



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA.

CRIMINAL CASE NO. 24 OF 2018.

STATE.....PROSECUTOR

VERSUS

IKK.....ACCUSED

JUDGMENT

The Accused **IKK** was charged with offence of murder contrary to Section 204 of the Penal Code. The particulars of the offence are that on the 15th June 2018 in Bungoma West Sub-County within Bungoma County murdered **LNK**.

The prosecution case is that the deceased who was aged 7 years old was a daughter of the accused. He was staying with the deceased **LNK** and another child **J** alone in their house.

On 15.6.2018 at around 4.00p.m **PW1 RNN** sister in law was in her house when the deceased **LNK** and **J** came and told her accused had sent them to her for lunch. While they were still there the accused called them and they went. After a short while the deceased's mother **JM** came and they went to the house of accused. On arrival they found the deceased lying down on a mattress. They observed her and saw she had excrement and whitish discharge from her private parts. The accused was not present. They screamed and people came. The deceased was taken to Cheptais hospital where she was pronounced dead.

PW2 JM the mother of the deceased had left the deceased and another child at home and went to a funeral. When she came back together with **PW1** went to the house of accused who had called the children where they found the deceased lying on a mattress. On observing her she saw deceased had a cut on the toes, had excreted on herself and had scratch marks on the neck. They took her to hospital where she was pronounced dead. The accused escaped to Nairobi on 9.8.2018. She went to Nairobi where she saw the accused and raised the alarm. Accused ran to Muoroto police station where he was arrested.

PW4 DR. NYONGESA KERRE produced a post mortem report prepared by Dr. Wafula who performed a post -mortem on 20.6.2018. He found the deceased had bruises on the eye; bruises on left side of neck, lacerations on right foot and big toe; she had bloody fluid on her lungs, bleeding in both lungs. She also had tears of the hymen and indication of sexual intercourse. He formed opinion that cause of death was due to

Shortage of breath due to strangulation.

PW9 NO. 219338 JOSEPH BAHATI KENGA assistant commissioner of police recorded a confession statement from the accused on 12.8.2018. In the confession statement which produced as Exhibit 5 in which he stated in details how he had called the deceased to his room, grabbed her and when she wanted to shout squeezed her neck and suffocated her. He then defiled her and ran away.

The accused upon being put on his defence decided to give sworn evidence. In his sworn evidence the accused testified that on 15.6.2018 he went to work and later went to drink chang'aa. At 4.00p.m. he went home and asked A'S wife for food. She did not respond. He sent the deceased to collect the food. She came back without food. He then hit her. He then left for Nairobi where he stayed until he was arrested. He stated that he does not know if he defiled her. He admitted he recorded a confession with the police which was voluntary.

The accused is charged with the offence of murder. In a charge of murder the prosecution must prove:

1. *The fact and cause of death.*
2. *Malice aforethought.*

3. That the accused is the person who inflicted the injuries that caused the death of the deceased.

PW4 DR. NYONGESA KERRE who produced a post-mortem report prepared by Dr. Wafula testified that upon post mortem examination, the deceased has scratch marks on the neck, lacerations on foot. Upon opening the body he found that there were bloody fluid on the bronchi and blue coloration of the breathing system. He formed the cause of death to be due to shortness of breath due to strangling.

The cause of death therefore is established to be due to strangling. The accused when placed on his defence explained the sequence of... leading to the death of the deceased. The accused stated that after sending the deceased to get food from the wife of A, she came back to inform him that there was no food. He got angry and hit her. He testified that he cannot remember where he hit her or the weapon used. However, in his confession statement which he admits he gave voluntary.

I wish to recall and stat that on 15th June 2018 I left my house and went to Busereri in Uganda. I went there just to take alcohol and I came back at around 3.00 p.m. I came direct to the house and called LNK (the deceased) to my house because I wanted to send her to go and bring me food from my cousin A within the same homestead. She came alone and I sent her and she went. She came back after a short while and told me that there was no food till evening because whatever was prepared had all been eaten. I called her to where I was and she came. When she was near me I grabbed her by the neck. As she wanted to shout, I grabbed her mouth to prevent her from shouting and I squeezed her neck and suffocated her. I held her down while holding her mouth and neck till she died. That is when she passed feases and she was still. I removed her long trouser, then the pant. I forced my penis into her vagina and penetrated her. I then lost my erection because of the human feases and I stopped and covered her body with a blanket. I then zipped up and left. I decided to run away because what I had done was bad and I feared for my life. When I was doing all this, the deceased's mother was not at home, she had gone to a funeral at the neighbouring home I went on foot up to Kitale. At Kitale I met Kamau whom I used to work with in a bus company called mwanake and he gave me a lift to Nairobi the same evening.

From the above evident, it is clear that the accused admits that he is the last person with the deceased, and explains in details how he inflicted the injuries which caused the death of the deceased. The issue of identification of accused as the person who inflicted the injuries was therefore proved.

The last ingredient the prosecution has to prove is that the accused had a malice aforethought.

There is no doubt that the accused deliberately inflicted the injuries on the deceased. The fact of strangling or squeezing the deceased to cause injuries to the neck point is a deliberate act of strangling with the intention of suffocating the deceased of oxygen with intended result of killing her. The acts of the accused, all combined demonstrate a clear malice aforethought.

The accused defence stated that on this material date he had drunk chang'aa and therefore drunk and did not know what he was doing.

That cannot be true. He knew he was feeling hungry, he called the deceased, sent her to collect food for him. She came back and informed him there was no food. He held her to the room; hit her, strangled her, at tempted to defile her; held her mouth; and when he noted she was dead he walked on foot to Kitale. He then boarded a vehicle to Nairobi because he feared for his life. Those cannot be actions of a person who is drunk as not to know what he was doing. I therefore do not find the defence that he was drunk plausible and reject it.

Upon considering all the evidences, I am satisfied that the prosecution has established the charge of murder against the accused beyond any reasonable doubt. I therefore find accused IKK guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Dated and Delivered at Bungoma this **30th** day of **January, 2020.**

S.N RIECHI

JUDGE