



**Republic v Makokha (Criminal Case 40 of 2015)
[2022] KEHC 11364 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 40 OF 2015**

SN RIECHI, J

MAY 25, 2022

BETWEEN

REPUBLIC PROSECUTOR

AND

EVANS WANJALA MAKOKHA ACCUSED

JUDGMENT

1. The accused Evans Wanjala Makokha is charged with offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the offence are that Evans Wanjala Makokha on the 28th August 2020 at Nzoia B area Ndalú Sub-Location in Bungoma North Sub-county within Bungoma county, murdered PN.
3. The case for prosecution is that Esther Nafula (PW3) is the wife of the accused Evans Wanjala Makokha. The deceased PN who at time of death was aged 4 years old was the daughter of Esther. On 28.8.2020 Esther (PW3) was at home with the deceased and another child J aged 9 months. While there accused came at night and Esther (PW3) informed him that the deceased had drunk medicine which was meant for J. On receipt of the report, the accused became angry that Esther had allowed her child PN to take medicine which as for his child J. Accused started beating Esther. The deceased PN went to where Esther was. The accused then hit her on the head. They took, the child to Ndalú Health Centre where she was pronounced dead. They came back home with the body.
4. The next day as the child did not belong to the accused, they took the body to the home of Esther. On arrival accused alleged that it is Esther who had killed the child. The matter was reported to police who arrested the accused and his relatives including accused's mother who had a stick she alleged was murder weapon.



5. On being cross-examined by Wamalwa for accused, she started that the deceased was sired by another man before she got married to accused. She then had one child, J with the accused. She further stated that accused called her mother to inform her of that Esther had killed the child.
6. PW1 Judith Nanyama Nyongesa the mother of Esther (PW3) was at her home on 28.8.2020 when her husband Evans Wanjala received a telephone call from accused who informed him that Esther had killed her child the deceased. Later accused called her and gave her the same information and said they will bring the body to her home the next day. On 29.8.2020 the accused, Esther, accused's mother, brought the body while Esther was crying. The village elder interrogated them and then informed police. She noticed that Esther had injuries on the back and chest.
7. PW2 Samwel Natembea the brother of Esther received information of the death of deceased. On 29.8.2020 he went home and found Esther, accused, his mother and sister had brought the body. While accused said it is Esther who killed the child, Esther maintained it was the accused. They informed police and accused was arrested.
8. PW5 Edwin Muthoka Masinde a bodaboda rider was called by accused who told him he wanted two motor cycles to take him to Sirisia. He complied. On 29.8.2020 at 4 a.m. he carried accused's mother, sister and a child aged 3-4 months who was alive as he was crying. Accused who also had a motor cycle carried his wife and a child being carried by accused's wife. They went to Sirisia at the home of accused's wife where he noticed that when the passengers alighted they started crying. He noticed that the child accused's wife had carried was dead. Many people came and the village elder called police.
9. PW4 Perpetus Akwane a clinical officer attached to Ndalu Health Centre was at the Health Centre when deceased was brought at 11 p.m. by accused and Esther where they said the deceased had fallen from a table. She examined the child and confirmed she was dead. She advised the parents to take the body to the mortuary.
10. On 1.9.2020 Esther came to the Health facility and alleged she was assaulted on 28.8.2020 but was seen by John Bwiyo. She had pain on the back and swelling on left hand inflicted by a blunt object. He assessed the degree of injury as harm and filled the P3 FORM Exh.2.
11. PW6 NO. xxxxx Copl Job Lemirige attached to Sirisia Police station received a telephone call from a clan elder Jamin Mukhwana who gave him a report of suspected murder. He went to the scene where he found deceased lying down. He interrogated the father of the child the accused and the mother who told him that accused was beating her when he hit the child on the head and she fell down. They had taken the child to hospital where she was pronounced dead. He arrested 5 people and handed them over to DCI for investigations.
12. PW10 No. xxxxxx PC Felix Oduor the Investigating officer took over investigations from the Sirisia Police station and also received the 5 suspects. He noticed one of the suspects Esther had injuries and he issued her a P3 form which was filled. He recorded witness statements. He established there was a scuffle between accused and his wife Esther where the child was injured by accused and died. He caused accused to be charged with present offence.
13. PW9 Dr. Haron Ombangi who performed the post-mortem on body of deceased testified that the deceased had bruise on left eye, swollen left eye, linear skull fracture on frontal region. He formed opinion that cause of death was due to severe head injury as a result of assault by a blunt object.
14. The accused upon being put on his defence gave sworn evidence. He testified that on 28.8.2020 he came home from work at 8.30 p.m. While at home his wife Esther told him she wanted to go to her parents' home. He then heard the deceased crying. He went to check and found Esther had hit her with



- a pier of firewood and had fallen down and was unconscious. He went and called his mother and they took the child to hospital where the child was pronounced death.
15. He informed his relatives who advised him that since he was not the biological father the body should be taken to the home of Esther his wife. They took the body to Esther's parents' home and they explained how the child had died. Police were called and he and others were arrested.
 16. The accused is charged with the offence of murder Contrary to Section 203 of the Penal Code. Section 203 provides:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
 17. The ingredients of the offence of murder which the prosecution must prove beyond reasonable doubt are:
 - a. The fact and cause of death.
 - b. The unlawful act or omission causing the death
 - c. That it is accused who caused the unlawful act or omission or inflicted the injuries that caused the death of deceased.
 - d. That the accused committed the unlawful act with malice aforethought.
 18. The death of the deceased is not in contention even the accused in his defence confirmed that the child PN was taken to hospital where she was pronounced dead. PW9 Dr. Haron Ombangi who performed the post mortem issued death certificate NO. 1477600 confirming the fact of death. The doctor who performed the post mortem found the deceased had bruises on the eye and a linear skull fracture on the frontal region caused by a blunt object. This is the injury that caused her death and it was due to an assault by a blunt object. He therefore confirmed the cause of death as due to blunt head injury caused by assault.
 19. The injuries causing the death were inflicted on the child aged 4 years by a person. Who inflicted the injuries?
 20. PW3 Esther Nafula the mother of the deceased testified:

“He started beating me saying I had left my child to take medicine of his child John. He continued beating me. John is 9 months old. PN was 4 years old. When PN saw me being beaten she came to me. He aimed to hit me but he hit PN the deceased. She was hit on the head. We took her to Ndalu hospital on arrival we were told she was dead. She had injuries on the eyes. These are the treatment notes at Ndalu.”
 21. In cross examination by Mr. Wamalwa for accused she stated:

“It is accused who hit the deceased. We then took the child to hospital. Accused went and called the mother. Accused then called my mother when we were told the child was dead. Accused told the doctor the child had fallen down. Accused was saying I am the one who had hit the child when I was at their home I accepted. When we reached my home I said it was accused who had hit the child.”



22. PW7 Jamin Wamukwa the village elder who interrogated both accused and the wife Esther stated in cross-examination:

“The accused said it was the mother. The mother said it was accused. They said it was an accident when they were fighting.”

23. The accused in explaining how deceased sustained the injuries stated in his defence:

“I then heard the child crying. I left the bathroom and went and saw deceased crying. I found Esther had hit the child with a firewood and fell down. I saw the child had become unconscious. I went and called my mother. She came and observed her. My mother bought cold water and poured on the child but did not respond. My mother told me to take the child to hospital. I and my wife took the child to Ndaluhospital. I was restrained out as I did not have a mask. My wife Esther accompanied the child into the hospital. The doctor came and told me the child had died.”

24. From the evidence of both accused and his wife, there was a quarrel between them on the material night. In the house were the accused, his wife Esther, the deceased PN who was aged 4 years old and a baby called John. While the accused denies that he assaulted his wife Esther there is evidence of P3 form filled on behalf of Esther which confirmed that she had injuries on the back and swelling on the left hand. I therefore do find that Esther was assaulted on the material night.

25. The only people who were present when the deceased sustained injuries were the accused and deceased’s mother Esther. While Esther the mother testified that it is accused who inadvertently hit the deceased while aiming to hit her, the accused maintains that it is Esther who hit the deceased with a piece of firewood and the deceased fell down. The accused does not in his evidence state why Esther would hit deceased with a firewood. This is the narrative he developed and maintained throughout the investigations.

26. Though accused denies that he is the one who hit the deceased, from the evidence I am satisfied that he is the one who hit the deceased on the head while intending to hit the mother who was with her.

27. I am therefore satisfied that it is accused who inflicted the injury on the deceased from which she became unconscious and died.

28. From the evidence of PW3 Esther the mother of the deceased, the accused had aimed to hit her when he hit the deceased. I find that this act was unlawful and the same caused the death of deceased but did not have the necessary means rea to establish an offence of murder.

29. Section 202 of the Penal Code defines manslaughter as:

“Section 202.

1. Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.
2. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.”



30. After considering all the evidence, I find the accused not guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code. I am satisfied prosecution has proved a charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

DATED AT BUNGOMA THIS 25TH DAY OF MAY, 2022

S.N RIECHI

JUDGE

