IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 42 of 2005

EMILY CHEPKIRUI …… APPELLANT

AND

REPUBLIC …… RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kericho (Muga Apondi, J.) dated 6th October, 2004

in

H.C.CR.C. NO. 23 OF 2002)

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JUDGMENT OF THE COURT

Learned Assistant Director of Public Prosecution, Mr. Gumo concedes this appeal and we think he was right to do so. The appeal arose out of the conviction of EMILY CHEPKIRUI RUTO by the superior court (Muga Apondi, J.) for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged in the information filed by the Attorney General on 18th March, 2002, that the appellant did on the 4th day of June, 2001 at Gesagetiet village in Kericho District, murder Felix Kibet. Felix was the appellant's only child, a two-year old son.

The evidence that led to the appellant's conviction came from nine prosecution witnesses, but none of them gave any direct evidence to connect the appellant with the offence. Reliance was thus made on circumstantial evidence, and as we shall shortly see, it fell short of the required standards.

On the 4th day of June, 2001, the appellant went to visit her aunt **Esther Chebet Chepkwony** (PW1) (Esther) at her Gesagetiet village. She carried with her the two year old **Felix Kibet** ("the deceased") and arrived there in the evening at 8.00 p.m. in time for supper. By that time the deceased was asleep and so he was laid on Esther's bed by one of her children. Asked by Esther whether the child had eaten, the appellant replied that she had given him bread and porridge but if he woke up at night she would feed him. Esther gave out some 'ugali' and milk to the appellant before they all retired to bed in the same room. Sleeping on the same bed as the appellant and the deceased, was Esther's 4-year old daughter. The following morning, Esther woke up and prepared tea before leaving for her farm nearby. Just as she arrived at the farm, the appellant called her out and she rushed back. She found the appellant screaming about her dead child. On confirming that the child was dead, Esther also ran out screaming. The screams attracted neighbours who then converged on the home. Esther could not tell when the child had died or what caused the death.

Among the first arrivals to the scene was Esther's son, and therefore, the appellant's cousin, **Richard Kipngetich Siele** (PW2) (Richard) whose homestead was 100 metres away from his mother's. He found his mother screaming and running away as the appellant was screaming "*my baby ……. my baby"*. The other neighbour was **Anderson Kipngetich Siele** (PW3) (Anderson) who found the appellant screaming "*woi …… my child"*. Both Richard and Anderson reported the matter to the Assistant Chief of the area **Joseph Kipyegon Mutai** (PW6) (Chief Mutai) who went to the scene immediately and in his testimony, which turned out to be the fulcrum of the prosecution case, stated *inter alia*, as follows:

"*I talked to the Accused outside the house and she replied that the child was sick. Later, the Accused called me aside and told me that she wanted to tell me the truth. She told me that she was working in the home of her cousin viz, John.*

On her way to the house of PW1 she bought bread and rat poison. On reaching the river, she took a piece of bread and soaked the same with water - and added the rat poison before giving the same to the child. She did that because her mother was harassing her".

The theory that the appellant had poisoned the deceased was then repeated in evidence by Richard (PW2), Anderson (PW3), the village elder **John Kimutai Cheruiyot** (PW5), and the investigating officer, **PC. Sally Tarus** (PW9). To confirm the theory, PC Tarus arranged for a postmorterm on the deceased's body which was carried out by **Dr. Langat** at Kericho District Hospital. She also took the stomach contents, liver and blood samples for examination by the Government Chemist. The postmortem report was produced in evidence by Dr**. Christopher Kemboi** (PW8). It showed the following physical observations on the body:

"- *the eyes were red*

- *bruises on the right hand*

- *scratch marks on the right lower abdomen*

- *burnt scars on the left lower jaw - and right upper part of the face*

- *fluid in the right and left brochi*

- *the stomach was full of undigested ugali and green vegetables*

- *The other systems were essentially normal".*

The cause of death in the opinion of the Doctor was:

"**Asphixia (sic) due to aspiration and possibly strangulation".**

Dr. Kemboi explained "*aspiration"* as "*where food substance goes into the lungs"*. He further said it was "*possible for one to have 'aspiration' without being strangled* and that "*aspiration cannot be caused by strangulation because the trachea will collapse"*. The report of the Government Chemist returned a negative result on examination of the stomach contents. It stated:

"**The stomach contents were examined for chemically toxic substances with negative results".**

