

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 36 OF 2002**

REPUBLIC.....PROSECUTOR

VERSUS

EMILY KIRUNUKA.....ACCUSED

RULING

The accused, Emily Kirunuka, was charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that on the 18th September 2001 at Kampi ya Moto Nakuru District, the accused murdered Peter Kamotho. When the accused was arraigned before court, she pleaded not guilty to the charge. At the hearing of this case, the prosecution was given several opportunities to avail its witnesses but they only managed to produce two witnesses.

PW1 Shadrack Ngumi Mathai, a posho mill operator based at Kampi ya Moto, Rongai Division of Nakuru District, testified that on the 16th of September 2001 at 6.00 am he left his homestead as usual and went to work. He left his wife, (the accused) and his two children Peter Kimotho (*hereinafter referred to as the deceased*) aged two years and seven months and Maria Wangare. PW1 testifies that the three were healthy and well when he left them. At 5.30 pm when he reached home, he found the accused at the gate of the homestead's compound. The accused told PW1 that their child, the deceased, had fainted and was very sick. PW1 went into the house. He found the child. He thought the child was sleeping on the bed. However, on further investigation he discovered the child was dead. There were no visible injuries on his body. PW1 went to the nearby Administration Police camp and reported the matter. PW1 was instructed to take the deceased to Molo District Hospital where a post-mortem was performed. PW1 recalled that he had married the deceased in the year 1996 when the accused was then aged sixteen years and was working as a house-help. PW1 did not remember having any marital problems with the accused. He reiterated that the deceased was not sick when he left him in the morning of the fateful day with the accused. He recalled that when he left home in the morning, the deceased had woken up and drank tea with him. PW1 testified that he was shocked when he realised that the deceased was dead. He immediately left his house and reported what had transpired to the Administration Police.

PW2 Corporal Philip Nduhiu Githambo (P/F No. 27791) testified that, he was, at the material time attached to Rongai Police Station. On the 19th of September 2001, while at the report office, he received a report that the child of the accused had been found dead in the house. PW2 went to the house of the accused and found the body of the deceased child. PW2 recalled that the child was aged between two to three years old. He did not see any visible injuries on the body of the deceased. PW2 found the accused at the scene. He collected the body of the deceased and took it to the mortuary. PW2 could not remember if a post-mortem was conducted. PW2 recalled that the report of the death of the deceased was made to the police by, among others, the husband of the accused (PW1). PW1 testified that the deceased was lying on a makeshift bed in the house when he saw him. The body had been covered by a small piece of cloth. PW2 reiterated that he did not see any visible injuries on the body of the deceased.

The prosecution was granted several adjournments with a view of enabling it to produce witnesses to court. On the 9th of February 2005, this court granted the prosecution a last adjournment after it had considered the fact that the accused had been in lawful custody for nearly three and a half years. On 10th of May 2005, the prosecution did not again avail witnesses. Mr Koech, Learned Counsel for the prosecution sought an adjournment again to enable witnesses to be availed to court. This court rejected the prosecution's application for adjournment and consequently ordered the prosecution's case closed.

I have considered the evidence adduced by the prosecution. The prosecution is required in law to establish to the required standard of beyond reasonable doubt that an accused killed the deceased with

malice aforethought to sustain a charge of murder against the accused. In the instant case, apart from adducing evidence to the effect that the deceased was found dead while in the custody of the accused, the prosecution did not place before the court any evidence pointing to the culpability of the accused. PW1, the husband of the accused, suspected that the accused had something to do with the death of the deceased. He did not consider that the deceased could have died of natural causes before making the report to the police. When PW2, visited the house of PW1 and the accused, he saw the deceased. PW1 and PW2 did not see any visible injuries on the body of the deceased. This court was denied an opportunity of hearing the evidence as relates to the cause of death of the deceased as contained in the post-mortem report. In the absence of such a report, this court cannot be certain that the deceased met his death at the hands of the accused.

The prosecution's conduct of this case since the accused was first arraigned before this court on the 24th of July 2002 is nothing to write home about. The prosecution has woefully demonstrated its lack of seriousness in prosecuting this case. In spite of being granted several adjournments, the prosecution had not risen to the occasion and availed witnesses when so required by the court. The pendulum of justice does not swing in one direction. The courts have a duty to terminate criminal proceedings if it appears that the prosecution is not keen on prosecuting the same and further if it appears that the rights of an accused person are being infringed by her continued detention in remand custody without there appearing to be an end in sight for end of the criminal case facing her.

Having considered the evidence adduced, I do find that the prosecution has not established a prima facie case to enable the accused to be put on her defence. The evidence by the two witnesses cannot sustain a charge of murder brought by the State against the accused. The accused is consequently acquitted of the charge. She is consequently set at liberty and ordered released from prison unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 6th day of July 2005.

L. KIMARU

JUDGE