



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL CASE NO. 28 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FREDRICK NGETICH SOME.....ACCUSED**

**JUDGMENT**

1. **J K W** (deceased), was killed at a tender age of 1 year and 4 months. **Fredrick Ngetich Some (accused)** was charged with the murder of the deceased.

2. Deceased was a child of **R W W (R)**. **R W W** was 21 year old single mother. She stated that the accused was her boyfriend and they lived together but had parted from each other five months before the death of her deceased child. **R W W** said that they parted because the accused married someone else. **R W W** said that the accused was paying rent for her.

3. On 29<sup>th</sup> September 2016 **R W W** said that at 11 p.m. she went to attend 'Mabolezi' (funeral arrangement meeting). **R W W** left her deceased child sleeping in the house. Her house was in a plot with other homes. That because it was cold that night Rose decided not to take her child with her. She left him sleeping alone in her house. She however requested her neighbour, next door, to watch over the deceased child. **R W W** said she returned home at 11.30 p.m. to check on the child. On checking the child **R W W** returned to the meeting. **R W W** arrived at her home at 5 a.m. and this is what she stated in evidence:-

***“When I returned at 5 a.m. I found the house was broken in and everything in that house was thrown outside. Mattress, blanket everything were thrown out only my clothes were not thrown. I wondered where my child was. I asked my neighbours.....and because I knew Freddie was coming .....”.***

4. **R W W** went to Ngarua Police Station to report the matter.

5. The evidence of P.C. Cyrus Wanjohi (PW 1) was that on 30<sup>th</sup> September 2016 he was on duty at Ngarua Police Station. He was at the report office of that police station. While there at 12.30 a.m. someone went and introduced himself as Fredrick Ngetich Some (accused). He was carrying a baby. This officer then stated in evidence:-

***“..... he (accused) collected him (deceased) while being (sic) abandoned at dustbin located within Kinamba.”***

6. PW 1 the police officer said that he observed that the deceased baby had bruises on his hands, face and was defecating on himself. The deceased baby was also crying with a low voice. The police officer noted that the deceased baby was in pain. He therefore noted it in the occurrence book (O.B.). The police officer then issued the accused with a note to use to take the child to Ndindika Health Centre.

7. Rachel Waithera Ndungu is a nurse at Ndindika Health Centre. She recalled that at 1.30 a.m. on 30<sup>th</sup> September 2016, while she was on night duty, she first heard noise, at the gate. She saw someone with a baby. She stated in her evidence:-

***“I was with the watchman. We saw someone was holding a child by the hand. The child was hanging. The child was completely naked ..... I saw the child was nose bleeding. On checking I saw the child had dried blood on the side of his mouth ..... The one who brought the child had police note which stated he was a good samaritan.”***

8. As the nurse began to treat the deceased child she was calling the child toto (child). The nurse noted the good Samaritan, who she identified as the accused before court, was calling the deceased child by name. The nurse questioned the accused how, if he was a good Samaritan, he knew the child's name. The accused told her:-

***“I am guessing to see if the child will respond”.***

9. Because the nurse noticed that the child was gravely ill she referred the child to Nyahururu District Hospital. The child was taken to that hospital by an ambulance in the company of another nurse. The nurse who took the child to hospital later informed her that the child died before reaching the hospital.

10. The nurse in her evidence stated:-

***“I was at first, when the accused came, I really believed he was a good Samaritan but as he tried to talk the child (deceased) I doubted. The way the accused carried the baby holding only the hand it was not normal. He carried the child like a handbag.”***

11. The post-mortem of the deceased was carried out by Dr. Miringu. He found that the deceased child had bruised frontal and parietal region, segmental skull fractures on frontal parietal and left skull. The deceased also suffered diffused intra-cranial haemorrhage. The cause of death was severe head injury leading to diffused intra-cranial haemorrhage.

12. The accused gave a sworn defence. He confirmed that he and Rose (PW 3) lived together for six to seven months. That the deceased child was born when they began to live together.

13. On 29<sup>th</sup> September 2016 at 5 p.m. the accused said he went to watch football. Later as he went to the washroom he saw **R W W** (PW 3) in a club in the next building. Accused said he stayed at the place watching football up to 11 p.m. when he left to go home. As he went home he found a child at the side of the road. This is what accused stated:-

***“I found the child at the side of the road. The child was alone. I heard the child cry. I took out my phone to get light. I noted it was a small child. I found the child had injury on the head and he was bleeding.”***

14. The accused said that because it was drizzling he went to report the matter at Ngarua Police Station. Accused said that as he took the child to that police station he did not recognise the child but when he reached the police station, because of electricity, he realised that it was James Kairu, deceased in this case.

