accused who was his former lover and they agreed that she would take care of the same. He gave her the child in the month of June 2016 and would visit from time to time, with the last such visit being 13/05/2017. It was his evidence that on 14/05/2017 the accused tried calling him but he missed her call. When he called back the accused asked him why he was not responding to her call. She then gave him information to the effect that the deceased had fallen down while climbing the bed and fainted. She informed him that she had rushed him to Arrow Web Hospital Kayole and was allegedly okay. At about 4.30 – 5.00 a.m. she called him again while crying with information that the deceased's condition was worse and was with him at Mama Lucy Hospital.

7. It was his evidence that he followed her to Mama Lucy Hospital where he saw the deceased who had a dry boil wound on the head and a fresh one. He noticed that the deceased was already dead. They were given a note to the police and the accused when asked what had happened to the child, told the police that he had fallen down from a bed. Both the accused and the witness were locked in police cell for one month while investigations were ongoing. It was his evidence that the accused had no issue with the deceased until a sister of hers came to stay with her who must have influenced her negativity.

8. In cross-examination he confirmed that the accused used to carry the deceased with her to her place of work. He confirmed that the accused called him on 14th but he could not answer. Immediately he called her back she told him that the child had fallen down. He further stated that when he gave the deceased to the accused the deceased used to be very weak and would fall down while walking from time to time. The deceased was in bad health and was epileptic. It was his evidence that the accused loved the deceased and had no reason to hurt him.

9. **PW6 CORP. PRECILA KALUKI** received the accused and **PW5** with the deceased at the police station and took the body to city mortuary while she handed the two to **Cl. OPIYO** of CID for further investigations. The deceased's body had a fresh wound on the head and hand which the accused said had been caused by a fall. **PW7 JOSEPH CHERUIYOT** corroborated her evidence while **PW8 PC GEORGE OUMA** investigated the case and established that the accused told him that the deceased had fallen down. He visited the accused's house and was shown the bed from which the deceased allegedly fell. On 18/05/2017 post-mortem was carried out on the body of the deceased by **Dr. Maingi** who ruled out the possibility of the death being caused by a fall.

10. In cross-examination he confirmed that the accused was taking good care of children including the deceased. He confirmed having spoken with the neighbours of the accused but got no adverse report and that the children of the accused also never talked of any negative thing about the deceased towards the deceased, they never found any murder weapon in the house. He confirmed that **PW1** saw the deceased while still alive who advised them to go to another facility.

11. **PW9 DR. SILVERSTER MAINGI** produced a post-mortem report in which he confirmed that the deceased had laceration vertex of the head with depressed fragmented right parietal bone. There was bleeding under the scalp. As a result of the examination he formed an opinion that the cause of death was haematoma due to severe head injuries caused by blunt force trauma. It was his evidence that the same could not have been caused by a fall from a bed though the child was malnourished and wasted. In cross-examination he stated that it was possible to get the injuries from a fall which can be termed blunt object since there was no cut.

DEFENCE CASE

12. When put on her defence the accused gave unsworn statement of defence and stated that the deceased was in the bedroom sleeping when she heard at 9.00 p.m. something fall down in the bedroom. When she went to check, she found that he had fallen. She took her to the nearest hospital but was advised to refer him to a better facility if he did not improve. She called his father and gave him the information. At 3.00 a.m. she found him convulsing and took him to Mama Lucy Hospital where he was admitted and was later on informed by the doctor that he had died. She was in shock having stayed with him for nine (9) months and loved him as her child.

SUBMISSIONS

13. The defence filed final submissions while the prosecution relied upon evidence on record:- On behalf of the defence it was submitted that the prosecution failed to prove all the ingredients of murder. It was stated that the prosecution failed to prove the cause of death of the deceased as the evidence of **PW9** who prepared the post-mortem report, confirmed under cross-examination that the death could have been caused by a fall. It was submitted that **PW9** did not see the bed which the deceased fell and could therefore not state that it was too low. It was submitted that there was no evidence whatsoever linking the accused to the injuries sustained by the deceased as the prosecution evidence was purely suspicion, speculations and circumstantial. It was therefore submitted that the prosecution did not meet the test set out in **JOAN CHEBICHII SAWE v REPUBLIC (2003) eKLR** and **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR** on circumstantial evidence.

14. It was the defence's further submission that there were contradictions on the prosecution case as to the injuries sustained by the deceased and that the prosecution failed to call in any witnesses from Mama Lucy Hospital where the deceased was taken and the Court was urged to make adverse inference along the principles set out in **BUKENYA & OTHERS v UGANDA [1972] EA 549**. Reliance was made to the case of **PON v REPUBLIC [2019] eKLR** where the Court of Appeal observed the danger of suspicion and held thus:-

“In conclusion, and to reiterate what the courts have stated time without end, no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction . . . Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not.”

15. It was finally submitted that the prosecution failed to establish malice aforethought on the part of the Defendant as no motive for the offence was established. It was stated that the conduct of the accused person before and after the alleged offence did not lead to an inference of guilty. It was stated further that the accused's evidence was able to displace the doctrine of last seen alive with as she stated how she took the child to Arrow Web Hospital and later to Mama Lucy Hospital.

ANALYSIS AND DETERMINATION

16. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code** the prosecution is required to prove beyond reasonable doubt the following elements of the offence:-

a) The fact and cause of death.

b) That the death was caused by unlawful act of omission or commission on the part of the accused person.

c) That it was committed with malice aforethought - mens rea on the part of the accused as defined in Section 206 of the Penal Code.

