



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

***CRIMINAL DIVISION***

**CRIMINAL CASE NO.81 OF 2004**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**1. DR. JOHN NYAMU**

**2. MARION N. KIBATHI.....ACCUSED**

**3. MERCY K. MATHAI**

**RULING**

*(Under Section 306 of CPC)*

The three Accused persons before the Court are charged with offence of murder contrary to Section 203 as read with Section 204 of Penal Code (Cap.65 of Laws of Kenya).

The particulars of the offence in count No.I are that these accused persons jointly with others not before the court on diverse dates between 23rd and 25th May, 2004 at Nairobi murdered an unidentified female person number 1912 weighing 3012 grams. The particulars of count No.II are that the Accused persons between the same dates and place as aforesaid jointly with others not before the court murdered an unidentified male number 1913 weighing 2232 grammes.

The Prosecution called thirteen witnesses with a view to prove its case as required under the law. However, the Defence at its close vehemently submitted that the prosecution has not led any evidence against any of the Accuseds and the court should declare them not guilty at this stage. These submissions were made under Section 306 (1)of Criminal Procedure Code which stipulates:

***“306: (1) When the evidence of the witness for the prosecution has been concluded the court, if it considers that there is no evidence that the accused or any one of several***

***accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty. (emphasis mine)***

From the wordings of this subsection, which in my view are very clear, what the court is required to ascertain, at the end of the Prosecution case, is that, there is ***'no evidence'*** led against any of the Accused persons after the Prosecution has closed its case. In my humble view there is a subtle difference in the approach to be taken by the court when considering this section from the one to be taken under Section 210 of the Criminal Procedure Code which comes into operation when the trial is before a subordinate court. In my view the approach of the High Court is not only not to expect the defence to fill in any gaps left by the prosecution case at its close, but also to be satisfied that no such filling is required. In most of the cases the difference will not be noticeable or the same be seen to be merging but the court should not close its mind to its happening.

With this caution, I shall deal with the facts of the case as well as shall consider the same along with submissions made.

At the outset I shall first deal with the issue whether the offence as per law has been shown to have been committed by the Prosecution because it is submitted by the defence that there is none in existence in this case.

Section 203 of the Penal Code defines the offence of murder and it provides:

***“Any person who, with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”***

In this case as the particulars have indicated that the murdered persons were fetuses and section 214 of Penal Code defines or stipulates when a child becomes a person capable of being killed. It provides:

***“A child becomes a person capable of being killed when It has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.”***

I shall however, deal with this issue, i.e. whether the two fetuses were capable of being killed, along with consideration of the evidence to decide the main issue i.e. whether there is any evidence connecting either all or any of the Accused persons, with those offences.

Furthermore, I shall have to consider the evidence by keeping in my mind that the prosecution case is based on circumstantial evidence. I shall begin with evidence as to discovery of 15 fetuses and documents which form the basis of the prosecution case. PW.1 Stephen Mumo Muia and PW.2 Fredrick

Koach, were watchmen of a church called International Christian Centre, situate along Mombasa Road and adjoins a bridge over a river passing nearby. Both of them had stated that water in the river was scant.

PW.1 is, in all respect, a key witness to the prosecution case. I also notice that the statements of PW.2 and the Administratrix of the church Priscilla Wambui (PW.3) were taken few days prior to the date they gave their evidence before the court.

PW.1 recalled that he used to see garbage being thrown in the river since January, 2004. He was informed by three street boys that the garbage thrown were not ordinary garbage but contained human fetuses. He also stated and I quote ***“the garbage used to float down the river but some still remained”***. When these street boys (not identified) informed him, he in turn intimated to PW.3 the Administratrix of the church, and also the Pastor of the church. He was told by PW.3 to keep a check on such garbage. This fact has been denied by PW.3 in her evidence who stated that she was just informed of the garbage and did not either report to the police or take any action personally. She only informed the pastor who was also a lawyer. Anyway I do not have evidence from him.

On the material night i.e. 26th May, 2004 (emphasis mine) at about 11 p.m. he was on guard duty. He also did not rectify the said date in his statement after it was read over to him. I would also note that he stated that he saw a vehicle parked near the bridge and he was in compound of the church while PW.2 was at the gate. He further stated and I quote

***“When I saw the vehicle, I felt that the vehicle could be the same from where the garbage were thrown”.***

That night street lights were not on, and he agreed that the traffic was very heavy on Mombasa Road as usual with noises of the moving vehicles. Then he went to alert PW.2 and both of them opened the gate and went near the vehicle to see what was being thrown into water. The vehicle had finished dumping and drove off to the Highway.

He did not see its registration number or its colour, though he agreed he had a torch and that vehicle was facing them. Then he said the vehicle was being blocked by other vehicles. He also stated in cross-examination that although he had stated in statement that he saw two people throwing things in the river, he further stated and I quote:

***“Now I say there were two people at the back of the pick-up. I did not see them throwing things in the river.”***

When vehicle left he and PW.2 went near the river and found black polythene bags. He woke up the street boys and they removed bags and kept them on the bank of the river. He asked them to open two bags which according to him contained documents. He and PW.2 took those two bags and according to him were kept in his sentry box. This box is neither described nor shown to the court. He also emphasized during crossexamination that his aim was to look for documents but did not elaborate why and how he arrived at that aim. Anyway he said there were vouchers, files, papers as if from the hospital

and register books. Out of those documents a voucher pad (Ex.1), two registers (Ex.2 and 3) and a third book looking like a register (Ex.4) only were identified and produced. It has to be noted that no inventory was made or photographs were taken of those documents. He did not look at those documents at night but when the next morning they were given to PW.3 he read them which showed that they were from Reproductive Health Service.

It shall be better to deal with evidence of these documents as adduced by other witnesses now. PW.2 stated that when he and PW.1 went near the scene, he saw that the things were dropped near the bridge and he also saw through dark and thought that the two bags contained documents. And then in cross-examination he stated that he guessed that the two bags contained documents due to its light weight.

He further stated that he did not hear any splash although he was nearer to the bridge than PW.1 and also because he was at the gate. Then he agreed that the documents produced in the court could not be contained in two bags which he saw and that **“they were in bags containing fetuses.”** He also stated that the documents were from Reproductive Health Centre and a Maternity Home from Juja Road. There is not evidence before me relating to any maternity Home at Juja Road. This witness also stressed that the bags were not in the river and that the documents were not wet or that he did not see any wet document. According to him the two bags were kept near his post and were given to the officials in the morning when they were opened and he saw they contained syringes, cotton wool, directions of hospital, some forms and big books. In any event in cross-examination he stated that the police came to him on 11th February, 2005 and they gave him a report and a paper which he signed after he was satisfied that they contained truth. This shows that his statement was not recorded from him and that fact itself is sufficient to raise eye brows as to its credibility.

At this juncture I must note that:

**1. No basis is shown how these two witnesses assumed that out of six bags two contained documents.**

**2. No explanation is coming forth why only four documents from those contained in two bags are before the court.**

PW.3 stated that on 26th May, 2004 when she arrived at the church around 6.45 to 7.00 a.m., PW.1 and one Ezekiel and not PW.2, had some papers on their hands and informed her that they had found some fetuses at the bridge. I shall come to the evidence of fetuses later but it could be proper to state here that PW.1 had specifically stated that they did not open other four bags and went next morning to see its contents after PW.3 was informed and went with her. They further stated her i.e. PW.3 that they had some documents which they kept underneath a tree in the church compound. She only stated that Ex.2 looks like one of the documents she saw that morning which contained files, documents business cards etc. She also stated that the documents under the tree looked damp. She agreed when shown that documents produced before the court (Ex.1 to 4) did not bear names of Dr. Nyamu. She also agreed that she had not been shown any file or business cards before the court.

PW.5 PC Joseph Mwangi who visited and collected documents while stating that the documents were found in the parking Area and were scattered. He and his colleague officers placed them in a carton to avoid them being photographed by press. He stated that they included some cards showing name of a clinic at Afya Centre and also some registers which looked like normal accounts book. He said he would

not be able to identify any one of those documents shown to him.

Lastly Investigating Officer Assistant Commissioner of Police Mr. Nyagah Reche (PW.13) received documents out of which some of them were bearing name of Afya Centre Health services and others were receipts. He also stated that as per his investigation and I quote "**the documents were discovered in the morning by a watchman guarding a building next to the scene and collected by the road side leading to South 'C'**" He agreed he did not make any inventory of the documents received by him. When shown Exhibits 1 to 4 he agreed that only thing which shows that they are from Reproductive Health Service is the paper attached on top thereof by the police.

