



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL CASE NO. 11 OF 2017

REPUBLIC.....PROSECUTOR

-VERSUS-

BMM..... ACCUSED

J U D G E M E N T

1. **BMM**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars as per the information provided are that on the 19th July, 2017 at [particulars withheld] village in Kiseuni sub-location in Lower Yatta within Kitui County, she unlawfully killed MM.

2. The accused did plead not guilty to the charge facing her and the prosecution presented a total of seven witnesses. The prosecution case is based on both indirect evidence or direct evidence of at least one witness who testified that he saw the accused assault her own son claiming she was disciplining him.

3. **Justus Maingi** (PW1) an Assistant Chief, testified that he received a report on 19th July 2017 at around 7PM that the accused had assaulted her son (deceased) and killed him in the process. He testified that he proceeded to the home of the accused after reporting the news to the Area Chief and on reaching there, he found the child lying dead on the floor. He testified that next to where the boy (deceased) lay, was a rope and a piece of wood (hoe handle) which had split into two.

4. **JK** (PW2) testified that on the material day 19th July 2017 at around 1PM, the deceased child went to his home followed closely by his mother (the accused herein) and that when he inquired from the accused if she had beaten him, she stated that the boy had been asked to wash utensils but had ran away. He told this court that he saw the accused getting hold of the boy and leading him back to their home. The witness later at around 7pm heard what had transpired and when he went to check, he found the boy (deceased) lying down dead with a swollen face. He testified that besides where the boy lay, was a rope.

5. **MW** (PW3), a wife to PW2 testified and corroborated the evidence of her husband adding that she pleaded with the accused not to beat her son after reporting that he had refused to wash utensils.

6. **MM** (PW4) a brother to the accused testified to this court that he helped identify the body of the deceased during post mortem examination.

7. **TMJ** (PW5) on her part testified that the previous day before the material date, the deceased child had gone to her home, ate and slept and that the following day the mother (the accused herein) went and reported to her that the child was of unsound mind claiming that she had sought assistance of a witchdoctor. The witness said that she advised the accused to seek prayers from a pastor instead. She testified that the same day the child went back to her home claiming that the mother (accused herein) wanted to beat him up. She further testified that later PW4 went reported to her that the accused had beaten the child to death. She testified that she went to the scene and found the child lying down dead with his hands tied with a rope. She stated that the Assistant Chief came and untied the rope. She recalled seeing at the vicinity signs showing something had been dragged down for almost 100 metres.

8. **FK** (PW6) was the only eye witness to the incident testified that he was a herder and that on the material day he was walking home after taking the animals to the river for water and that he went to the home of Peter Mwinzi and found a child crying and went near to find out why, he found the accused and asked why she was beating the child. He stated, that the accused had tied up the child's hands with a rope and was beating him with a stick that got broken in the process. The witness stated that he left the scene leaving the accused as she went on beating the child and that he later heard that the child had died. He recalled that before he left the scene, he had observed that the child had swollen as a result of beatings.

9. **Dr. Muriithi Miano** (PW7) testified and told this court that he had worked with Dr. Mwanadamu, the doctor who performed post mortem examination on the body of the deceased, and who could not be found because he had proceeded for further studies. Dr. Miano confirmed that having worked with Dr. Mwanadamu for two years, he was familiar with his signature and handwriting. He confirmed that as per the

post mortem report, the deceased aged 13 years died as a result of multiple head injuries. The doctor further testified that the victim's lungs had collapsed because the ribs were fractured. He tendered the post mortem report as P Ex3.

10. When placed on her defence, the accused filed a statement and relied on it saying she was a stammerer and could not talk. In her sworn statement, the accused conceded that she beat her son to death. She further admitted that she had followed her son to a neighbour's home and got hold of him after he tried to run away. She further stated that as she dragged the body home, he resisted and began wailing but she forcefully took him home nevertheless where she states that she tied him up and began disciplining him using a rod. She states that the boy wailed the more and she beat him up even more because she thought she was feigning pain to elicit sympathy. She stated that her son was extremely troublesome and that he beat him for a considerable time and untied him. She stated that the boy fell down and she thought he was sleeping and only realized later that he was not breathing and was dead. She stated that she never intended to kill her son.

11. The prosecution in its written submissions dated 15th September, 2021 submits that they had established all elements of murder from the evidence tendered.

12. On malice afterthought the State submits that the accused acted in a manner that demonstrated malice. That she picked the child from the neighbour's home where he had sought refuge and went ahead to tie him up shows she was up to no good. The state has relied on the case of **Kipkering Koske versus Republic (1949) 16 EACA 15** where the court held that incriminating facts must be incompatible with the innocence of the accused and incapable of any other explanation other than that of guilt.

13. This court has considered the evidence tendered by the prosecution and the statement of admission and confession by the accused. Looking at the admission, this court wonders why the accused took all the time spent during trial denying committing the offence only to admit when placed on her defence.

14. The accused as observed above, is charged with the offence of murder Contrary to **Section 203 of the Penal Code**. The Section defines murder as;

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

15. The necessary ingredients of murder are: -

i. *Fact of death*

ii. *Actus reus-cause of death and the fact that the unlawful act is connected to the accused.*

iii. *Mens rea*

16. The first two elements of fact of death and the element of *actus reus* is uncontested. The evidence tendered by the prosecution has proved these two elements. The post mortem report P Ex 3 corroborated the evidence of prosecution witnesses and PW6 in particular. The accused has admitted in her statement that she committed the unlawful act.

17. The only issue for determination in this matter really is the element of malice aforethought. It is important to note that malice aforethought can be inferred from the actions of the accused person. The provisions of **Section 206 of the Penal code** provides as follows: -

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.....”

The question posed is whether the action of accused was actuated by malice and whether the above provision applies in respect to her action.

18. This court has considered the fact that the accused chased her son to her neighbour's home and dragged him home where she tied him up. She used a hoe handle piece of wood to beat him up. The accused denied using the hoe handle (piece of wood) claiming she used a stick but the evidence given by PW6 shows how brutal the accused was towards her son. The post mortem report P Ex3 showed that the deceased child suffered multiple head injuries, injuries to the stomach, multiple injuries to the limbs that indicated how the child tried in vain to shield himself from his mother's wrath. The fact that the child also suffered fractured ribs showed that the accused was really merciless and used a blunt object whose force was able to inflict the sort of injuries the unfortunate boy suffered. The accused states that the boy was troublesome and that he had refused to look after livestock or wash utensils and instead went playing with other children. That is so unfortunate because that is what most children do at that age. The deceased was 13 years old and his life was unfortunately cut short by a mother whose unlawful and savage actions against her own son were beyond reason. The child died due to multiple head injuries and witnesses saw how the boy's face was swollen which shows that the injuries inflicted were brutal, merciless and reckless. The deceased child died at the hands of his mother who acted in a most inhuman way. She claims that she was only disciplining her son but this court finds that was far from it. The provisions of **Section 206 of Penal Code** applies in the circumstances. The fact that she tied him up before inflicting cruelty and pain on him shows that she was ill motivated.

This court finds that all the ingredients of murder had been proved by the evidence tendered by the prosecution to the required standard. She is hereby found **guilty** as charged and she is hereby convicted under **Section 203 of the Penal Code**.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF FEBRUARY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE