



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL APPEAL 446 OF 2007**

**NEEMA MWANDORO NDURYA ..... APPELLANT**  
**AND**  
**REPUBLIC ..... RESPONDENT**

**(Appeal from a conviction and sentence of the High Court of Kenya at Malindi (Ouko, J) dated 8<sup>th</sup> September, 2006**

**in**

**H.C. Criminal Case No. 25 of 2005)**

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**JUDGMENT OF THE COURT**

The appellant herein, **NEEMA MWANDORO NDURYA**, was charged with murder contrary to **section 203** as read with **section 204** of the Penal Code (Cap 63 Laws of Kenya). The particulars of the offence according to the information laid before the High Court at Malindi were that between 13<sup>th</sup> and 15<sup>th</sup> October, 2005 at Kwandamo in Sabaki, Malindi, the appellant murdered Jane Katana Kaka (the deceased).

The trial of the appellant commenced before the superior court at Malindi (Ouko J.) on 13<sup>th</sup> February 2006 where the learned Judge sat with three assessors (as the law then provided). The prosecution called eight witnesses to testify while the appellant defended herself by making a brief unsworn statement. The summary of the evidence adduced before the superior court was that on 15<sup>th</sup> October 2005, some women went to fetch some firewood in the village thicket when they came across the decomposed body of a child. The women made a report to the village elder Karisa Wapetumi Kitsao (PW 1 – Kitsao) who after visiting the scene in turn reported to the police. The scene was also visited by the appellant’s brother Cosmas Ndule (PW 2 – Cosmas), a former boyfriend to the appellant, Hezron Kahindi Madore (PW 4 – Hezron) and Pc Bernard Masaha (PW 5). Due to the state of decomposition, the body could not be identified by those who visited the scene. However, the body was later identified as that of the deceased, a child aged between 1 year and 1<sup>1/2</sup> years and a daughter of the appellant. Dr. Anisa Omar (PW 6) who performed postmortem examination on the body of the deceased testified that she observed a deep cut wound on the neck, severing large vessels and that the right eye ball had been gouged out. There was

also a torn wound in the vagina. In the doctor's opinion, the cause of death was cardiopulmonary arrest due to severe bleedings as a result of deep cut wound on the neck.

When put to her defence, the appellant elected to make an unsworn statement in which she told the learned trial Judge and the assessors that at the time of the deceased's death, she (the deceased child), was under the care of a man called Katana Kaka who she claimed was her husband and the father of the deceased. Katana Kaka (PW 8) who was called by the prosecution denied the appellant's claim asserting that the marriage between him and the appellant lasted only three years and that the appellant was married twice after the breakup of their marriage. It was Kaka's evidence that the deceased was conceived during one of the two subsequent marriages.

After summing up to the assessors, each assessor was of the opinion that the appellant was guilty as charged.

In a reserved judgment dated and delivered at Malindi on 8<sup>th</sup> September 2006, the learned Judge agreed with the assessors' opinion, convicted the appellant as charged and sentenced her to death.

The appellant now comes to this Court by way of appeal challenging her conviction and sentence by the superior court.

When this appeal came up for hearing before us on 14<sup>th</sup> July, 2008, Mr. Geoffrey T.S. Were appeared for the appellant while the State was represented by Mr. Jacob Ondari, the Assistant Deputy Public Prosecutor.

Mr. Were faulted the learned trial Judge on his evaluation of the evidence pointing out that there was no direct evidence against the appellant. It was his contention that the learned Judge convicted the appellant on circumstantial evidence alone and yet the evidence of Kaka (PW 8) does not show where Kaka was on 14<sup>th</sup> and 15<sup>th</sup> October, 2005. In support of his submission, Mr. Were relied on the authorities of **OKETHI OKALE & OTHERS V. R [1965] E.A 55** and **LUKAS OKINY SOKI V. REPUBLIC – Criminal Appeal No. 26 of 200** (unreported).

Mr. Ondari conceded the appeal on the ground that the evidence did not prove that the appellant was staying with the deceased and further, that there was no consideration of **section 210** of the Penal Code as regards the possibility of the offence of infanticide.

On our part, we have endeavoured to reconsider the evidence, re-evaluate it and come to our own conclusions since this is a first appeal – see **OKENO V. REPUBLIC [1972] E.A 32**. We agree with the learned Judge that the evidence against the appellant was circumstantial since there was no eye witness account on how the appellant caused the death of the deceased. In the course of his judgment, the learned Judge said:

**“There is no direct evidence to the effect that those wounds were inflicted on her by the accused person. The case must therefore be decided purely on circumstantial evidence.**

**It is now settled that for a court to convict on circumstantial evidence there must be evidence which points irresistibly to the accused person to the exclusion of any other person. At the same time there must be no co-existing factor or circumstances which may weaken or destroy the inference of the guilt of the accused person.**

**See R V Kipkering Arap Koske, (1949) 16 EACA 135.”**

We entirely agree with the above. Having so stated, the learned Judge proceeded to consider the circumstantial evidence adduced before the court. He accepted the evidence to the effect that the appellant was the mother of the deceased and that since the appellant had the care of the deceased, then she must have been the one who murdered the deceased and dumped the body in a thicket.

In this appeal, we find that it is true that the appellant was the mother of the deceased. The particulars of the charge state that the offence took place between 13<sup>th</sup> and 15<sup>th</sup> October, 2005. There was no evidence as to when the appellant was last seen with the child. All that was placed before the superior court was that some women stumbled on a decomposed body of a child. It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in **R. V. TAYLOR WEAVER AND DONOVAN (1928) 21 Cr App. R. 20.** But circumstantial evidence should be very closely examined before basing a conviction on it. In **TEPER V. R [1952] AC** at p. 489 Lord Normand said:

**“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 guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence”**

In view of the foregoing, we think that as there was the lingering doubt as regards the possibility of Kaka (PW8) having been involved in the commission of the offence, and as there was no evidence as to when the appellant was last seen with the baby, it cannot be said that circumstantial evidence was so watertight as to exclude a possibility of another person having murdered the child. There might have been a suspicion that the appellant might have known how the deceased died but suspicion alone, however strong, is not enough to sustain a conviction.

In **SAWE V. REPUBLIC [2003] KLR 364** at pp. 375-6 this Court said:-

**“In this state of the evidence, the two watchmen are not excluded from being persons who might have started the fire or for that matter any intruder might have done so. If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of R v Kipkering Arap Koske & Another 16 EACA 135 where it held, *inter alia*, that;**

***‘In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.’***

**In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku v Republic (Criminal Appeal No. 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt.”**

The foregoing applies to the facts of this case. We similarly disagree with the learned Judge’s view that the prosecution had proved its case against the appellant beyond reasonable doubt.

Before we conclude this judgment, we must comment on the age of the deceased. The witnesses put the deceased’s age at between 1 year and 1½ years. For example Kitsao (PW1) said:-

**“The deceased was the accused’s child about 1½ years”**

and Masaha (PW 5) said:

**“The body was that of a young child – naked – a baby girl – about 1 year.”**

And Dr. Anisa Omar (PW6) who conducted postmortem examination on the body of the deceased said, *inter alia*:-

**“On 24.10.2005 at 12.30 p.m. I conducted a post mortem examination on a child – Jane Katana Kaka – the deceased about 1 year old.”**

From the foregoing, it would appear that the doctor who conducted postmortem examination gave the age of the deceased as about 1 year. Hence this was a borderline case so that even if there had been sufficient evidence that it was the appellant who had caused the death of the deceased, the court should have considered **section 210** of the Penal Code which provides:-

**“Where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide, and may not for that offence be dealt with and punished as if she had been guilty of manslaughter.”**

That being our view of this matter, we allow this appeal, quash the appellant’s conviction, set aside the sentence of death imposed by the superior court and order that the appellant be set at liberty forthwith unless she is otherwise lawfully held. Order accordingly.

**Dated and delivered at Mombasa this 18<sup>th</sup> day of July 2008.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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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**