REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO 108 OF 2014

REPUBLIC ……PROSECUTION

VERSUS

E W N.....ACCUSED

JUDGEMENT

1. The accused person faces one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code (cap 63 laws of Kenya).** The particulars are that:

> "**Between the months of September 2014 to 30th October 2014 at [particulars withheld]Estate in Kasarani within Nairobi County the accused murdered T W N."**

2. The prosecution called a total of seven (7) witnesses.

3. PW1 was the mother of the deceased. She stated that on 22nd September 2014, she moved to Sudan in search of employment and left her child the deceased herein under the care of her cousin E N, the accused herein. PW1 testified that on the 30th of October 2014, she called the accused who informed her that the deceased was having a cold but was doing well. PW1 stated that on the 1st day of November 2014, the accused called her asking her to come back to Kenya because her child (deceased) had been admitted at Neema Hospital suffering from diarrhoea and vomiting.

4. PW1 said that she travelled back home and arrived in Kenya on the 2nd day of November 2014. She was informed by the accused on phone that the deceased had been discharged. PW1 proceeded to the accused house and on enquiring from the accused where her child was, the accused indicated that the child was with a lady by the name Rosemary and that they were on their way home. PW1 testified that soon thereafter the accused returned home in the company of a lady by the name Mama Sue. It is Mama Sue who informed PW1 that the deceased had died on arrival at NEEMA Hospital.

5. PW1 said that on the 3rd of November, 2014, she proceeded to Kenyatta University Mortuary where the child's body was being preserved. She was shown the body and she noticed that the child had marks on the right side of the face, wounds on the elbows, knees, nose, and below the nose budge. PW1 also noticed a nail scratch on the nose, left ear and below the chin. The wounds on the elbows and knees were open fresh wounds while those on the back and left shoulder were healed wounds. On seeing all these wounds, PW1 became doubtful and requested for a post-mortem. She was advised by the doctor to first make a report at the police which she did at Kasarani Police Post.

6. PW2 was an aunt to the accused and PW1. She stated that on the 1st day of November, 2014 at around 6.00 pm her son J came and informed her that the deceased was sick. PW2 went out to check as accused house was 5 minutes away. PW2 said that on her way to the accused house, she met the accused and a neighbour carrying the child. On enquiring from the accused what had happened, the accused informed her that the child was sick. PW2 went back home to change then followed the accused to Kamwitha Medical Centre. She was in company of PW4 and Rosemary Njeri. However on reaching at Kamwitha she was informed that the child had been referred to Neema Hospital. PW2 left for Neema Hospital but before she reached the hospital the accused and her husband called her and informed her that the child had died. Together with PW4 and one Rosemary Njeri, PW2 proceeded to Neema hospital where she found the child's body covered. On uncovering the child, PW2 noticed open wounds on the knees and elbow on the left side.

7. PW3 accompanied PW1 to the mortuary where they attended the post mortem of the deceased on the 6th day of November 2014. PW3 was able to notice an open wound on left side between the eye and ear which appeared like a scratch. On both knees PW3 noticed open fresh wounds and likewise on the ankles and elbows.

8. PW5 was the investigating officer. He stated that on the 6th of November 2014, he was called by the C.I.P Dorothy Kamau and instructed to proceed for a post mortem of a child who had earlier died. PW5 completed a post mortem examination request form and proceeded to K.U mortuary. PW5 attended the post mortem. He said that he noticed that the deceased had scratches, teeth bites on the left hand and wounds on both knees. PW5 also noticed a scratch between the nose and mouth.

9. PW5 later realised that the findings of the doctor's examination contradicted the 1st report made by the accused on the 1st day of November, 2014. This was a report in O.B. NO. 91 of 1st November, 2014 which indicated that the deceased had died in hospital while suffering from Diarrhoea and vomiting. PW5 further stated that the accused had earlier indicated that the deceased had been ailing and that she found her dead and seated on her "potty". PW5 produced the Occurrence book as P. Exhibit 4, a copy of the O.B report as P. Exhibit 4a and a P3 form in respect of the accused as P. Exhibit 5.

