



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL CASE NO. 11 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**EMMANUEL LEDIMA TOME.....ACCUSED**

**JUDGMENT**

The accused, **Emmanuel Ledima Tome** was charged with **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on **25<sup>th</sup> April, 2018** at unknown time of the night at Kaisagat village, Kaisagat location in Trans Nzoia County, the accused murdered **GK** (the deceased). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called a total of five (**5**) witnesses in its bid to establish the charge against the accused. The trial commenced before Chemitei J. The learned Judge heard four (**4**) prosecution witnesses before he was transferred from the station. This court took over the proceedings on **27<sup>th</sup> April, 2021** after the accused had indicated that he had no objection to the court doing so. The court heard one (**1**) prosecution witness before the prosecution closed its case.

What are the facts of the case according to prosecution witnesses?

The accused is the son of PW2 Margaret Ekiru. They are residents of Kaisagat village, within Kaisagat location which is in Kwanza Division of Trans Nzoia County. According to PW4 Timothy Nguite Tome, the accused's brother, they all reside in the same parcel of land but in different houses. Each son has constructed a house in the parcel of land. According to PW2, the accused and himself usually ate their meals at their mother's (PW2) house which was in the same parcel of land. PW1 lived with the deceased, the son of his daughter. The deceased was aged about nine (9) years at the time of the incident.

According to PW2 on 25<sup>th</sup> April, 2018 at about 6.00 pm, she saw the accused arrive at his house from work. The accused went into his house and got his bicycle. He passed by her house and inquired from her the whereabouts of the deceased. The deceased, who was in the house, answered to his call. The accused sent the deceased to the nearby shops to buy sugar and three 'mandazis' (buns). When the deceased returned with purchased items, the accused took them to PW2's house. He then gave one of the bun to the deceased. PW2 then requested the accused to eat the supper that she had prepared. The accused told her that he was satisfied. He had already eaten elsewhere.

PW2 recall that the accused again called the deceased and sent him to the shops to buy him bread. The deceased went to the shops. He did not return home. PW2 waited for him until 8.00 pm when she decided to go to sleep. She left the door unlocked just in case the deceased returned home later that night. PW2 testified that she slept until the following morning at about 6.30 am when she was woken up by a loud thud outside her house. She opened the door and went outside to investigate. She said that it was the accused who had fallen to the ground in front of the house. The accused told her that he had taken an acaricide (cattle dip solution) (which is poisonous). PW2 went to the accused's house and found a bottle of an acaricide. She realised that the accused may have told her the truth about ingesting the cattle dip. She called PW4 and requested him to rush the accused to hospital.

PW4 confirmed that upon being called by his mother and told to take the accused to hospital because he had taken poison, he put him on his motorcycle and took him to Kipsaina Health Centre. As they were waiting to be attended to at the Health Centre, his brother by the name Mashack arrived at the Health Centre and told him that the deceased had been found in a nearby farm, not too far away from their mother's kitchen. He was dead. PW2, testified that after the accused had been rushed to the hospital, she went to her kitchen and saw a sack which they used to store sawdust. It was blood stained. There was a hole which had been created on the wall of the kitchen. There were marks on the ground as if someone had dragged something through the hole on the wall. She heard a neighbour call her. The neighbour told her that body of the deceased had been found in a nearby farm.

The area assistant chief (Kaisagat) PW3 David Kosgei was informed. He in turn informed the police. The police led by PW5 CIP John Wesonga arrived at the scene. A scenes of crime officer also visited the scene. He took photographs which were produced in court as Prosecution's Exhibit No. 3. The certificate by the scenes of crime officer was produced as Prosecution's Exhibit No.4.

According to PW3 and PW5, when they visited the scene on the morning of 26<sup>th</sup> April, 2018, they saw the body of the deceased lying some

distance from the kitchen belonging to PW2. The head was covered with a sack. There were cut injuries on the head. PW3 was told that the accused had taken poison and had been rushed to the hospital. PW3 thought that the accused was feigning illness so as to give him an opportunity to escape from justice. He rushed to Kipsaina Health Centre when he arrested the accused. By that time, a mob had gathered at the hospital and wanted to lynch the accused. PW3 was able to intervene with the assistance of Kenya Police Reserve. They took the accused to the police station.

PW5 testified on what he saw at the scene of crime. He stated thus in his testimony:

**“We found the body of the deceased in a sukumawiki garden near a spring of water- the body was covered by a manila sack at the head stretching to the shoulder. When we removed it, saw multiple wounds to the head. Because it had rained, the body was covered with mud particularly the feet. There were marks-dragging marks from the scene - to a sukumawiki plantation to a maize plantation to the kitchen of the accused - the kitchen is attached to the main house but 2 metres from the door in a corner of the house - a hole had been dug in the corner of the kitchen - inside the kitchen there were fresh bloodstains both on the floor and a sack containing sawdust. Next to the sack, there was a hole - and a hoe stick containing bloodstains”.**

PW2 and PW3 both corroborated the testimony of PW5 in regards to what was found at the scene. They both saw the hoe with the hoe stick. The hoe and the hoe stick were produced into evidence as Prosecution’s Exhibit No. 1 and 2.

The body of the deceased was taken to Kitale Referral Hospital for Post Mortem. The post mortem was performed by PW1 Dr. Okumu Moses. He noted the following injuries in external examination. There was a deep cut wound on the head. On internal examination he observed a cut wound along the sagittal plane which caused intracerebral hemorrhage. The brain matter was exposed. He assessed the deceased’s cause of death to be severe head injury due to brain damage secondary to assault. The Post Mortem Report was produced as Prosecution’s Exhibit No. 1.

When the accused was put on his defence, he exercised his right of saying nothing in his defence. He then closed his defence without calling any witnesses.

In criminal cases, the burden of establishing the charge to the required standard of proof beyond any reasonable doubt is on the prosecution. This burden is always on the prosecution and never shifts to the accused. In the present case, the prosecution is required to establish the charge of **Murder** contrary to **Section 203** of the **Penal Code** i.e. that the accused killed the deceased with malice aforethought. The evidence adduced by the prosecution was essentially circumstantial. No direct evidence was adduced as to who saw the accused actually kill the deceased. However, circumstantial evidence was adduced by which the prosecution strove to prove that it was the accused and no one else who killed the deceased. Circumstantial evidence can be described as evidence by elimination. All other persons are excluded as the likely perpetrators of the offence save for the accused. Such evidence ties the accused to the scene of crime in such a manner that a reasonable man dispassionately evaluating the evidence reaches no other conclusion than that it was accused and no other person who committed the offence. As was held by the Court of Appeal in *Joan Chebichii Sewe -vs- Republic [2003] eKLR*:

***“In order to justify, on circumstantial evidence, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other 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”.***

In the present case, the prosecution relied on several pieces of evidence in its bid to establish the guilty of the accused. The first piece of evidence is that of opportunity. According to PW2, the mother of the accused and the grandmother of the deceased, on the material evening of 25<sup>th</sup> April, 2018, the accused was the last person who was seen with the deceased while he was still alive. PW2 testified that the accused sent the deceased twice to the shops to buy certain domestic provisions. The first time, the sugar and buns which the deceased had been sent to purchase was delivered to PW2’s house. The second time, which was late in the evening, the accused sent the deceased to buy him bread. The bread was to be delivered to the accused’s house. The deceased did not return to his grandmother’s house after being sent to the shops for the second time by the accused. The next time the deceased was found, he was dead.

It is the prosecution’s case that the court should draw an inference that after the deceased delivered the bread to the accused, he hit him on the head with the piece of stick that is fixed on the hoe as a handle. The second piece of evidence is the bloodstains that were found in the kitchen. From the testimonies of PW2, PW3 and PW5, it was apparent that the deceased was killed in the kitchen. There was bloodstains on the floor and on the gunny sack that contained saw dust. The hoe stick, which was blood stained, was also found in the kitchen. A corner in the mud walled kitchen was knocked down - a hole was created upon which there were drag marks which was evidence that the body of the deceased had been dragged through it to the place, a short distance away, where the deceased was eventually found. Because it had rained the previous night, according to the prosecution, the deceased’s body was muddy and bore the hallmark of having been dragged from the kitchen to the place the body was found.

It was further the prosecution’s case that the only people who had access to the kitchen was PW2, PW4, the accused and the deceased. Since PW4 and PW2 could account for their whereabouts during the material time, evidence irresistibly pointed to the accused as the only person who killed the deceased. The photographs taken by the scenes of crime officer clearly showed that the door to the kitchen was not broken into in order for the person who killed the deceased to access the kitchen. The person who accessed and gained entry to the kitchen was a resident of the compound within which the kitchen is situate. In reliance to the circumstantial evidence adduced, it was the prosecution’s case that the only person who could access the kitchen, and indeed was able to gain entry into the kitchen to the exclusion of any other else to commit the crime was the accused.

A further circumstantial evidence that the prosecution adduced is the accused conduct before the body of the deceased was found. According

to PW2 and PW4, the accused went to the house of his mother (PW2) at about 6.00 am and fell down at her door steps. This woke up PW2. When she went to investigate, she found the accused lying prone at her doorstep. The accused told PW2 that he had taken poison. PW2 called PW4, the accused's brother. She requested him to rush the accused to hospital. PW4 went to the house of the accused and indeed found a bottle of an acaricide. PW3, the area Assistant Chief, at the time thought that the accused feigning illness. He followed him to local health centre when the accused was waiting to be attended to. He had him arrested and taken to Endebess police station.

PW5 testified that at the police station, they realised that the accused's medical condition was deteriorating - they took him to hospital where he was treated before being discharged. A mental assessment report was prepared. The accused was established to be mentally fit to stand trial. It is the prosecution's case that the accused's behaviour soon after the death of the deceased was consistent with the behaviour of a person with a guilty conscience. Why would he attempt to commit suicide if he do not kill the deceased?

The accused had the opportunity, at least under **Section 111** of the **Evidence Act**, to explain away the evidence that circumstantially connected him with the death of the deceased. He failed to avail himself to this opportunity. By requiring the accused to give an explanation regarding matters that are uniquely within his knowledge, the court is not shifting the burden of proof to the accused; rather it requires the accused to give an explanation that will controvert the evidence that has been adduced against him by the prosecution. As it were, the entire evidence adduced by the prosecution witnesses connecting the accused to the killing of the deceased was not challenged.

On evaluation of the entire evidence adduced by the prosecution witnesses this court is persuaded that the said evidence is cogent, truthful and connects the accused to the killing of the deceased. The circumstantial evidence adduced by the prosecution points to the accused and no one else as the person who committed the offence. He is the one who killed the deceased. The evidence irresistibly points at the accused as the one who killed the deceased. He was the last person that was seen with the deceased when he was alive. This court therefore holds that the prosecution established, to the required standard of proof beyond any reasonable doubt that it was the accused that killed the deceased.

The issue that remains for determination is the question where the accused killed the deceased with malice aforethought. From the evidence adduced by the prosecution, it cannot be clearly discerned what was the motive that cause the accused to kill the deceased. Several theories were advanced by the prosecution. However, the most compelling one is the one related to the evidence of PW4 who testified that the accused had disagreed with his wife who had two weeks prior to the incident left with their child. The deceased used to sleep either with his grandmother or with the accused. It could be that the accused killed the deceased to spite his wife or that he could not cope with the fact that his wife had left him. But what is clear is that from the nature of the blows he hit the deceased on his head, he intended to kill him if not permanently maim him.

Under **Section 206 (a)** of the **Penal Code** any person who inflicts an injury to any person in the course of committing a criminal offence as a result of which the victim dies will have caused the death of the victim with malice aforethought. The facts of this case clearly establishes, to the required standard of proof beyond any reasonable doubt that the accused killed the deceased with malice aforethought.

In the premises therefore, this court holds that the prosecution established the charge of **Murder** contrary to **Section 203** of the **Penal Code** as against the accused to the required standard of proof beyond any reasonable doubt. The accused is accordingly found guilty and convicted of the offence.

**DATED AT KITALE THIS 18TH DAY OF AUGUST, 2021.**

**L. KIMARU**

**JUDGE**

**18/8/2021**

Coram:

Before - Kimaru, Judge

Court Assistant - Kirong

Wanyama for the accused

Omooria for the State

**WANYAMA**

I have not been able to get any mitigation from the client I leave it to court.

**ACCUSED**

I have got nothing to say.

**OMOORIA**

I urge the court to find that the offence committed is a relatively serious one. He assaulted himself without any justifiable reason. The accused did not offer any defence. The accused should face the death penalty. If the court applies the Muruatetu decision the sentence should not be less than thirty five (35) years.

**COURT**

I have considered the sentiments of the prosecution. The accused has chosen not to offer any mitigation. The crime committed was heinous. An innocent child lost his life. In the circumstances of this case, this court sentence the accused to suffer death in a manner prescribed by the law. Right of Appeal explained.

Judgment read and delivered in court, mitigation and sentence on **18<sup>th</sup>** day of **August, 2021**.

**L. KIMARU**

**JUDGE**