15. Although accused in his defence said that he explained to the PW 1, the police officer at the report office, that at first he did not know the child but only realised it was deceased at the police station, PW 1 in his evidence which was not subjected to cross examination, was that accused said he did not know the child but that he was a good Samaritan.

16. Accused further said that he took the child to Ndindika Health Centre but because the child was severely injured he was transferred to Nyahururu hospital. Accused then went home and slept.

17. Accused denied that **R W W**'s neighbours had seen him at **R W W** house when the house was ransacked. Accused also denied he killed the deceased.

### **ANALYSIS AND FINDINGS**

18. The cause of death of deceased child was stated by the doctor who performed the post-mortem. The deceased died of severe head injury. That injury caused fracture of the skull which resulted of blood being within the brain of the deceased.

19. Did the accused through unlawful act cause the death of the deceased? As it is clear from the evidence adduced before court there was no eye witness of exactly who caused the injury of the deceased. The prosecution relied on circumstantial evidence. In the case **Republic v Michael Muiriuki Munyuri [2014] eKLR** the court considered when the courts should rely on circumstantial evidence to find an accused guilty and referred to the case **ABANGA alias ONYANGO V REPUBLIC CR. APPEAL NO. 32 OF 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:-

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilty is sought to be drawn, must cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) 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 none else.”***

20. The evidence presented in this case was that the accused on the subject night was expected to be at the house of **R W W** (PW 3). **R W W** when she found her house ransacked said:-

***“I knew Freddie was coming.”***

21. **R W W** further said:-

***“Freddie told me he was there.”***

22. That evidence by **R W W** was not challenged in cross examination. It places the accused at the scene the night that **R W W**'s house was ransacked.

23. There is also a lot of inconsistencies in the information the accused gave when he took the deceased to the police station and to the health centre.

24. At the reporting office of the police station accused said that he did not know the name of the child he had rescued. The evidence of PW 1 in that regard was not challenged in cross examination. PW 1 stated in evidence that the accused told him that he found the child in a dustbin. Later the accused told the nurse that he found the child in a trench.

25. The nurse observed the accused and did not believe him. Particularly because the accused described himself as a good Samaritan who rescued the child from a trench, yet he seemed to know the name of the child. If indeed the accused had informed the police officer, PW 1 that he knew the identity of the child, as the accused stated in his defence, that police officer would have put the name of the child in the chit written by him to be used by the accused to take the child to health centre. And if the name was in that chit the nurse in her hospital notes, of her treatment of the child would have indicated the name of the child. The hospital treatment notes prosecution exhibit No. 3 does not bear the name of the child.

26. As much as the nurse was of the view the accused was not truthful I too formed the same opinion when I received the defence of the accused. It became very clear to me that the accused was telling lies.

27. **R W W** in her evidence was very clear that she left the deceased child asleep and well. Later the accused is in possession of the child who had severe injuries to the head.

28. The circumstantial evidence adduced by the prosecution witnesses lead me to infer guilt of the accused. That evidence was consistent and cogent. That evidence also tends to unerringly point to the accused as guilty. **R W W**'s house had not been broken into by 11.30 p.m. when **R W W** left the house but after the accused is found to be with the severely injured child the house is found to be ransacked. The front door is broken from the outside and as stated by the investigating officer Corporal Joseph Mose, the child had been sleeping on the floor and may have been hit by the door as it was broken down.

29. The circumstantial evidence of the prosecution taken cumulatively forms in my view a chain that is so complete that the only conclusion is that the accused broke down the door which resulted in the injury of the child. Therefore the deceased met his death as a result of an unlawful act by the accused.

30. I am, however, unable to find that the accused committed the unlawful act with malice aforethought. Whatever was the disagreement between the accused and **R W W** it may have led to the unlawful act by the accused. He broke down **R W W**'s door and in doing so there is no evidence he intended to kill the deceased. There was no malice aforethought.

31. Following my findings above, and the circumstance under which the deceased child met his death I hereby substitute the charge of murder to a charge of manslaughter. I convict Fredrick Ngetich Some of manslaughter of J K W deceased.

**DATED AND DELIVERED AT NANYUKI THIS 2<sup>ND</sup> DAY OF NOVEMBER 2018.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Mariastella

Accused:.....

For Accused .....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**