REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 48 OF 2012

REPUBLIC……PROSECUTOR

VERSUS

JAMES ENUKAN ANGEME ……...ACCUSED

RULING

The accused **JAMES ENUKAN ANGEME** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

> ***"On the 21st day of June, 2012 at Rongai District within Nakuru County murdered V C K".***

The accused pleaded **'Not Guilty'** to the charge and his trial commenced before Hon. Lady Justice Roseline Wendoh on 11/6/2014. The Honourable Judge recorded the evidence of three (3) witnesses before she was transferred to the Meru High Court. I then took over the matter and heard the remaining seven (7) witnesses. The prosecution called a total of eleven (11) in support of their case.

PW1 E K was the mother of the deceased who was a girl-child aged 7-8 years old. **PW1** told the court that on 21/6/2012 at 7.00am she left her home and went to the neighbouring farm which belonged to one **'C K' PW6** to work as a casual labourer. Her daughter **'V C'** (deceased) had gone to school as usual. However the child was sent back home from school to collect a pencil.

From that time the child went missing. She did not return home from school. Neighbours mobilized and launched a search for the missing child. On 23/6/2012 the body of the child was found stuffed into a well in the farm of **'C K'**. The child's hands and legs had been tied together and some of her clothes were missing. The missing clothes which included the following

- Red child's panty
- Black checked skirt

were found thrown into a nearby pit latrine together with a red shirt said to belong to the accused. The accused who was a herder employed by the said **'C K'** was suspected to have raped and murdered the child. He was arrested and charged with this offence.

The prosecution having closed its case this court must analyze the evidence on record and determine whether a prima facie case has been established to warrant placing the accused onto his defence.

The definition of what constitutes a **'prima facie'** case was given in the case of **RAMANLAL T. BHATT Vs REPUBLIC [2957] E. A 332** where the court held that

> ***"A mere scintilla of evidence can never be enough …… It may not be easy to define what is meant by a 'prima facie case' but at least it must mean one of which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence".***

In this case the fact of death of the child is not in any doubt. Several prosecution witnesses testified that they were present when the body of the child was pulled out of a well.

Evidence regarding the cause of death was tendered by **PW10 DR. TITUS NGULUNGU**, the pathologist who produced the post-mortem report **P.exb 1**. **PW10** told the court that his colleague **DR. NONDI** conducted an autopsy on the body of the deceased on 26/6/2012. The doctor noted extensive bruising and swelling around the neck and sisal strings were tied round the neck. The cause of death was opined to be

'respiratory arrest secondary to strangulation as a result of massive pressure to the neck'. This was expert medical opinion evidence which was neither challenged nor controverted by the defence.

There is no direct evidence regarding how the child met her death. Nobody saw who strangled and killed the child. The prosecution therefore is seeking to rely on **'circumstantial evidence'** to prove their case. Circumstantial evidence is that evidence which though not direct sufficiently implicates an accused person as the perpetrator of the offence in question.

In **REPUBLIC Vs TAYLOR WEAVER & DONOVAN 1928 21 Cr. App 20** the court held that

> ***'Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it circumstantial'***

Likewise in **TEPER Vs REPUBLIC [1952] A. C 489** it was held that

> ***'Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another …… It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference'***.

Finally on this point in the case of **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009]e KLR** the Court of Appeal sitting in Kisumu held as follows:-

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests***
>
> ***i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.***
>
> ***ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused***
>
> ***iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and none else"***

Out of the eleven (11) prosecution witnesses none of them saw how the deceased meet her unfortunate end. There was no witness who saw the child in the company of the accused on the material day. Certainly none of the prosecution witnesses saw the accused defile or strangle the child.

It seems that after the child was sent back home from school to collect a pencil nobody saw her at all. It has been said the child went to the farm of **PW6** in search of her mother. However there is no witness who saw her in that farm and **PW1** the child's mother told the court that she did not see the child at the place where she was doing casual work.

Suspicion fell on the accused because he was said to have been a farm – hand employed by **PW6** who worked and lived on that farm. **PW6** confirms that the accused was his employee who had worked for him for a period of only two (2) months.

Under cross examination **PW6** told the court that it was the accused who phoned him and informed him that the child had gotten lost in his farm. Further there is evidence from the witnesses that the accused was amongst those who were searching for the child. The accused did not absond or run away. These are not the actions of one who had a guilty mind. If indeed the accused had committed such a heinous crime, it is unlikely that he would have remained at the scene and it is unlikely that he would have participated in the search for the missing child.

