



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL CASE NO. 35 OF 2010

REPUBLIC.....PROSECUTION

VERSIS

STEPHEN MACHARIA KINYUA.....ACCUSED

J U D G M E N T

1. **STEPHEN MACHARIA KINYUA** the accused stands charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars as stated in the information are as follows:-

“On the 9th day of October, 2010 at Mukithi Village in Kirinyaga County within Central Province murdered unnamed infant”.

2. The accused pleaded not guilty and the case proceeded by the Prosecution calling nine (9) witnesses. The evidence is that PW1 (MWM) is the mother of the deceased while the accused is the father. It was the evidence of the Prosecution that PW1 and the accused were not staying together shortly before this incident because of a marital misunderstanding. She was living with her parents in law (PW2 & PW3).

3. PW1 delivered a baby on 9/10/2010 early morning and accused was informed. This baby had a breathing problem. He came and looked at the baby and left. He came later while drunk and was making noise demanding to be given the baby. He took him and went to his house with him. PW1 went for him but the accused refused to release him to her. She told him she was going to report.

4. She was later accompanied by PW2 and PW3 to the Police post to report. Upon their return with police officers they went to the accused's house. He was not there. On further checking they found the baby covered with a shawl and blanket and he was dead. The body was in clothes.

5. Dr. Nderitu (PW5) who conducted the postmortem found the cause of death to be asphyxiation. The baby's lungs were congested with blood. He explained that the blockage may be caused by several factors e.g. birth complications. He did not identify any of them in the deceased's body. PW3 had mentioned that when she was 7 months pregnant with this baby the accused had asked her to abort it.

6. Those who observed the body did not see any injuries on it but the doctor said he had noted 2 bruises (front part of face and right forearm). Investigations were carried out and the accused was arrested.

7. Its important to note that PW2, PW3, PW8 & PW9 were all relatives of the accused. None of them saw the accused kill the baby. PW6 & PW7 are police officers. They only acted on what they were told by

PW1. No independent investigations were carried out.

8. The accused in his sworn statement of defence denied the charges. He said he was on 8/10/2010 informed that his wife was unwell. He went home and slept there so as to take her to hospital. On 9/10/2010 morning PW2 reported to him that PW1 had delivered at her house. He did not go to see the child because of traditions. He denied having killed the child or threatening PW1 over the pregnancy. He was arrested on 10/10/2010 when he had come home.

Ms. Muthoni for the accused submitted that the cause of the baby's death had nothing to do with the accused. And the Prosecution had failed to prove its case beyond reasonable doubt. She cited the cases of

(i) REPUBLIC VS STEPHEN NDWIGA NYAGA [2005] eKLR

(II) REPUBLIC VS JOSEPH CHERUIYOT & 3 OTHERS [2006] eKLR

10. The State submitted that the conduct of the accused was suspicious and he was the last person to be seen with the baby alive.

11. This is the case before Court for determination.

12. The accused faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. There are two ingredients which must be satisfied for a charge of murder to stand viz

i. **Actus reus (killing)**

ii. **Mens rea (malice aforethought/intention)**

13. There is no dispute that the deceased herein was found dead on 9/10/2010 by PW1 among others. The doctor (PW5) found the cause of death to be asphyxiation. He explained that the baby had lungs congested with blood. He did not explain what this means.

14. In cross examination he said the blockage of congested lungs could be caused by several factors e.g. birth complications. He did not identify any of them. Again he did not enumerate all the factors that would cause a complication of this nature.

15. It also came out through the evidence of PW1 that this baby was born on 8/10/2010. He had breathing problems which she called snoring. The baby had been born at home and not in hospital. Infact PW1 had planned to take him to hospital if he continued snoring.

16. It is therefore clear from all this that there is still a dispute as to the cause of death of this infant. How could a baby 1½ days old have lungs congested with blood? Was this a normal occurrence?

17. From the evidence of the witnesses the accused was the father of this child. He had come home drunk and was making noise. He was complaining that he had been denied a chance of seeing his child. PW3 was sick at home. PW1 was apprehensive that given the drunken condition the accused was in, he could not be trusted with the child. No one was left monitoring the accused.

18. It's not clear from the evidence how long PW1, PW2 and PW9 took at the police post before coming back home.

i. It is unknown when the accused left his house on 9/10/2010.

ii. It is unclear at what time this child died e.g. did he die before the accused left or after he left?

19. PW1 denied that the accused had threatened her severally over the pregnancy. She said it was just once when she was seven (7) months pregnant.

20. I am clear in my mind that the evidence I am dealing with is purely circumstantial evidence. The chain of events must be closely knitted together without any breakage. In the case of **NDURYA VS REPUBLIC [2008] KLR 135** the Court of Appeal held thus:-

“Circumstantial evidence was often the best evidence as it was evidence of surrounding

circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.”

21. And in **WAMBUA & 3 OTHER VS REPUBLIC [2008] KLR 142** the Court of Appeal said the following of circumstantial evidence:-

(I) In order to justify an inference of guilt from circumstantial evidence, the incantatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. This burden of proving facts which justify the drawing of this inference is always on the prosecution which is required to establish its case beyond reasonable doubt.

(II) It is also necessary, before drawing the inference of the accused's from circumstantial evidence, to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

22. From my observation above it could either be that the accused killed the child and left or it could be that in his drunken state he over covered the child with the blanket and shawl leading to suffocation or that the infant died from the effect of the lungs congestion with blood. It was the duty of the Prosecution to establish through the postmortem evidence what was the exact cause of death.

23. The accused has in his defence denied the charges. Yes he may have taken the child to his house but the question is whether he killed him. The Court will not act on suspicion to convict. In the case of **SAWE VS REPUBLIC [2003] KLR 364** the Court of Appeal stated thus:-

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

24. It is the duty of the Prosecution to prove its case beyond reasonable doubt. Considering the lingering dispute on the cause of death I do find a doubt in my mind as to the guilt of the accused. The accused will benefit from that doubt. He is acquitted under Section 322(1) of the Criminal Procedure Code.

25. He will be released unless otherwise lawfully held under a separate warrant.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF MAY 2014.

H.I. ONG’UDI

JUDGE

In the presence of:-

Ms. Ingahizu for State

Mr. Ithiga for accused

Accused

Njue CC

