REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAKURU

(CORAM: TUNOI, O'OKUBASU & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 77 OF 2009

BETWEEN

CHARLES KIPLANGAT NGENO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Kericho (Musinga, J.) dated 27th February, 2009

in

H. C. Cr. C. No. 21 of 2005)

****

JUDGMENT OF THE COURT

Charles Kiplangat Ngeno, the appellant, was after trial convicted on 27th February, 2009 by the High Court of Kenya at Kericho (Musinga J) of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code and sentenced to death. According to the information filed by the Attorney General the appellant on 30th May, 2005 at Kiptaltal Village, Waldai location in Kericho District within Rift Valley Province murdered his newly born infant daughter, the deceased.

The background facts are short and straightforward. The appellant and his wife, Betty Ngeno (PW 1), had been married since 2000 and have two young daughters. In early May 2005 PW 1 had an advanced pregnancy and according to her testimony her labour pains started on 29th May, 2005 at about 6.00 pm. She informed the appellant about it but he declined to give her any assistance. Instead he walked out of the house and when he returned he went straight to bed without uttering a word. At about midnight when she could not bear the pains any more, she tried to wake up the appellant so that he could call her mother in-law, but, the appellant refused to wake up. PW 1 woke up and went to the sitting room. After a short while past midnight, she told him that she was unable to deliver the baby alone but the appellant told her that he was not going to call anyone. PW 1 testified that eventually she delivered the baby alone

when the appellant just stood by next to her and watched her as she struggled alone. After the delivery, PW 1 became unconscious and was not even able to tell the sex of the child.

It is her further testimony that she regained consciousness at about 4.00 am and neither saw her husband nor the baby. She realized that the main door was wide open. At about 5.00 am the appellant returned to the house. When PW1 asked the appellant where the child was, he said he had thrown her away because she was a baby girl. PW 1 started crying and screaming but she was very weak and could not scream loudly.

In the morning she told her family members what had happened. A search for the body was commenced and after an extensive search involving the chief and the members of the public the body was found in a pit latrine.

A different aspect of the case was given by Rose Ngeno (PW 2), a sister to the appellant. She testified that PW 1 had told her that she had suffered a miscarriage but did not know where the child was. When PW 2 visited the appellant's house at about 8.00 am on the material day she found PW 1 making chapati and she observed that the house had fresh mud smeared on the walls. PW 1 told her that she (PW 1) had done so together with her husband.

A few days later a post-mortem was conducted on the body of the deceased by Dr. Kennedy Sigilai (PW 6). He found that the lungs of the infant were inflated and the neck was hypertensive. The other internal organs were normal. He concluded that the child had died as a result of asphyxia. He discounted the suggestion of a still birth.

The appellant denied the charge preferred against him. He testified that on the material day he woke up as usual, had breakfast and left for work at about 6.30 am. He knew nothing about the death of the deceased.

In convicting the appellant, the learned Judge held:

"The accused's defence was a mere denial. His defence did not oust the strong circumstantial evidence that was adduced against him. The evidence on record points to the accused as the only person who threw the deceased into the pit latrine. By so doing he intended to kill the child, which he did. I therefore find him guilty of murder as charged and convict him accordingly."

The main complaint raised by the appellant through Mr. Orayo, his learned counsel, is that the learned Judge erred in convicting the appellant on evidence that was contradictory and insufficient to sustain the element of ***actus reus***; and that, the charge against the appellant had not been proved beyond all reasonable doubt.

The learned State Counsel, Mr. Nyakundi, concedes the appeal and submits that the conviction is unsafe since it is impossible on the evidence tendered before the trial court to exonerate anyone of the couple. He contended that it was not proved beyond all reasonable doubt that the appellant alone or jointly with his wife caused the death of the newly born child. With respect we would agree.

The evidence adduced before the trial court was contradictory and indeed incredible. If PW 1 had miscarried it would have been impossible for her to gather enough strength to make chapati and smear her house two hours after the agony. Her evidence is not at all worthy of belief.

On our own assessment and evaluation of the entire evidence on record, we are of the view that the prosecution's case is incredible and the evidence adduced is not sufficient to discharge the burden squarely on it, that is, to prove the charge beyond any reasonable doubt.

In the result this appeal is allowed. The conviction entered against the appellant is quashed and the sentence of death imposed on him is set aside.

The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 21st day of April, 2011.

P. K. TUNOI

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR