



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO.62 OF 2013

BETWEEN

REPUBLIC..... PROSECUTOR

AND

E O O 1ST ACCUSED

Z A O..... 2ND ACCUSED

JUDGMENT

1. The accused, **E O O** (“E”) and **Z A O** (“Z”) are husband and wife. The prosecution case against them is that in July 2013, Z gave birth to their third child whom they named **S A** and that between 20th August 2013 and 27th August 2013, their infant baby boy disappeared. It was alleged that the accused took the infant to Ochimbo Hills and he was not brought back. E's father reported the child's disappearance to the police who visited the scene with the accused and only recovered a baby's clothes. The body has never been recovered. Thereafter this court was informed that on 11th September 2013 that they had jointly murdered **S A** during the period between 20th August 2013 and 27th August 2013 at Kagan Village, Ochimbo Hills, Homa Bay District within Homa Bay County. The prosecution called seven witnesses while both accused testified and called one witness.
2. The evidence presented by the prosecution was as follows. On the morning of 2nd September 2013, APC Corporal William Ruto (PW 2), who was in charge of Ndiru AP Camp, recalled that Samuel Luong'o Ongaro (“Mzee Ongaro) came to the AP Camp with Z. He knew Mzee Ongaro as a teacher in the locality. Mzee Ongaro introduced Z as the wife of his son E. Mzee Ongaro reported that his infant grandchild had disappeared. He asked Z where the child was and she responded that she and her husband had taken the child somewhere. PW 2 called Ngegu Police Post and gave the information to the in-charge, Sergeant Korir. They agreed to meet at Nyangweso with other officers who were on patrol in the area. He then left the AP Camp with Mzee Ongaro, Z and the Assistant Chief and proceeded to Mzee Odongo's homestead where they picked E on the way to Nyangweso.
3. On the same day two officers from Ngegu Police Post, PC Peter Waithaka (PW 1) and PC Nelson Bett (PW 3), were on patrol near Olare area. At around 9.00am, they received a call from their officer in charge, Sergeant Korir, to proceed to Nyangweso to meet AP Corporal William Ruto (PW 2). At Nyangweso they met PW 2, the area Chief, Mzee Ongaro and both accused. They were informed that the two were suspected to have murdered their infant child at Ochimbo Hills.

4. From Nyangweso, the group proceeded to Ochimbo Hills. The base of the hill was swampy and the area was forested with bushy thickets. The area, which was about 4 km from Mzee Ongaro's home, was sparsely populated. When they arrived there Z directed them to the place where she said they had left the child. E then followed them. They did not find any baby but instead found a pink baby trouser (Exhibit 1) and a pink baby shawl (Exhibit 2). Both items had soil markings. Nothing else was found at the scene. PW 3 took possession of items and handed them over to the investigating officer, Inspector Odenyo (PW 7) who, after collating all the evidence, caused the accused to be charged with murder. As Mzee Ongaro had died during the proceedings, PC Ben Kiplagat (PW 5), who recorded the statement of Samuel Luong'o Ongaro, produced it in evidence (Exhibit No. 5). I shall advert to this statement later in the judgment.
5. After their arrest, the accused were examined by Dr Ayoma Ojwang' on 16th September 2013 to confirm whether they were mentally fit to stand trial. He certified that they were fit to stand trial. Michael Ocholla (PW 4), a clinical officer, produced their respective medical reports as Dr Ojwang had passed away before the trial.
6. Nancy Kulei (PW 6), the officer in charge of Ndiru Health Centre and custodian of the records at the facility, testified that on 16th September 2013, an officer from Homa Bay Police Station came to inquire whether Z A had given birth at the facility. She went through all the records and confirmed that Z was admitted on 16th July 2013 and had attended the ante natal clinic four times. Her name was recorded as C A from Kanyiriema village/sub-location, aged 25 years and married. According to the record this was her 3rd pregnancy. She had labour pains before admission and delivered a live baby on 16th July 2013 at 1.45am after 9 months without any complications. No birth notification number was given for the child. She produced an extract of the Maternity Register for July 2013 (Exhibit 6) and the Immunization Register (Exhibit 7) which confirmed that the child had been immunized at birth but the mother did not follow up on all the other immunizations.
7. After the prosecution case, the accused were put on their defence and elected to give sworn testimony. E O (DW 1) testified that Z A O (DW 2) was his wife and that they had two children; BOO and WAO. He denied that they ever had any other children or a child by the name S A. He stated that between 20th and 27th August 2013, he was doing his normal work as a boda boda rider and that he was surprised to be arrested on 27th August 2013 by police officers.
8. On her part, DW 2, denied that she had delivered a child known as S A and that she only had two children with DW 1. She recalled that on 2nd September 2013, she was just at home when her father in law, Mzee Ongaro, came with police officers to come and arrest them. She stated that it is Mzee Ongaro who took them to Ochimbo Hills. She denied knowledge of the children's clothes recovered at the scene.
9. Silpah Adhiambo Ongaro (DW 3), the wife to Mzee Ongaro and E's mother, testified that the accused were married and that they lived in the same homestead. She further testified that she gave birth to E before she married Mzee Ongaro and that the relationship between E and her late husband was acrimonious. She stated that when Mzee Ongaro reported the matter to the police, he did not inform her as she was away taking care of her sick mother. She denied that Z had any other baby apart from the two children.
10. After the close of the defence case, counsel for the accused submitted that prosecution failed to prove its case beyond reasonable doubt as it failed to prove that the accused had a child by the name S A, that there was no proof that the said child had been killed or was dead and that the accused indeed killed the child. The prosecution on the other hand submitted that there was sufficient proof that the 2nd accused had given birth to a child and that all the evidence pointed to the fact that accused had murdered the child. Counsel for prosecution submitted that there was sufficient evidence to convict the accused despite the lack of a body.

11. No one saw the accused kill the child and as the case against him is grounded on circumstantial evidence, it is important to recall that the principle that has been restated by our courts on many occasions that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt and that it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Rex v Kipkering Arap Koske & Another* [1949] 16 EACA 135 and *Mwangi & Another v Republic* [2004] 2 KLR 32).
12. The essential ingredient of the offence of murder is that there must be death of a person. Thus the prosecution must prove that there was a person who died as a result of an unlawful act or omission. The first line of defence by the accused is that Z did not give birth to a baby known as S A. The principal witness on this issue was PW 6 who produced the maternity and immunization register (Exhibit 6 and Exhibit 7 respectively). Counsel for the accused submitted and suggested in cross-examination that the registers could not be relied on as they were incomplete, altered and deficient in material respects.
13. The maternity register (Exhibit 6) for the month of July 2013 recorded at entry no. 9 that the name of the parent was, "Cytony Ayungo" who was admitted to the health centre 16th July 2013 and had a normal delivery. According to the record she gave birth to a male child. No notification of birth was issued. The immunization register (Exhibit 7) shows that a male child "Baby Z" was registered on 16th July 2013 which was the date of birth. The baby's father was recorded as "E O" and the mother full name as "Z A". Apart from the polio vaccine administered on 16th July 2013, no other vaccine was administered to the child.
14. I examined both registers and I am satisfied that they were both authentic and original records from Ndiru Health Centre as they were a continuous record made in the ordinary course of business. PW 6 explained, when cross-examined, that although there were gaps in the vertical entries that recorded certain particulars, the horizontal entries for each child left no gap as they were required to be recorded continuously. Despite the spelling mistakes, the two registers read together recording the birth and vaccination of the child leave no doubt that a male child was born to Z and that the father was E. The fact that no notification of birth was issued was not irregular as it is evident that the birth notifications were also not issued for the other children recorded in the registers. The truthfulness of the record was also corroborated by the fact that Z had given birth at the health center twice before, a matter confirmed by E.
15. I also find that PW 6 was an honest witness. She did not know the accused personally and had no reason to lie or alter records to the detriment of the accused. I therefore find and hold that Z gave birth to male baby boy on 16th July 2013 and that the contemporaneous record reflected that the father was E and that after the child was born he was not brought back to the clinic for further vaccination. I therefore reject the testimony of the accused and DW 3 that Z did not give birth to a baby boy. I also find that the reference to the child as "Baby Zaytuni" or the absence of the child's name or denial by the accused that the child was known as S A does not take away from the basic fact that Z gave birth to a baby boy who is the subject of the information before the court.
16. What happened to the child? Mzee Ongaro recorded the statement (Exhibit 5) produced by PW 5 that the child had disappeared. Under the provisions of **section 62 and 63** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, a witness must give oral and direct evidence of what they saw, felt or perceived save in the exceptions provided under **section 33** of the *Evidence Act*. The statement recorded by Mzee Ongaro does not fall within the exceptions and cannot be relied upon to prove the contents therein. It remains hearsay evidence and is admissible only to prove the fact that the statement was made. The statement only confirms that Mzee Ongaro reported that the child had disappeared, a fact independently corroborated by PW 2 to whom he had earlier reported. While DW 3 testified that Mzee Ongaro's complaint was motivated by his animus against E, this does not in any way diminish the fact that the child was missing. It is his report that