From the evidence it is clear that the accused was not the only worker in the farm of **PW6** on that particular date. **PW6** told the court that he had hired casual workers who were also working on his farm on the material day. **PW6** also told the court that he had employed several herds boys not only the accused. The police have not explained what investigations were done to exclude all these other workers as suspects. Given that there were several other people working in the farm, the possibility that it was a person other than the accused who came across the deceased as she searched for her mother in that farm cannot be ruled out.

PW3 B K was the father of the deceased child. He admitted to the court that

> ***"I do not know who murdered the child".***

Under cross-examination **PW3** admitted that after the child was found dead the villagers began to interrogate all **'foreigners'. PW3** stated at page 16 line 10.

> ***"I recorded that all villagers started interrogating foreigners. There are all tribes in the village. My family are Kalenjins. All tribes are there – Kikuyu and even luyias ……"***

It is clear that as far as the residents of the village were concerned the crime was committed by a foreigner *ie* a non-kalenjin. The accused was a Turkana. The very real possibility that suspicion fell on the accused only due to the fact that he was a non-kalenjin cannot be ruled out.

There was evidence from some of the prosecution witnesses that the accused admitted to having defiled and killed the child. **PW4 V K** a neighbour stated that

> ***"We questioned the accused. He said that he raped the child and then said he had done something bad so he killed her".***

This admission amounts to a confession on the part of the accused. The law regarding the admissibility of confessions is clearly set out in Section 25A of **The Evidence Act**. Section 25A(1) provides that

> ***"25A(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a Judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector of Police and a third party of the person's choice".***

There is no evidence that the accused was properly cautioned before he made any such confession to either a Judge, a Magistrate or a police officer holding a rank of Inspector and above. No police officer recorded any statement [confession] from the accused. Indeed **PW9 W K L** also a neighbour stated that

> ***"We arrested the accused and questioned him. He admitted that he did the deed. He said this before police came"*** (own emphasis)

If the accused had truly made such an admission I have no doubt this fact would have been conveyed to the police. The police then would have taken steps to ensure that this confession was procedurally recorded. This was not done.

The record indicates that at the time of this incident the accused was also a minor. This court cannot discard the possibility that any such admission was made due to fear upon being questioned by angry villagers who seemed to have already decided that he was the culprit.

Therefore whatever statements the accused may have made to fellow villagers does **not** amount to a confession and is **not** admissible against him in a court of law.

The final piece of evidence relied upon to implicate the accused was the recovery of items of clothing belonging to the deceased child in a pit latrine within the same farm. The witnesses have testified that it was the accused who showed them where these items clothing were. The same were recovered and were produced as exhibits.

Amongst the recovered clothes was a red shirt, **P. exb 3** said to belong to the accused. There was no proof that said shirt actually belonged to the accused. No witness testified that they had regularly seen accused wearing that shirt. There was not peculiar mark on the shirt which identified it belonging to the accused and nobody else.

The other clothes a red panty and a flowered skirt were identified by **PW1** the deceased's mother as belonging to her child. There is no evidence on how those clothes got into the pit latrine. No witness saw accused place them there. The allegation that the accused led the villagers to the recovery of the clothes certainly raises a **'suspicion'** that the accused may have been involved in the murder of the child. However suspicion does not amount to proof of guilt. In **SAWE Vs REPUB LIC [2003] KLR 364**, the Court of Appeal as follows

> ***"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of MARY WANJIKU GICHIRA Vs REPUBLIC (Criminal Appeal No. 17 of 1998 (unreported) suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence…."***

In this case the recovery of the dead child's clothes and the claim that it was accused who pointed out where those clothes were is certainly grounds for suspicion that he had a hand in the murder, but it is not enough.

The death of this child was an unfortunate incident and undoubtedly very painful to the parents. The evidence certainly leads to a suspicion that the accused was involved. But the police failed to mount a case that stood the test of law. The case lacks cogency. It is trite law that the onus lies at all times on the prosecution to prove its case. At no time does this onus ever shift to require an accused to explain anything. If the accused exercised his legal option to remain silent in his defence the evidence on record would not be sufficient to sustain a conviction.

For the above reasons I find that the prosecution have failed to prove a *prima facie* case. I enter a verdict of **'Not Guilty'** and I acquit the accused of this charge of murder. The accused to be set at liberty unless he is otherwise lawfully held.

Dated in Nakuru this 17th day of July, 2017.

Mr Bosire holding brief for Mr. Wambeyi

Ms Nyakira for DPP

Maureen A. Odero

Judge