10. PW6 conducted the post mortem examination on the body of the deceased child. Externally PW6 noticed multiple ***ontenious*** injuries at various stages of healing. There were fresh bruises, 2 bruising marks on right cheek measuring 5mm long by 2mm wide and two (2) bruises on the left cheek 4mm and 6mm each in length. There was an abrasion at the base of the nasal bridge approximately 7cm long. PW6 also noticed other injuries that were healing as they appeared lighter skinned. These scars were on the upper limbs on both sides and on the lateral aspect of the chest on both sides.

11. PW6 also noticed that multiple extensive deep contusions which could be seen on both upper limbs and similar deep injuries were visible on both lower limbs, both knees, both elbows, the scalp that is the skin covering the head; the gluteal region or buttocks; as well as the groin area or private part. PW6 described these injuries as being deep seated injuries that went beyond the skin.

12. Internally PW6 found bruising around the genital areas. There was bleeding that was extensive and involving the entire scalp, subdural haematomata. There was bleeding into the substance of the brain especially the frontal area, subdural haemorrhage on parietal region and multiple focal subarachnoid haematomata.

13. PW6 found bilateral lung consolidation meaning the lungs were heavier than normal which is a condition caused by bacterial infection that is pneumonia. PW6 formed the opinion that the cause of death was multiple injuries due to blunt force trauma. PW6 stated that the injuries she noticed were suggestive of child battering. PW6 produced her report as P. Exhibit 1.

14. PW6 further explained that the injuries she noted were at various stages of healing, an indication they had been caused at different times. PW6 stated that though pneumonia could cause death, the pneumonia the deceased was suffering from was mild and could not have caused death. PW6 set out the features she

found which were suggestive of child battering as injuries caused to a child; injuries caused at more than one occasion and extensive all over the bodies; and injuries not in conformity to play at the stage of the age of the child.

15. On cross examination PW6 stated that apart from the injuries on the head, the rest of the injuries on the body could potentially have killed the child. PW6 also stated that the injury on the brain was a very recent injury that could be zero to 1 week old. PW6 also stated that the contusions she saw went deeper beyond the skin level and had been caused by a blunt object and were spread on hands, legs, head, buttocks and genital area.

16. PW7 was the scenes of crime officer. He stated that on 6th November, 2014 he went to K.U Mortuary on being requested by PW5. He took 6 photos of the deceased at the mortuary. In cross examination as to why he described the wounds as injuries, PW7 stated that it was because they appeared like scratches to him. PW7 produced the Photo booklet as P. Exhibit 2 and his report as P. Exhibit 3.

17. The accused was placed on her defence. She opted to give a sworn defence and called two witnesses. The accused stated that the deceased used to get pimples on the neck and the nose which would develop into blisters and thereafter wounds. She stated that they were applying a cream called Beclomin cream 15gm which she produced as D. Exhibit 1. She also produced two other medicines, cypon syrup as D. Exhibit 2 and Dyrade as D. Exhibit 3. The accused stated that around the month of September, PW1 informed her that she was to leave the deceased with her as she had gotten a job in Sudan.

18. The accused stated that on the Wednesday before the Saturday the deceased died, she called PW1 and informed her that the deceased health was not improving. The accused stated that PW1 instructed her to go for medicine in the usual place they used to go to collect medicine whenever the deceased fell sick. The accused said that she went there and was given Dawarit, Pamol, Sabulin and promethazine Elixir which she produced as D. Exhibit 4, 5, 6 and 7 respectively. The accused stated that she noticed that the deceased vomited all that she ate and was not in the moods to play which was unusual as she was a playful girl. The accused said that on Thursday night she called PW1 and informed her that the child had not improved and that she wanted to take her to Kahawa West Hospital. She said that PW1 asked her not to change the hospitals as her doctor understood the deceased's condition better.

19. The accused stated that on Saturday morning she went to check on the children in their bedroom and found the deceased lying down on the floor near the bed. On waking her up, the deceased started crying and declined to take porridge. The accused woke up her husband DW2 and together they went to see the doctor who usually treated the deceased but found his Chemist closed. The accused stated that later in the day as they were in the house, the deceased collapsed. The accused proceeded to call one Mama Steve who came and carried the child and together they headed to Kamwitha hospital where they were referred to Neema Hospital. On arrival at Neema hospital the child was received by the doctors but after 20 minutes they were informed that the deceased had died.

20. The accused stated that they were given a letter at Neema Hospital which they were advised to take to Kasarani Police Station. At the Police Station the accused stated that they were given a letter authorising them to take the body to the mortuary.

21. The accused said that she was later arrested on the day the deceased was meant to be buried on accusation that she had caused the death of the deceased. The accused attributed the injuries on the deceased nose and chin as marks caused by the medicine D. Exhibit 1. She attributed the injuries on the face to a scratch caused by a wire while deceased was playing in the chicken's pen. On the injury on the knees, the accused stated they were scratches that the deceased had suffered while playing. Finally on the trauma injury on the deceased head, the accused stated that it might have been caused by a fall while the child was playing outside without her knowledge.

22. In cross examination the accused denied having reported to the police that the deceased had died while seated on a *portie*. The accused further stated that she could not explain the injuries PW6 had described in P. Exhibit 1 as she was not with the child all the times. The accused stated that she was not

aware of the injuries on the groin areas of the deceased and stated she did not see who caused the injuries on the deceased.

23. DW2 was the husband of the accused. He stated that on 30th October 2014 upon arriving home from Machakos where he worked, the accused informed him that the deceased had a cold and it was not clearing. DW2 noticed that the deceased had a fever and he gave her paracetamol and put her to bed. DW2 said that on 1st November 2014 he woke up and prepared porridge for the children. He said that he noticed that the deceased did not finish up her porridge as she had lost her appetite. DW2 said that he then prepared tea and bread for the children and he left them playing as he washed their clothes. DW2 stated that as he left for Machakos, he instructed the accused to request one Mary their neighbour, to help carry the deceased to hospital for her to be seen by a doctor.

24. DW2 left to a nearby gym and while there, the accused called him while crying. The accused asked him to head quickly to Kamwitha which was a clinic in Zimmerman.

25. DW2 said that he met the accused at Kamwitha Clinic and upon asking the nurse what the matter was, the nurse informed him that the child had convulsed and they were being referred to Neema Hospital. DW2 said that on arrival at the Neema Hospital, he was informed by the doctor that the child was dead. DW2 attributed the injuries described in P. Exhibit 2 and P. Exhibit 1 to falls suffered by the deceased as the deceased was very playful. On the other marks on the body of deceased, DW2 stated that the deceased had a skin disease and upon applying the medication that PW1 had left them with, the deceased would develop blisters that were itchy.

26. On being cross examined, DW2 denied that they were chased away at Kamwitha Medical Clinic. DW2 acknowledged that he did not know what had caused the death of the deceased. DW2 also acknowledged that he was not aware of the multiple extensive deep wounds on thighs, knees and scalp of the deceased. DW2 maintained that the child was prone to falling and denied being aware of the deceased being battered by anyone.

27. DW3 was the accused neighbour. She operated a market stall near the accused house. DW3 said that on 1st November, 2014 at around 5.00pm she heard some commotion of someone calling from the accused house. She recognised the voice as belonging to one Mama Mary who was saying “come and help”. DW3 said that she went to the accused house and found Mama Mary carrying the child saying that her condition had deteriorated. DW3 said that she and the accused took the child to Kamwitha Hospital where they were referred to Neema Hospital. She said that they took the child to Neema Hospital and where they were informed that the child had died. On cross examination DW3 stated that though a neighbour to the accused, she could not tell what was happening inside the accused house. She acknowledged that she did not know what had caused the death of the deceased.

28. Learned counsel for the Prosecution Ms. Onunga in her submissions urged that the deceased child was left under the care of the accused and therefore the accused assumed the role of a guardian. Counsel urged that the accused had a duty and responsibility to protect the deceased from both internal and external harm and also to protect the deceased from inflicting injury on herself. Counsel urged that PW6 testimony was that the deceased had suffered massive injuries whose features were suggestive of battery. Counsel finally urged that the accused first report to the police was that the deceased was suffering from diarrhoea. However the post mortem established that the cause of death was due to blunt force trauma. Counsel urged that it was accused who inflicted the injuries and should be found guilty of the murder as charged.

29. The defence counsel Ms. Ocholla in her submissions urged that the post mortem report was of great important to this case as it was the sole basis on which the police charged the accused with murder. Counsel urged that the question that ought to be answered is whether the alleged injuries were non-accidental to suggest child battery or they were accidental. Counsel urged that there was no direct evidence pointing to the accused as the person who murdered the deceased and that mere suspicion could not be a basis for conviction. Counsel urged that the prosecution had failed to prove that the alleged injuries could have been caused in the manner alleged by PW6 which was child battery and nothing more.

Counsel urged that no weapon was recovered or identified in the accused house. Counsel further urged that no ill intentions were established between the accused and the deceased and as such no evidence was adduced to prove that the accused had malice aforethought.

30. Ms. Ocholla urged that P. Exhibit 1 documentation on the external appearance of the deceased was not detailed as requisite in terms of the site, shape, situation, pattern and age of the injuries alleged. Counsel finally urged that there were inconsistencies in the prosecution witnesses' description of the injuries they all observed and the medical report adduced in court. This inconsistences, counsel urged were material and substantial hence fatal and raised doubts as to whether the findings of the doctor were on the right body that is that of the deceased herein.

31. The accused person faces a charge of murder contrary to **Section 203** of the **Penal Code**. This section creates the offence of murder and provides as follows:

> **"Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder"**

32. Malice aforethought is an essential ingredient in the offence of murder. The circumstances that constitute malice aforethought are set out under **section 206** of the **Penal Code** as follows:

> **"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**
>
> > **1. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not,**
> >
> > **2. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
> >
> > **3. An intent to commit a felony;**
> >
> > **4. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."**

33. Having considered the evidence adduced by the parties herein I find these issues not in dispute. It is not in dispute that the accused and PW1 were cousins. It is not in dispute that PW1 was the mother of the deceased. It is not in dispute that PW1 left deceased subject with the accused after PW1 left to work in Southern Sudan. It is not in dispute that the deceased had injuries on the body.

34. The real issues in dispute is whether the prosecution has established the real cause of death of the deceased; whether accidental death due to falls during play can be ruled out and whether natural causes could be ruled out. The other issue is whether the accused defence is plausible and reasonable in all the circumstances of the case.

35. There was no eye witness in this case, and therefore the prosecution case that the deceased was battered did not receive any direct evidence from any of the prosecution witnesses. The prosecution relies on the post mortem findings by the Pathologist, Dr. Njeru who was PW6 and other evidence by the investigating officer PW5 and the mother of the deceased PW1. The evidence of PW2 and 3 also render credence to the prosecution case. I have set out in full detail the injuries found at post mortem on the deceased body. However to bring it home I will discuss the injuries in reference to the pathologists findings and the issue at hand.

36. From the evidence of the pathologist PW6, three classes of injuries were noted on the external examination of the body of the deceased. These were multiple centaneous injuries at various stages of

healing; healed scars and thirdly multiple extensive deep contusions.

37. The multiple centaneous injuries were classified into two. The first were the fresh injuries which the pathologist found were 2 abrasion marks on the right chin each 5 mm long and 2 mm apart. The second were one abrasion on the base of the nasal bridge 7 mm long; and two abrasions on left zygomatic region (left neck) approx. 4mm and 6 mm long.

38. Regarding these injuries the pathologist testified that they had been caused at different times; and that some were fresh while others were at different stages of healing. PW6 testified that they were caused by a blunt object. PW6 testified that this meant that the injuries had not been caused as a one off but at different occasions. She gave the age of the injuries as between zero to one week.

39. The second class of injuries the pathologist found were healed scars at the back of the hands on both sides and on both sides of the chest on the lateral or sides. PW6 testified that these healed scars or injuries were one week to one month old.

40. The third class of injuries PW6 found on the deceased were multiple extensive deep contusions. PW6 testified that they were deep seated injuries which went deep into the skin and beyond. She testified that these injuries were found on the sides of both hands; on the front and sides of both legs; both knees; both elbows; the scalp meaning the skin covering the head; the gluteal region or buttocks and the groin or genital area. These she said were caused by a blunt object.

41. On the internal examination PW6 found extensive bleeding over the entire scalp. PW6 explained that the scalp region is the skin covering the head. She said that the bleeding extended to the subdural region; the parietal region and the multiple focal subarachnoid haematomata.

42. PW6 concluded that on internal examination of the head there was bleeding over the brain. PW6 explained that the bleeding into the brain was a recent injury and estimated its age as between zero to one week.

43. The defence paused specific questions to PW6. First one sought to find out whether the injuries found could have been associated with a fall or falls, given the age of the deceased was one year and 10 months. PW6 answered that the features of the injuries she saw were not caused by a fall but by child battering which were inflicted at different occasions.

44. The defence asked whether any of the injuries PW6 found on the deceased were infected to which she said they were not.

45. The defence sought to know whether pneumonia found in the lungs could have caused death. PW6 testified that the pneumonia was mild and that at the stage she found it, it could not have caused the deceased death.

46. PW6 stated that on her opinion as a pathologist, having examined the body of the deceased post-mortem, and having noted the injuries she had, the cause of death was multiple injuries due to blunt force trauma with features of child battering.

47. PW6 set out the features of child battering as the fact they were caused to a child at more than one occasion and were extensive injuries covering all over the body and fact they were not in conformity to play at the stage of the age of the child.

48. Ms Ocholla for the defence urged that the mere fact a child has injuries does not mean that it is being abused. In support of that proposition counsel cited a book titled **"Family Violence, Legal Medical and Social Perspective"** Third Edition by Harvey Wallace, at page 42 to 45 as follows:

> **"a normal, healthy, well cared children will injure themselves. Injuries on the front position of the arm, legs and face may be consistent with normal childhood activities, normal bruises occur**

over bony prominence such as the knees, anterior tibia (that portion of the bone that extends from the knee to the ankle on the front of the leg) and forehead."

49. To buttress her argument further counsel cited another writer Cyril John Polson in **"The Essential of Forensic Medicine, Third Edition** at page 550 – 552" thus:

> **"he noted that the pathologist report should include detailed account of all bruises present, with special reference to size, position and probable age. Bruises of the forehead can occur because the child was often bumping his head, bruising of the arm can result from grip applied in the course of legitimate restraint or attempt to prevent a fall. Bruising in the ankle may be due to gripping. It is also important to remember that children bruise more readily than adults"**
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> **"Sub-Dural haemorrhage are either acute or chronic. As said in Polson and Gee, The Essential Forensic Medicine, 3rd edition page 176-178. They said the majority acute haemorrhage are as a result of head injury and are traumatic. Chronic haemorrhage are sometimes found but chance at the post – mortem examination of alcoholic subjects and mental patients and in circumstances where there is no record of any head injury. It leave the probability of trauma open as the causes of haemorrhages. Trauma can be by fall, hit or several blunt force"**

50. Ms Onunga in her submissions regarding the doctor's testimony on the injuries found on the deceased urged that the evidence of PW6 was clear. Learned Prosecution Counsel urged that the doctor's evidence was that the deceased suffered massive injuries whose features were suggestive of battering. That the doctor had stated that some of the injuries were fresh and open while others were old and healing and were spread all over the body indicative of having been caused at different occasions.

51. The two texts cited by Ms. Ocholla Learned Defence Counsel are persuasive to this court. The citation from Harvey Wallace suggests that injuries as a clued may be self-inflicted consistent with normal childhood activities and he gives examples of such injuries as injuries on the front position of the arm, legs and face and bruises over bony prominence such as the knees, anterior tibia and forehead.

52. I have no issue with the writer's suggestions. It is however very clear that the injuries that were found on the deceased included injuries to the sides of the hands, chest and legs and over the entire scalp, and such hidden areas as the genitalia. There was also injury to the entire scalp, covering of the head with extensive bleeding all over the scalp and over the brain.

53. The writer's argument therefore does not compare with injuries found on the deceased in this case. The argument is thus inapplicable to this case.

54. The text by Polson suggests that a pathologists report should include detailed account of all bruises present with special reference to size, position and probable age. PW6 report was very detailed in my view to a fault she set out all the injuries with their sizes, locations and also in evidence gave the probable age.