triggered the search for the child by PW 1, PW 2 and PW 3 at Ochimbo Hills where they had been led by the accused and found a baby's clothing (Exhibit 1 and 2).

17. The accused denied knowledge of the clothes (Exhibit 1 and 2) found at Ochimbo Hills. Despite the denial, I accept that the accused led the police to where they left the child and the irresistible inference is that the clothes belonged to their child. From the testimony of PW 1, PW 2 and PW 3, the place where the clothes were found is a bushy area, far from human habitation where it was not normal to find such clothing unless the items were deliberately taken there.

18. The fact that the body of the baby was never found does not automatically exculpate the accused. The Court of Appeal in *Dorcas Jebet Ketter and Another v Republic* ELD CA CRIM APP. NO. 10 OF 2012 [2013] eKLR quoted with approval the decision of the New Zealand Court of Appeal in *R v Harry* [1952] NZLR 11 (3rd Digest Supp) where the court stated that;

At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body or any trace of the body has been found and that the accused has made no confession of any participation in the crime before he can be convicted. The fact of death should be proved by such circumstances as renders the commission of the crime morally certain and leave no ground for reasonable doubt; the circumstantial evidence should be so cogent and compelling to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.

19. The prosecution having established that Z given birth to a baby boy and the baby was missing, it was incumbent upon the accused, as parents, to provide a reasonable explanation as to what have happened to their two month old baby. Under the provisions of **section 111(1) of the Evidence Act** they had to explain what happened to the deceased who was their infant son. That section provides as follows: -

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

When the accused fails to offer a reasonable explanation, the court is entitled to presume what could have happened under **section 119** of the **Evidence Act** which states

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

20. In the ordinary course of nature a two month old infant does not walk off and disappear. Such an infant is wholly dependent on the parents for sustenance, care and protection and cannot be expected to survive if left alone in a hostile environment. In the absence of a reasonable explanation the court is entitled to draw an inference that the infant is dead and was indeed murdered by the accused. In addition, the conduct of the accused after their child went missing is a relevant consideration. The immunization register (Exhibit 7) presented by PW 6 shows that after birth, the infant was never taken back for further immunizations. If he died of sickness or as a result of an accident or other misfortune, the accused and indeed DW 3 would have broadcast the occurrence. That they did not report the missing child to any authorities or raise any alarm or act in manner that ordinary parents would act when their infant child goes missing is inconsistent with their innocence.

21. Having considered the facts set out above, I am satisfied that no other facts or inference can be made that points to any other conclusion other than the fact that the accused murdered their child. The totality of the prosecution evidence points irresistibly to the fact that the accused took their infant child to Ochimbo Hills, murdered him and disposed of the body.

22.I therefore find **E O O** and **Z A O** guilty of the murder of **S A** and I convict them accordingly.

DATED and DELIVERED at HOMA BAY this 10th day of February 2016

D. S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke and Company Advocates for the 1st accused.

Mr Osoro instructed by Osoro and Company Advocates for the 2nd accused.

Ms Ongeti, Prosecution Counsel, instructed by the Director of Public Prosecutions for the State.