Despite saying that no inventory was made he still stated that attached documents to Ex.10 were given to him but conceded rightly that he did not have anything to prove that the same were recovered from the road side except that he was so informed. This is the evidence on documents claimed to have been recovered at the scene. Apart from the documents (Ex.1 to 4) whereon I have made observations, the other documents which is shown to be connecting the 1st Accused is attached to Ex.10 which are referred by Assistant Commissioner of Police Mr. Emmanuel Kenga (PW.10) the document examiner and Assistant Commissioner of Police Mr. Reche (PW.13).

PW.10 received three sets of documents. The first one was a delivery note dated 23rd January, 2002 from a company named Innovex K. Ltd and other two were documents bearing known signatures of Dr. Nyamu 1st Accused and those bearing specimen signatures of the 1st Accused. He carried out his examinations on the documents and arrived at an opinion that the signature on the delivery note was that of the 1st Accused. He agreed that names stated on the exhibits were also of the 1st Accused.

PW.13, after agreeing that the documents if found on the scene ought to have been photographed, also conceded that no inventory was made of those documents. None of the witnesses was shown documents contained in Ex.10. No one did even suggest that a document relating to the delivery was recovered at the scene. It is agreed by the witnesses that there were many other documents recovered which are not produced before the court.

It may be difficult to take it as a mere coincidence that the clinics of the Reproductive services were inspected by Dr. Helton Jilo on 8th June, 2004 wherefrom several documents were recovered and PW.10 Assistant Commissioner of Police Mr. Kenga also received some documents on the same day for his examination and opinion. PW.13 although stated that the documents annexed to Ex.10 were recovered by the watchmen could not substantiate that contention and conceded rightly that apart from information, he cannot prove its veracity. PW.1 or Pw.2 is not shown that document to verify that it was one amongst those documents found by them on the scene. I also note that the 1st Accused went voluntarily to the Police Station and was arrested. Similarly the other two Accuseds were called to the stations and were arrested.

Hence, I can safely find that there is absolutely no evidence on record to show that the documents in Ex.10 were in fact recovered at the scene by PW.1 and PW.2. The Prosecution case on this issue is nothing but an assumption and far cry to the court to accept the same as fact. Unfortunately this court cannot accept the same as an evidence of fact under the circumstances of the case.

Now I shall deal with the evidence as to recovery of fetuses as well as at the post mortems of the two fetuses by a team of three doctors.

I have already dealt with evidence of PW.1 and PW.2 as to the discovery of six bags. Both of them had testified that they did not open or look at the four bags which they only did in the next morning when

PW.3 arrived.

PW.1 only stated in Examination in Chief that when they collected four bags opened by street boys he peeked into them and found children. Although he further stated that it was difficult to count them as they were mixed but still stated that they were fifteen. He agreed that, even though he saw the plastic bags being dumped in January, 2004 he became suspicious only when he was told by street boys in March, 2004 and added that he did not want to report till he got hold of people who did the dumping. He also agreed that he took hold of documents as he wanted to preserve them but left fetuses for the police to investigate. I once again reiterate his statement that ***“my aim was to look for documents”***. In re-examination he said he knew garbage contained fetuses without saying why he could specifically know, when they were not opened at night.

With all humility I state that this evidence is not from a witness who just happened to witness a happening of a crime but is of a person who had some mission to achieve. His evidence in any event cannot be termed as that of an impartial or independent witness of truth and any court shall have difficulty to accept the same on its face value.

PW.2 also stated that the four bags were left near the bridge and two bags were opened which had syringes, cotton wool etc (I have already specified earlier) and documents. The syringes etc are not before the court. What the court has, are what were recovered during inspection of two clinics by Dr. Jilo with other Police officers. I shall come back to his evidence later in this ruling.

He further stated that, the next morning when they visited the scene they found contents of those bags scattered which were fetuses about 15 in number. PW.3 stated that she found on the scene (and I quote) ***“the fetuses on the top of the bridge in the morning. There were two big black plastic bags and some of them had fallen down as one of the bags was open.”*** She also denied having seen any cotton wool or syringes.

PW.5 PC Joseph Mwangi testified that on arrival at the scene he saw some eight fetuses scattered besides the bridge and then added they were on the bridge beside the river. Then he stated those fetuses were kept back in plastic bags and carried to City Mortuary. He insisted that other seven fetuses were later removed and altogether they were fifteen. He left the fetuses with O/C and mortuary attendants who were giving them numbers. Later he was given a paper with numbers 1909 to 1923 to be placed in a register.

PW.4 Sgt Samuel Barongo attended two post mortem performed on those fifteen fetuses. On 30th May, 2004 a Post mortem was performed Dr. J. Wasike but the same was directed to be repeated on 2nd June, 2004. He attended the second autopsy performed by Dr. Wasike and two doctors. He escorted four blood samples given to him to government chemist. He denied having signed any Post Mortem forms specially two bearing numbers 1646 and 1647 shown to him.

The last witness concerning evidence of fetuses is Dr. Njue (PW.12) apart from Rose Nyambura Gikubu (PW.8) who carried out DNA tests.

Dr. Njue is one of the doctors who performed Post mortem on two fetuses on 2nd June, 2005, although only one Post mortem report bearing Number 1647 in respect of female fetus was produced as Ex.13. I may also state that the number of the fetuses does not appear in the form, however, the weight thereof tallies with that stated in particulars of count I in information. Thus, the court has not been shown where these numbers were posted or how they were given. The other two doctors were Dr. Jane Wasike and Dr. Okero Agina, none of them has been called as a witness.

Although the Learned State Counsel Mr. Ondari has frowned upon the evidence of Dr. Njue and has asked the court to admit or accept his testimony in part, I shall have to state that PW.12 is a prosecution witness and is also an expert witness and cannot accept his evidence as suggested by Mr. Ondari.

At first I shall deal with his testimony as is on record of the court. He stated that all except two fetuses were macerated meaning badly decomposed. However, he removed a bone from a fetus bearing No.PP.1639 for DNA profile.

In respect of fetus in PP.1647 (Ex.13), the same was referred as flesh still birth. It weighed 3012 grammes and did not have any bleeding or bruises. Bone, blood and hair were removed for DNA profiles. Lungs and Liver were removed for Histological tests. The purpose of this test was to ascertain whether the off-spring was born alive. Its result showed that the lungs were solid and firm which meant, as per his medical opinion, that there was no spontaneous breathing by the child.

The second fetus was examined by way of post mortem on 19th March, 2004. It was in respect of fetus mentioned in count No.II of the information. It was also a flesh still birth. It had a swelling at the back of the head and on dissection a blood clot was found in his brain. It had subdural and subarachnoid haematoma. Blood, bone and hair were removed for DNA profiles. Lungs, kidney, brain and heart were removed for histology. The result of histological test was that lungs had collapsed and were solid and thus the fetus was still born. He explained that still born is the removal of fetus which is of more than 28 weeks gestation or 0.5 kg in weight. I shall further quote his testimony:

***“In proper set up the same can deliver and survive Independent survival.***

***Removal means by earlier delivery or by an operation. If there is spontaneous breathing and evidence of cardiac activities or movement, it cannot be termed as still birth. The presence of all these three things in good proportion, need to show that it was not a still birth. Removal is from womb of the mother. I was expected to establish whether any of the fetuses presented to us had lived independently of the mother. It was sensible and logical because the fetuses were found in a bag. The fetus is alive in the womb with the mother – dependent on mother for blood, oxygen and does not have independent spontaneous life. The fetus starts independent existence (1) It should be removed –extricated from the womb – (2) Exhibit the cordial existence which includes the above three. If the death was in the womb, we would find collapsed solid lungs but if it was outside the womb and the child had independent life, then the lungs would have expanded and would show that baby had an independent life outside the womb. I can say with confidence that all of them were born dead.” (emphasis mine).***

He further explained that on removal of the fetus there would inevitably be presence of heart beats but that is not independent existence of the fetus.

In cross-examination questions were asked on a common report prepared by all the doctors and which was signed by the witness and Dr. Mutuma. The report stated that lungs were found to be firm and no evidence of separate existence or child destruction was found. He also explained the cause of death stated in Post mortem reports which was Asphyxia and categorically stated that the said cause was before histological tests were carried out and the same was ***“a possibility not a conclusion.”***

PW.8 Rose Nyambura is Government Analyst who received several items i.e. blood samples, pieces of bone (15) and as well as various medical and surgical equipments including dust coat, apron and used sanitary towels. She was expected to look for blood stains from 17 items received from Afya Centre Clinics and 17 items from Eastleigh Reproductive Health Centre, and if the same is found, to generate biological relation (maternal) with the blood from fetus.

She was also sent blood samples from one Irene Cheptoo. This court has not been told who that lady was and how and why her blood sample was sent to compare the same with blood samples of 15 fetuses.