55. Polson suggests further that subdural haemorrhage could either be acute or chronic and goes further to suggest such injuries if found on alcoholic subjects and mental patients with no record of any head injury leaves the possibility of trauma open. That suggestion is immaterial in this case as the case before the court touches on a child of one year and 10 months and not an alcoholic or mental patient.

56. Ms. Ocholla challenged the post mortem report highlighting certain sections and showing their shortcoming. On the second page of the Report counsel urged that the actual time of post mortem was 'suspiciously' missing and only the date was indicated. On the general observation of the learned counsel lamented that her height was not indicated and further that time of death was not indicated.

57. I have considered these issues and find them very minor and of no consequence. There is no issue as

to the date and time of death as the accused admits in her evidence that the deceased died soon after taking her to Neema Hospital. As to time of post mortem, the accused acknowledges she was aware of it and raised no issue with it.

58. There was further challenges on the evidence of the prosecution witnesses *vis a vis* the findings of the pathologist PW6. Ms. Ocholla raises issue with the fact that some of the injuries pointed out as those on the left zygomatic region were not seen by any other prosecution witness.

59. Further issues were raised on presence of injuries PW6 stated she noted. Counsel urged that injuries described as multiple extensive deep contusions were not positively identified by PW7 in the photos in P.Exh.2 neither were the sizes, shapes, colours indicated. On the internal organs counsel suggested CT scan should have been produced to prove presence of the injuries. On hemorrhage found, Ms. Ocholla urged that PW6 did not say whether it was acute or chronic.

60. I dealt with the issue of doctors' opinion and the value of same to the court, in **REPUBLIC Vs. KAMLESH MANSUKLAL DAMJI PATTNI alias PAUL PATTNI [2005] eKLR. In the cited case, I quoted from a text, Sarkar's Law on Evidence 15th Edition Vol. 1,** the opening remarks under the title ***Medical opinion and its*** **value thus:**

> **"The opinion of physicians and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent the effect of the disease or of physical injuries upon the mind or body as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death.'**

61. In same text, **Sarkar on Law of Evidence** (Supra) I relied on a case quoted from **TANVIBEN PAKAJIKUMAR DIVETIA Vs. STATE OF GUJARATA 1995 SC 2196; 1997 Criminal Law Journal 2535, 2551** where it was suggested:

> **"The doctor who had held the postmortem examination had occasion to see the injuries of the deceased quite closely and in absence of any convincing evidence that he had deliberately given a wrong report his evidence is not liable to be discarded.'**

62. In same case**, REPUBLIC VS PATTNI, (supra), I quoted REPUBLIC Vs. LANFEAR 1968 1 ALL ER 683 where DIPLOCK, L. J.** gave the correct English position in regard to doctors evidence thus:

> **'… Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the court…**
>
> **The above case did not elaborate on the statement to show when a doctor's evidence can cease to be treated as that of a professional man giving independent expert evidence. I did come across a more recent British authority which seems to lay down principles to be applied by the court to determine the value to be placed on such evidence. TURNER {1975} QB 834 at page 840;**
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> 'Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or had omitted to consider relevant facts, the opinion is likely to be valueless.'
>
> **It would seem then that the position in England seems to be that the facts upon which doctor's opinion is based must be disclosed and proved in evidence. Failure to prove them in evidence would render such an opinion of minimal or no value. In Kenya the position is quite clear and established, in DHALAY vs. REPUBLIC {1997} KLR 514 the Court of Appeal**

held:

'It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.'

The acid test set out in this case is that an expert's opinion can only be rejected if there is proper and cogent basis for rejecting it. The principle was fortified in an earlier case NDOLO vs. NDOLO {1995} KLR 390. The Court of Appeal held;

'The evidence of PW1 and the report of MUNGA were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held, the evidence of experts must be considered along with all other available evidence and it is the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision… of course where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected**.'"**

63. I need not say much as the cited authorities speak volumes. A court has a duty to consider the evidence of experts, including medical experts, alongside other available evidence. A court also has a right to decide to believe or disbelieve the evidence of an expert. However where such evidence is not believed the court must give reasons for so doing. Any challenge to medical opinion should be based on cogent proof. It is of course reasonable to say that in the case where medical opinion is sought by a party to be challenged, that should be done by an equally qualified medical personnel in the field in issue. The court would then have to determine which opinion to believe, weighing the opinions against the rest of the evidence adduced.

