



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 33 OF 2013

N W P APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court Criminal Case No. 47 of 2012 by Hon . D. G. Karani P.M. on 21/3/2013)

JUDGMENT

1. **N W**, the Appellant was charged with the offence of **infanticide** contrary to **Section 205** of the **Penal Code**. Particulars of the offence being that on the 19th day of April, 2011 at [**particulars withheld**] in **Masinga** District within **Machakos** County, she willfully caused the death of **P M**, a child under the age of 12 months.
2. Facts of the case were that on the 20th April, 2011, at about 7.00am. PW1, **Paul Mutiso** found an infant having been thrown inside a water tank. He alerted people who called the police. PW3, **A I** who cohabited with the appellant returned home at 1.00am to find the door to their house ajar. He went in search of the accused and found her at a nearby bar drinking alcohol. She could not tell him where the child was. All over a sudden the appellant ran away disappearing into darkness. The following morning while leaving the house he saw people in pursuit of the appellant. **PW2, Erustus Ngalama Musau** who was among them managed to arrest her. She was re-arrested by PW5 No. 230193 **APC Naomi Kajuju**. PW3 was also arrested.
3. **PW6, Dr. Mulwa Jachim** performed a postmortem on the body of **P M** a Child aged approximately seven (7) months. He noted evidence of strangulation on the neck. The tracheal cartilage was fractured. He formed an opinion that the cause of death was hyporia due to strangulation leading to cardiopulmonary arrest.
4. PW7, No. 54290 **Sergeant Antony Kimani** received a call from members of the public. He acted on information received, moved to a borehole at **Kivaa** Market where he found the body of a child inside. They retrieved the body which had a piece of cloth around the neck. She moved to the Administration Police Post and re-arrested the appellant whom she took to Matuu Police Station. The body of the child was preserved at Matuu Hospital mortuary. **PW7, No. 33939 Sergeant Machogu Abunga** investigated the case and charged the appellant with the offence of **murder**. Subsequently, the High Court directed that the charge be substituted with the instant one.
5. When put on her defence the appellant stated that she returned home from work at 9.00pm. Her creditor went to her house demanding for money. She left the child sleeping as she went to look for money. The only person within the plot where they lived was **Sarah Mueni** a person she had disagreed with. On her way back she encountered PW3 who was looking for the child. They went home but the child was not there. She went in search of **Sarah** and found her house locked. They decided to report the matter to the police. They encountered one **Mwangangi** who told them that there were two (2) people inside her house who wanted to be paid for water that they had

delivered. She went to the Administration Police Post. Thereafter she returned home but did not find her friend. The following morning as she searched for the child, **Mwangangi** called her and told her that the child was dumped in the borehole. She confirmed the same. Her friends escorted her to Kamburu Police Post. Her friend (PW 3) was traced in a lodging with **Sarah**. Both of them were arrested but her friend bought his freedom at Kshs. 50,000/=. She was emphatic that **Sarah** is the one who killed her child.

6. The trial magistrate analyzed the evidence adduced, took into consideration the appellants demeanour and reached a finding that the case was proved beyond any reasonable doubt. He convicted her and sentenced her to **eight (8)** years imprisonment.
7. Being dissatisfied with the conviction and sentence she appealed on grounds that:-
 - i. **The trial magistrate failed to consider that a grudge existed between the appellant and PW1 with his girlfriend;**
 - ii. **Exhibits availed in court were planted by PW1 and his girlfriend;**
 - iii. **No malice aforethought was proved;**
 - iv. **Evidence adduced was hearsay as there was no eye-witness;**
 - v. **No evidence placed her at the scene;**
 - vi. **Judgment was contrary to the law.**
8. At the hearing the Appellant opted to rely on the grounds of appeal. In response thereto the State through learned State Counsel, **Mr. Machogu** opposed the appeal. He argued that the appellant was the last person to be seen with the child, this therefore pointed to the fact that the death of the child was within her knowledge. He submitted that evidence that the child was murdered by another was not supported. The sentence imposed in his opinion was lenient. He called upon the court to dismiss the appeal.
9. This being the first appeal, my duty as a court is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. (*See Okeno versus Republic (1972) E.A. 32*).
10. Issues the court had to determine were:-
 - i. **Whether the appellant caused the death of the child, who was under 12 months;**
 - ii. **Whether it was by a willful act or omission;**
 - iii. **Whether at the time of the act the appellant was disturbed following the effect of the birth of the child.**

11. Evidence adduced clearly establishes a fact not in dispute that the appellant, a woman was the mother of the child, **P M**. Although PW3 stated that the child was aged about three (3) years, photographs of the infant were produced by **PW8 No. 49711 Corporal Reuben Mahyolo** of Scenes of Crime. The doctor who performed the autopsy estimated the age of the child as seven (7) months. Having observed the photographs of the infant, supported by the evidence adduced of the Doctor, and that fact having not been in dispute, it was proof that the child was under the age of twelve (12) months.

12. The child was found in a borehole already dead. No one saw the person who dumped the child in the borehole. The appellant could not be placed at the scene as clearly stated in the grounds of appeal. However, it is not in dispute that prior to the child being found dead, he had been in custody of the appellant. The evidence adduced against her is therefore circumstantial.

13. In the case of *Teper versus Republic [1952] A.C. at Pg 489 Lord Normand* stated:-

“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 guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.

14. In the case of *Republic versus Kipkering Arap Koske and Another 16 EACA 135*. It was held

inter alia that:-

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

15. According to PW3, when he returned home to find nobody he went in search of the appellant who was at a bar taking alcohol. She started off by stating that the child was at home. Thereafter she changed the story and claimed the child was at **Omondi's** place. Ultimately she ran away and disappeared. The following day he saw people chasing after the appellant and he joined them. PW2 who arrested her confirmed facts of the circumstances in which she was arrested.
16. The appellant alleged that it was PW3 and his girlfriend who killed the child. The police arrested PW3 and later released him. The investigation officer, PW8 did not clarify this particular fact. In fact he was silent on the issue of having arrested PW3. In her testimony the appellant stated that she suspected PW1's girlfriend who was on the plot when she left, to have done something to the child. She allegedly heard from one **Mwangangi** that there were two (2) people, her creditors who were also at the house. She alluded to friends who were in her company prior to her arrest. She was given an opportunity of raising all these issues in cross-examination but she did not utilize that opportunity. Evidence adduced by PW3 and PW2 who eventually arrested her remained unchallenged.
17. Circumstances that prevailed pointed at the appellant as the person who caused the death of the child. Facts of the case do not suggest that the appellant was innocent. The only reasonable inference that can be drawn as was correctly done by the trial magistrate was that she was guilty.
18. The child was strangled. A piece of cloth was used to cause the heinous act. This resulted into a fracture of the tracheal cartilage. This was a willful act. Malice aforethought was not a requirement in this offence.
19. From the testimony of the appellant, it is apparent that at the time of the offence she was disturbed. She alludes to demands by creditors who had provided water and those she owed money. She claimed she had to leave the child to go and buy food. Above all she was struggling with PW3's infidelity. All these were a source of disturbance for a woman who was lactating after the birth of the child.
20. From the foregoing, the trial magistrate analyzed evidence adduced and reached a correct conclusion. I therefore uphold the conviction. In respect of sentence imposed, **eight (8) years** imprisonment was harsh. I therefore set it aside and substitute it with **five (5) years** imprisonment.
21. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day of MAY 2015.

L.N. MUTENDE

JUDGE