The appellant testified in her defence and vehemently denied killing her own son. She was living with her mother **Annah Chepkorir Ruto** (PW4), a single parent with two other sons. When the appellant gave birth to the deceased, her brothers were not happy and started quarrelling her. She found a job as a casual tea picker and was able to fend for the child who was also being taken care of by her mother (PW4). The baby became sickly and was suffering from pneumonia when she went to visit her aunt Esther (PW1). She told Esther that she was looking for money to take the baby to hospital and Esther promised to assist her. Unfortunately she found the child dead the following morning and was

shocked. As for the allegation by Chief Mutai that she confessed to him about poisoning the child, the appellant stated this:

"*The Chief took me aside and told me to confess that I had given the child rat poison. He promised me that I would not be charged if I stated the above at the Police Station. It was due to the above that I informed the police that I had poisoned my child.*

The chief blocked me from saying that the child was sick. My child used to suffer from pneumonia and scabbies.

If I had intended to kill him, then I would have done so immediately after the birth".

All the evidence was put to the three assessors who assisted in the trial and one of them returned the opinion that the appellant was "*not guilty*" while the other two thought she "*may be guilty of manslaughter*". The learned Judge however had a different view, and he delivered himself as follows:

"**In this particular case, the deceased was only about 2 years old. At that age, children are usually not very independent and tend to rely heavily on their mothers for feeding and general protection. From the word go, the accused was rather evasive to the PW1 about the feeding of the baby. Normally babies are fed before they go to sleep. However, the accused deliberately avoided that responsibility. With the benefit of hindsight, she knew that dead bodies never eat earthly food.**

Apart from the above, it was only the accused who had access to the deceased. The evidence on record does not show any duration of time where the accused had left the deceased to be taken care of by anybody else. The accused had the chance and opportunity to do whatever she wanted with the innocent child.

Significantly, the accused also had the motive to kill the child. Nobody in her family from the mother to the brothers had approved of the child. The accused felt totally frustrated by the above rejection and found that the only solution was to kill the child".

The appellant's defence was trashed as a "*fabrication as shown by medical evidence*".

The main complaint made before us by learned counsel for the appellant, Mr. Juma, was that the prosecution case that the deceased was poisoned by the appellant was not supported by evidence, that the cause of death had nothing to do with poisoning, or for that matter, strangulation. That evidence was also produced by the prosecution.

We stated earlier that there was no direct evidence to connect the appellant with the offence. The learned trial Judge appreciated this and resorted to circumstantial evidence. In appreciation of the principles applicable, however, the learned Judge fell in error. He thought the evidence should merely satisfy two criteria:

"**(1) It must point at the accused person and nobody else as the person who killed the deceased either alone or with other people.**

(2) It must not be capable of any other explanation except the explanation that it points to the "guilt" of the accused".

In our view, this waters down the principles laid out in this Court's earlier decisions, including **Mwangi v. R** [1983] KLR 522, where the Court stated:

"**In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt** (Sarkar on Evidence - 10th Edition p 31)**. It is also 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 - TEPER V THE QUEEN [1952] AC 480 at page 489".

It was also stated by this Court in **Omar Chimera vs. Republic** - *Criminal Appeal No. 56 of 1998* (unreported) that:

"**It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

(i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established,

(ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was comitted by the accused and none else".

See also **Judith Achieng Ochieng v. Republic**, Criminal Appeal No. 218 of 2006 (unreported).

We have carefully re-evaluated the evidence on record as we are bound to do as the first appellate court. We have also subjected the above legal principles to the evidence on record and we are in no doubt that the evidence does not measure up. In particular, there was a total failure by the prosecution to eliminate the possibility that the deceased died of natural causes. On the contrary, the prosecution evidence confirmed that the cause of death had nothing to do with strangulation or poisoning and was possibly caused by asphyxia which could have occurred independently of any action by the appellant. Those were co-existing circumstances which would weaken or destroy the inference of guilt. It is also plain that the death of the child was capable of explanation upon other reasonable hypotheses. In those circumstances, the charge laid against the appellant was not proved beyond reasonable doubt as by law required and the appellant must benefit from such doubts.

We allow the appeal, quash the conviction and set aside the sentence of death. The appellant shall be set at liberty forthwith unless she is otherwise lawfully held.

Dated and delivered at Nakuru this 6th day of March, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR