



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO. 27 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

EMO.....ACCUSED

J U D G M E N T

1. The Accused Person in this case, **EMO** (hereafter referred to as the Accused Person) was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the charge were that on 27/9/2017 at **KERENGA** Engineering Staff Quarters in Belgut Sub-County within Kericho County, the Accused Person murdered **BON**.
3. The Accused Person pleaded not guilty to the charge and was represented at the Trial by Nyadimo Advocate.
4. The prosecution called thirteen (13) witnesses whose evidence was that on the material day at 7 p.m. the Accused Person who was a neighbor went to the house of PW.1 (**ROBERT OTIENG BARASA**) to look for a charger. PW.1 said the Accused Person looked confused. He later heard screams from the Accused Person's house and when he went there, he found the deceased who was the Accused Person's son together with his younger sibling lying on a bed unconscious with injuries.
5. The deceased was unconscious while the other child was semi- conscious. PW.1 said he does not know what happened to the children.
6. **PW.2 AMM** who was working at Unilever Tea Estate said the deceased was his son. PW.2 said the deceased was born on 9/4/2009 and that he had married the Accused Person in the year, 2008 and they parted ways in 2011 and the Accused Person left with the child and changed his name.
7. PW.2 said the Accused Person got married to someone else but he used to see the deceased and to care for him.
8. PW.2 said on 27/9/2017, he got information that the deceased had been killed. He went to Siloam Hospital and saw the body of the deceased with a crack on the eye and the back of the head.
9. PW.2 said the Accused Person was arrested and the body of the deceased was released to him for burial.
10. **PW.3, INO** who is a sister to the Accused Person's husband said the Accused Person went to her house on the material day and told her that her child was ill. She said the child had stomach ache. PW.3 gave her flagyl tablets and the Accused Person left.
11. PW.3 said at 4 p.m, the Accused Person went back and told her she could not find the children and PW.3 told her that perhaps they were feeling better and they had gone to play.
12. PW.3 said the Accused Person went away and PW.3 saw her pulling the two children to her house. PW.3 said the Accused Person returned to her house again at 6.30 pm and asked her whether her phone had credit. The Accused Person talked to her husband through PW.3's phone and told him children had gotten worse. When PW.3 told her to take the children to hospital, The Accused Person told her that that did not concern her.
13. PW.3 said the Accused Person left and returned at 7 pm and told PW.3 that she was afraid to go to her house. She had a phone and a charger and she asked PW.3 to escort her to her house.
14. PW.3 gave her a child to escort her and later PW.3 heard screams from the Accused Person's house and upon going to check, she found the Accused Person's two children lying on a bed with injuries.

15. **PW.4 EUNICE ADHIAMBO OCHIENG** who was a neighbor said on the material day, the deceased came from school at about 10 a.m. in the morning with a letter which stated that he was sick. The Accused Person went with the deceased to her house. The Accused Person later went with PW.4 to a funeral wake where PW.4 left the Accused Person.

16. PW.4 said while passing at the Accused Person's house, she heard the deceased crying from inside the house. The deceased asked PW.4 to open the door for him. She asked him who had locked them inside the house and he said his mother. PW.4 opened the house for the two children and they went out to play and later PW.4 told the Accused Person not to lock the children inside the house.

17. **PW.5 SHALLODY CHEPKEMOI KEINO** said she went to the house of the Accused Person at 11 a.m. and found the Accused Person with the deceased. The deceased told her he was not in school because he was sick. PW.5 left at 1. Pm and returned at 2 pm. At 7.30 pm, she heard screams and she thought they were coming from the funeral wake and she did not bother. The following day, she learnt that the Accused Person's children had been attacked and the deceased had died.

18. PW.6, PW.7, PW.8 and PW.9 were all neighbours who said they had seen the Accused Person on the material day with the children and at 7.30 pm, they heard the Accused Person screaming. They did not know what happened to the deceased.

19. PW.10, a minor aged 11 years of age who is a daughter to PW.3 told the Court after voire dire examination that on the material day at 7.30 pm she was told by her mother (PW.3) to escort the Accused Person whom she referred to as Aunt Eva to her house.

20. When PW.10 got to the Accused Person's house, she said the Accused Person told her to check on the children. PW.10 opened the curtain dividing the Accused Person's house and she saw the children lying on the bed.

21. PW.10 said the deceased seemed to look at her. She told the Accused Person that the children were on the bed. The Accused Person opened the curtain and ran outside screaming. PW.10 did not know why she was told to escort the Accused Person to her house.

22. PW.12 said the Accused Person made a confession at the Police Station. The Accused Person retracted the statement and the Court ruled that the statement was admissible after conducting a trial within a trial.

23. The hearing of this case proceeded before Hon. Lady Justice Mumbi Ngugi (as she was) and later before Hon. Justice Dulu. I took the evidence of the Doctor and the Investigating Officer after complying with section 200 of the Criminal Procedure Code.

24. **PW.13, DR. WESLEY ROTICH** who did the Post Mortem on the body of the deceased said the deceased was identified by his biological father. PW.13 formed the opinion that the deceased died due to severe head injuries due to trauma to the head by a blunt object.

25. PW.13 said the body had a deep wound on the occipital region measuring 6 by 3 cm and a deep wound on the right orbital region. He said the head had scalp hemotoma and skull fracture on the occipital bone measuring 4 x 1 cm. The Doctor also said the body had intra cerebral hemorrhage.

26. Upon considering the prosecution evidence, this Court ruled that the Accused Person had a case to answer as the prosecution had established a prima facie case.

27. The Accused Person gave unsworn evidence and did not call any witnesses. She said she used to stay at Unilever Engineering Servant Quarters where she was working in a Saloon.

28. The Accused Person said on 27/9/2017 at 1 O'clock, the deceased went home from school with his friends. She said the deceased tore his friend's bag on the way home. She said the friend reported to her and she took a cane and told the deceased to lie down. She hit him with the cane and he ran away.

29. The Accused Person said she told his friend to ran after him, the deceased came and told her to forgive him and she left him in the house and went to the saloon.

30. When she returned from the Saloon, she found the other child awake and the deceased was still asleep. She called him but he did not respond. She saw blood oozing from his mouth and she called neighbours who assisted to take the deceased to Siloam Hospital where they were told he had died.

31. I have considered the evidence on record in this case together with the submissions filed by the defence Counsel. It is the duty of the Prosecution to prove the guilt of the Accused Person and the standard of proof required is beyond reasonable doubt.

32. There are three ingredients the prosecution must prove in order to prove a charge of Murder against the Accused Person which are as follows:-

i. The death of the deceased.

ii. That it is the Accused Person who killed the deceased.

iii. That the Accused Person had malice aforethought.

33. In the current case, the Accused Person made a confession to PW.12 that she assaulted her two sons. The reason she gave for her action

was that **PW.2 AMM** who was the biological father of the deceased had traumatized her by calling her and threatening to take away the deceased yet he had never assisted her in raising the child and he knew she was married to someone else.

34. I find that the evidence against the Accused Person is watertight. There is evidence though that it was the Accused Person who took the innocent life of her own child and the motive was that the father of the deceased could not let her move on peacefully with her life as he kept stalking her.

35. There is evidence that the Accused Person confessed and the confession was taken by PW.12. Although the Accused person retracted the confession, the Court conducted a trial within a trial and found that the confession was admissible in evidence.

36. There is circumstantial evidence which corroborates the confession. There is therefore evidence that the Accused Person with malice aforethought killed her own son.

37. Section 206 of the Penal Code defines malice aforethought 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; (c) an intent to commit a felony; (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

38. I find that the defence by the Accused Person is a mere denial. The Accused Person said she wanted to cane the deceased for tearing his friend's bag and later she left the deceased asleep with his brother and when she returned, she found him with injuries with blood oozing from his mouth. However, the injuries the deceased sustained were not inflicted by a cane.

39. I find that there is overwhelming evidence that the Accused with malice aforethought killed her own son because she was traumatized by his biological father who kept stalking her wanting to take away the deceased.

40. PW.2 the biological father of the deceased claimed he used to take care of the deceased. However, PW.7, the Accused Person's brother did not even seem to know him as he said he saw a man at the mortuary claiming to be the father of the deceased.

41. I find that the prosecution has proved the guilt of the Accused Person to the required standard in Criminal Cases and I accordingly convict her with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 30TH DAY OF APRIL, 2021.

A. N. ONGERI

JUDGE