After thorough examination of each fetus, DNA profiles with all the items sent to her which had blood thereon, she found that none of the fetus has any biological relation with the strange lady Irene Kiptoo, and that no biological relations between those blood samples and any of the items recovered from both the clinics, and that the result between A12 and AE syringes as well as between A15 and small bottle was inconclusive due to incomplete DNA profile. In short, no relevant evidence was produced by this witness.

I shall now deal with the evidence of Dr. Jilo (PW.7) who accompanied the police officers to inspect both the clinics at Afya Centre and Eastleigh. He inspected those clinics under oral instructions from Director of medical services Dr. James Nyikal. He inspected those two clinics and made lists of articles and equipments found there. They were assortment of surgical and medical equipments and some documents containing records of clients and registers.

In his report he had concluded that those were standard equipments used both in private and public hospitals and clinics, and are used in gynecological procedure but added that the same could also be used for abortion at an early stage. But he was ready to concede that the last comments were made by him on instructions of the Director of Medical Services. This witness is a Gynecologist by profession and is working as a Programme Manager with Ministry of Health attached to Division of Reproductive Health.

PW.11 Chief Inspector Eliud Lagat who, with other officers made search of both the clinics and recovered stained overall, some stained sanitary pads, syringes, drug bottles etc. His purpose was to collect and label them. He produced as Ex.11 an overall and 10 used syringes as Ex.12.

PW.9 is Paul Waweru Kangethe who is a Government Analyst and examined drug bottles and other items recovered from the two clinics. He did find that they were medicines and syringes and agreed that those could be found in any clinic and nothing unusual was found on them.

I shall reiterate here that nothing has been said as to the syringes and cotton wool etc found at the scene. What were tested as per the prosecution witness, were the ones searched and recovered from the two clinics. The result of their tests has been shown to be usual and nothing adverse is found in respect of any of the accused persons.

I have partially dealt with evidence of PW.13 Assistant Commissioner of Police Mr. Reche. He has candidly conceded that no inventory of the documents was made and need not reiterate the same. However, he also did not make any inventory of the documents recovered at the clinics later on and simply said they were taken by doctors. This particular piece of evidence is, in my view, very material so far as the documents shown in Ex.10 are concerned. In absence of any inventories either of the documents recovered at the scene or those recovered during search, I do not know or understand how the prosecution still insists on its version that the delivery note signed by Dr. Nyamu was one amongst the documents found at the scene. This becomes more difficult in view of the fact that none of the



witnesses (PW.1, PW.2 PW.3 or PW.4) has stated to have seen a document like that or has described it. Only documents which are identified and produced from amongst the documents claimed to have been recovered are Exhibits 1 to 4, which from the face thereof do not connect with any of the Accused persons. This fact also has been conceded by PW.13.

He also agreed that none of those documents was taken to the document examiner. He also conceded that he had not cared to find out whether all or any of the Accused persons were/was on duty on the dates shown on the charge i.e. 23rd to 25th May, 2004. He did not establish whether any patient visited any of the clinics on those days and if so what treatment was rendered to them. He stated simply that he, and I quote, **"assumed that Dr. Nyamu was in his clinic on those three days"** and also **"assumed that murder took place in the clinic"**. He did not establish whether Eastleigh clinic was closed during those days. As regards 2nd and 3rd Accused persons he simply stated that they were arrested due to nature of their duties without elaborating anything on those duties except to state that they both were in charge of each of the two clinics. He did not mention which one out of the two Accused persons was in charge of which clinic.

From the evidence on record which I have observed elaborately, I can be justified in finding, without much ado, that there is no evidence led by the prosecution to link either 2nd and 3rd Accused persons with the offence on hand. I therefore shall, without anything said further, enter finding of not guilty against the 2nd and 3rd Accused persons forthwith.

As against 1st Accused it has been vehemently argued by the learned state counsel Mr. Ondari that the documents found on the scene especially a delivery note signed by him (Ex.10) do link him with the offence.

I have amply made my observations on the discovery of documents, search of other documents, identification and description thereof as well as the productions thereof as exhibits. No court can unhesitantly find from the evidence led that the documents signed by 1st Accused in Ex.10 was found at the scene on the night of 25th May, 2004. The evidence of all the witnesses as to the documents have been more than sufficiently outlined by me earlier. The discrepancies in their respective evidence are quite substantial and I shall feel it unsafe to rely on it so as to connect 1st Accused. Moreover PW.13 has conceded that he cannot relate Ex.1 to any of the clinics and has nothing to show that the document attached to Ex.10 was found at the scene.