17. On the fact and cause of death of the deceased:- The evidence tendered before the Court confirms that the same was proved beyond any reasonable doubt. **PW9 DR. SYLVESTER MAINGI** confirmed the cause of death through his post-mortem report to be hematoma due to severe head injuries caused by blunt force trauma. The fact of the death was confirmed by the accused, **PW5** the father, **PW2** and **PW3** who attended post-mortem examination and identified the body, **PW7** and **PW8** police officers who attended to the body. It follows that the fact and cause of death was proved beyond any reasonable doubt.

18. The only issue in dispute which requires the court's determination is whether the said death was caused by unlawful act on the part of the accused person. As submitted by the same, rather than the accused, there was no other independent witness who saw the accused cause the death of the deceased and therefore the prosecution case against her is solely based on circumstantial evidence. As submitted by the defence, the law on circumstantial evidence was settled and applied in the following cases: -

(a) **JOAN CHEBICHII SAWE v REPUBLIC (2003) eKLR** where the Court of Appeal stated thus:-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”.

(b) **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR**

*“In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions, see **NAVANEETHA KRISHNAN v THE STATE BY INSPECTOR OF POLICE – SUPREME COURT OF INDIA, CRIMINAL APPEAL NO. 434 OF 2013.**”*

(c) **OMAR CHIMERA v REPUBLIC, Crim Appeal No. 56 of 1998** cited in **REPUBLIC v SKM [2017] eKLR** thus:-

“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy 3 tests. The circumstances from which the inference of guilt is sought to be established must be cogently and firmly established.

i. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused

ii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else”

19. The circumstantial evidence relied upon by the prosecution was that the accused was the person who was with the deceased when he sustained injuries which led to his death. The accused in her defence stated that the deceased had fallen from bed. He was taken to arrow Web Hospital in Kayole within Nairobi where **PW1 MARGARET WAITHERA** a clinical officer attended to him in a semi-conscious state with head injuries which she confirmed could have been from a fall. His condition later on became worse causing the accused to take him to Mama Lucy Hospital from where he died. As submitted by the defence no witness was secured from the said hospital to state the condition of the deceased when he was admitted thereat. **PW9 DR. SILVERSTER MAINGI** conducted post-mortem examination on the same and confirmed the cause of death but did not rule out the possibility of the said injuries being caused from a fall.

20. Whereas there is suspicion of the accused involvement in the death of the deceased as per the evidence of **PW5** her former lover that her attitude towards the child changed when her sister went to live with her, the evidence tendered by the prosecution contradicts this evidence as it is on record that the accused was staying alone with the three children. It was for the prosecution to prove their case beyond any reasonable doubt that the accused's attitude towards the deceased who she had lived with for the past nine months had changed so as to cause harm to the same.

21. In a case purely based on circumstantial evidence one of the strong chains which would link the accused to the offence is the motive. As was stated by the Court in **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR** (supra) thus:-

“In cases like this where the prosecution case is solely based on circumstantial evidence it is very important for the prosecution to establish motive as one of the chains linking the accused to the crime. Where the prosecution is not able to establish a motive behind the alleged crime it assumes importance as the proof of motive on the part of the accused person to commit the offence satisfies the judicial mind about the authorship of the crime. In the absence of motive the court is then required to have a deeper search into the circumstantial evidence tendered so as to link the accused to the crime.”

22. At the close of the prosecution case no motive was established by the same against the accused person. On 13th May 2017, she was with the father of the deceased throughout. The only day they were not together was on 14th May 2017 but she called him on phone with information that the deceased had fallen down. The accused's account as to what happened to the deceased was consistent throughout and her conduct was not that of a guilty person thereby raising doubt in the prosecution case the benefit of which should be given to the accused persons.

23. The two minor children of the accused one who testified before me confirmed that the deceased was always treated as part of the family

including sleeping in the bed with the accused and her last born child. The Investing Officer through his evidence confirmed that he interviewed the neighbours of the accused who did not give him any adverse report on the accused and further confirmed that on the night of the incidence the neighbours did not hear of any commotion from the house of the accused.

24. The medical evidence as presented by **PW1** who first saw the deceased did not rule out the possibility of the same having sustained the injuries which led to his death from a fall. The doctor who performed post-mortem examination on the body **PW9**, only stated that based on the nature of the injuries he did not believe the accused's account but did not rule out the possibility of the same being caused by a fall since it was caused by blunt force trauma.

25. As stated herein above, there was no motive proved by the prosecution on the part of the accused. She had lived with the deceased for the last nine months and as **PW5** stated in his evidence there was no reason at all for the accused to cause his death. The deceased was in poor state of health when he took him to the accused who agreed to live with him. There is no evidence that the deceased had annoyed the accused on the material day or that she administered some form of punishment on the same, neither was there any evidence that the father had stopped providing for them.

26. Whereas there is suspicion, it is a legal principle that suspicion however strong cannot be a basis of conviction in a criminal trial as was stated in the case of **PON v REPUBLIC (supra)**. Having taken into account the evidence tendered by the prosecution and the defence together with submissions before me and whereas the deceased lost his life, I am satisfied that the prosecution failed to prove all the ingredients of the charge of murder against the accused person and in particular that the death was caused by unlawful act on her part with malice aforethought and accordingly find the same not guilty. The accused shall be set free forthwith unless otherwise lawfully held.

27. The State has right of appeal and, it is so ordered.

Dated, signed and delivered at Nairobi this 9th day of October, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Mr. Farah for the Accused

Accused present

Court assistant- Karwitha