64. In this case no other medical expert was called to testify. Secondly, PW6, Dr. Njeru was not only properly qualified in the field of pathology, but also had extensive experience in it. Thirdly, PW6 gave an opinion, and buttressed her opinion with reasons upon which her opinion was based.

65. I considered the entire evidence adduced in this case and find that there was no other evidence in conflict with the opinion of PW6. What Ms Ocholla highlighted in the evidence of the pathologist Vis a Vis that of other witnesses cannot do, as these other witnesses were not experts. What they saw was based on sense knowledge and their evidence cannot be used to contradict that of PW6. In light of these facts I cannot see any basis upon which PW6's opinion could ever be rejected.

66. The accused case was that the deceased had a skin problem, for which she was under treatment, that the medication was causing itchiness, blisters and eventually wounds. She even produced in court the various medications she administered to the deceased. These medications were however not shown to the pathologist for her comment. Neither was it suggested to her that the deceased had a skin disease. PW6 was however clear that the deceased did not have any skin condition or any infected wounds anywhere on her body.

67. The injuries described by the pathologist and other witnesses including PW1, 2 and 3 were extensive. The doctor's description which is unchallenged shows that some of the injuries, especially described as contusions were very deep. The injuries to the head were deep, extensive, covering the entire skin of the head, and were also bleeding both below the scalp and in the brain. The doctor said they were between zero days to one week old. And the shocking abrasions on the buttocks and the genitalia of the deceased could not have been explained as illness or caused by a fall. And many other findings as herein above discussed were all not consistent with falls, a child playing or medical condition or illness.

68. DW2, the husband to the accused in his evidence was clear that he worked in Machakos and only went to his family for two days on Friday's. That means for the bulk of the time he would not be home. He could not therefore vouch for the accused or what happened at home in his absence.

69. DW3's only role was to help the accused carry the deceased to hospital, as the accused was expecting at the time and could not manage. Her evidence was not helpful as she sold a kiosk across the road from the accused, she could not hear much, and only saw anything when the child or accused went out of their house. Her evidence was not helpful.

70. The accused defence was she was caring and nurturing to the deceased. Under **sections 111(1)** and **119** of the **Evidence Act**, the accused has a statutory burden to explain how the injuries found on the deceased were inflicted and who inflicted them. It has been ruled out beyond any reasonable doubt that the injuries were not accidental or caused by illness. The injuries have been proved beyond any reasonable doubt to have been caused by child battering. The accused should explain who battered the deceased.

71. The accused has denied that the deceased was battered. She has stated that indeed the deceased was under her care for the month and a half or so which is the period between 22nd September to 1st November when she died.

72. The injuries were severe. There is no way that the accused could have failed to see them. They were bad enough to need medical intervention. They were many old ones, about a month old according to the doctor, and many much fresher. The only inference that the court can make is that it is the accused, who had sole custody of the deceased at the time the injuries were inflicted and who inflicted the said injuries. With due respect, the accused denial that the deceased was never battered cannot be true, reasonable or believable.

73. I find that the accused defence was an afterthought and a bare denial. I find that the accused was making up a case by portraying PW1 as a difficult person to live with and who was rejected by her maternal aunties. The accused portrayed PW1 as desperate as she was orphaned and that was the reason DW2 and the accused accepted them in their house. I commend the accused and DW2 for taking PW1 in, however the accused did not treat the deceased well. There was no justification for the attacks on the deceased. It cannot pass as discipline. The pathologist found multiple extensive ad deep injuries which ruled out discipline of the child. I find that the accused battered the deceased, causing her severe injuries from which she suffered before she succumbed and died.

74. Having come to the conclusion I have of the case, I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I find accused defence neither plausible nor reasonable. I reject it in total.

75. I find that the prosecution has established the charge of murder contrary to **section 203** of the **Penal Code** against the accused person beyond any reasonable doubt. I find the accused guilty of murder as charged and convict her accordingly under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 8TH DAY OF MAY, 2017.

LESIIT, J

JUDGE