I also say so in view of the simple fact that the evidence against 1st Accused is circumstantial.

Law on proof under circumstantial evidence is trite and has been consistent for obvious reasons. It has been admirably summarized in the case of **Republic versus Kipkering Arap Koske and another 16 EACA 135.**

***I shall simply quote the passage which the court adopted on 'circumstantial evidence' and observed:***

***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of any explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused"***

Unfortunately in this matter the facts of the prosecution case leaves wide yawning gaps and rents which are incapable of being filled or mended. The Accused thus is entitled to pass through them in safety.

Lastly but not the least, the defence counsel has also submitted that the prosecution has not established or proved the offence of murder. They simply relied on evidence of Dr. Njue. If the two fetuses in two counts were born dead, then there is no murder. A person who is dead cannot be killed.

They also relied on Section 214 of Penal Code. Mr. Ondari on the other hand stressed that there is murder as per the very definition of person provided in Section 214. He also stated that Dr. Njue crossed his limits in giving evidence on independent or separate existence. But I see that that is what has been stated in examination in chief. The evidence quoted by me in earlier part of this ruling is from examination in chief. He also stated there that he was confident that all fetuses were born dead.

Mr. Ondari also asked me not to rely on the medical expert evidence and arrive at my own conclusions. Although he promised to give me an authority on that issue, none was forthcoming.

While I may agree with him that the court as such is not bound to accept the opinion of the expert but there must be some proper basis before the court for rejecting such opinion, as the expert witness is expected to assist the court in the line of his expertise.

The Court of Appeal in the case of Parvin Singh Dhalay -v- Republic Cri. A. No. 10 of 1997 (Unreported) has held:

***“It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the court must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.”***

In the same case it was further directed and I quote:

**“....Of course where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected”.**

The Court of Appeal gave the aforesaid directions after it was adopted with approval a passage from the case of **Elizabeth Kamene Ndolo –v- George Matata Ndolo in Civil Appeal No. 1281 of 1995,** (Unreported) and I quote the same:

***“The evidence of PW.1 on the report of Munga were, we agree, entitled to proper and***

***careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) Republic v John Nyamu & 2 others [2005] eKLR 20 whether or not it believes the expert and give reasons for its decision. A court cannot simply say: 'Because this is the evidence of an expert, I believe it'.***

Apparently I have no evidence in conflict with the opinion of Dr. Njue who definitely is an expert in the field of pathology.

In my humble view that is the law and I am not shown any other authority to state otherwise, which in any event, will be difficult for me to accept.

Dr. Njue has categorically stated that the two fetuses in question were born dead. The prosecution has not bothered to call other medical evidence from any of the doctors who were present with Dr. Njue at the time of Post mortem. There is no other evidence before the court, whether cogent or otherwise, to find otherwise. I shall thus accept the opinion of Dr. Njue.

Section 214 of Penal Code (Cap.63) stipulates when a child becomes a person capable of being killed. I have carefully analyzed the wordings of the Section and submissions by the Learned State Counsel. In all humility I cannot accept the contentions from the Learned State Counsel that the last portion of the Section is the operative part thereof, i.e. ***“whether it has breathed or not, and whether it has an independent circulation or not....”***

I am of an opinion that for a child to become a person the most important ingredient is “when it has completely proceeded in a living state from the body of its mother”. That ingredient is not present in this case. Without that the fetuses in two counts were not persons capable of being killed. There is no murder.

I could have dealt with this case only on this issue. However, due to tragic circumstances of this case, I thought it fit to deal with the case as a whole. Unfortunately I could not find any evidence to link 1st Accused with the offence. I would have expected to see a more comprehensive and professional investigation and prosecution of this case. It is not pleasant to see fetuses dumped on the public places without knowing the sources of these foul deeds. I earnestly hope that the court does not have to see this kind of gruesome acts ever in future.

However, as a court of law, I am bound by the law of the land and all its ramifications.

In the premises, I find that there is no evidence against any of the three Accused persons at the close of the prosecution case. I thus enter findings of not guilty against them and direct them to be released unless held otherwise as per law.

**Dated and signed at Nairobi this 14th day of June, 2005.**

**K.H. RAWAL**

**JUDGE**

14.6.2005



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