



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**MURDER CASE NO. 17 OF 2014**

**DIRECTOR OF PUBLIC PROSECUTION.....REPUBLIC**

**– VS –**

**SWW.....ACCUSED**

**JUDGEMENT**

1. The accused person was charged with murder contrary to **Section 203 as read with 204 of the Penal Code.**
2. The particulars of the offence were that on the 2<sup>nd</sup> day of August 2014 at Karimani Village in Kirinyaga West District within Kirinyaga County, he unlawfully murdered FKW his 7 month old son.
3. He denied the charges and the prosecution summoned a total of ten witnesses in support of its case while the defence called only the accused person.
4. The facts of this case are that the accused in this case was the father of the deceased in this case who at the time of his death was a minor aged under One year old, that is Seven months old. On the material day the mother of the deceased (PW-2-), left the child lying outside the house. The accused was outside ferrying manure in sacks just outside the house. On her return, PW-2- found the deceased lying down on one side with deep cuts on the neck and head. She raised an alarm. The accused stood nearby staring at her. The accused had shown hostility to her and the child during her pregnancy. The matter was reported to the police who visited the scene and removed the body to Karatina Mortuary. A postmortem was conducted by Dr. Benson Muchiri, PW-9-. In his opinion, the cause of death was hemorrhagic shock secondary to a cut wound on the neck with a sharp object. He produced the postmortem form as exhibit -3-.
5. The accused was rescued from his home by members of community policing as there was a mob that was baying for his blood. He was later on 7/8/14 escorted to Embu Level -5- hospital where he was examined by Doctor Thuo (PW-1-) a consultant Psychiatrist who found that the accused had a mental illness which required in-patient treatment in a maximum security hospital (Mathari). The Doctor concluded that the accused was not mentally fit to stand trial.
6. Upon being arraigned in court, the Judge ordered that he be escorted to Mathari Mental Hospital for treatment. Later on 16/10/2014, Doctor Ngugi Gatere, consultant Psychiatrist based at Mathari National and Teaching Hospital sent a report confirming that the accused was fit to plead and face his trial.
7. Thereafter the accused was produced in court on 13/11/2014 and he was formally. He pleaded not guilty. The trial proceeded and the prosecution called witness.

**The Evidence**

8. PW1 Dr. Joseph Thuo a psychiatrist at Embu level 5 Hospital, testified that on 7.8.2014 the three accused persons were brought to the hospital by police officers through the OCS Kirinyaga, for mental assessment, he submitted that the accused person has signs of mental illness. He submitted the report as PEXH 1.
9. PW2 was the wife of the accused person, MN who testified that on the fateful day she had left the accused in the compound and the deceased child who was lying outside the house. The accused person was engaged in ferrying manure sacks with his brother just nearby the house. She testified that when she returned home with the other children she found her son's body lying down on one side with deep cuts on the neck and head. She screamed for help and neighbours came by including the brother of the accused. She testified that the accused was standing by staring at her. She testified that the accused had shown hostility to her during her pregnancy and towards the child.

10. PW3 JMW was the brother to the accused person who was present with the accused ferrying manure sacks near his home on the fateful day. He testified that the accused person had at some point left him and gone towards his home. Upon returning he noticed he had blood stained hands. Just as he was inquiring on what had happened to him, he heard the scream from PW2. He rushed to her and found the deceased child slaughtered by the neck. He then rushed back to the accused person fearing that he might harm himself or flee. He also testified that they searched the accused household with the police and found a wet panga. He also witnessed the postmortem of the deceased child.

11. PW4 Peter Mwangi Murimi testified that he had been told to rush home as there was a fight. He found the accused person being beaten by a mob for killing his son. He restrained them and accompanied the accused person to the police station at Baricho.

12. PW5 Eliud Peter Mugweru, testified that about 10:30 am while at home he heard screams at the accused persons boma, he found a mob beating him, he called the community policing officer Maina Muriuki and rescued the accused person. He witnessed the deceased body with a neck injury half way cut.

13. PW6 Stephen Maina Muriuki the community policing officer testified that upon receiving the call from PW5 he with Nahashon Maina went to the home of the accused person's home and rescued him from the mob facilitated his transportation to the police station.

14. PW7 CPL No.63637 Richard Mutai testified that the accused person was brought to the station at around 13:40hrs by PW6 and PW4. He was placed in the cell and later taken for treatment. He testified that he visited the scene where he saw the body of the deceased lying on a sack outside the home. The baby had a deep cut on one side of the neck and had bled profusely, he also found a panga about 2 metres from the body. The scenes of crimes personnel failed to come as they had no means of transport from Embu. He therefore took a rough sketch pan of the scene. He produced it as exhibit 3. They moved the body to Karatina Mortuary.

15. PW8 Dr. Stephen Wangombe Nderitu adduced the postmortem report conducted by Dr. Stanley Wahome as the doctor was transferred to Nairobi and he was familiar with his work. The cause of death was hemorrhagic shock secondary to the wound on the neck. The report was submitted as exhibit 3.

16. PW9 Dr. Benson Muchiri, the medical superintendent at the Nyeri Sub county office. He adduced the postmortem report conducted by Dr. Stanley Wahome on 7.8.14.

17. PW10- CIP No.219925 Linus Shimo , the OCS Baricho Police station. He testified that on 2.8.14 the community policing officer arrived at the station with the accused person. He then visited the scene, the scene was photographed, the body viewed, and sent to Karatina mortuary. He later escorted the accused person for mental assessment, where it was determined he was not fit to stand trial.

18. PW11 James Muthie Kiangara testified that he identified the body of the deceased, his nephew. He was also present during the postmortem.

### **The Defence Case**

19. DW1 Stephen Wachira testified he also heard screams from the home and that it was his wife who was with the deceased child. He testified he headed back home to find out, a large crowd then came towards him and started beating him for killing his child. He lost consciousness and was then rescued by the community policing officer, he was placed at the station for three days. He denied killing his son. He denied the testimony of PW3 and claimed he had an interest in his land.

### **ANALYSIS AND FINDINGS**

**(a) the death of the deceased occurred;**

**(b) that the accused committed the unlawful act which caused the death of the deceased; and**

**(c) that the accused had malice aforethought.**

#### **(a) The death of the deceased**

The death of the deceased has been proved by the PW8 Dr. Stephen Wangombe Nderitu and PW9 Dr. Benson Muchiri that produced the postmortem form PEXH. 3 that was conducted by Dr. Stanley Wahome.

The cause of death was confirmed to be confirmed that the deceased as a result of *hemorrhagic shock secondary to the wound on the neck*.

#### **(b) Proof that accused persons committed the unlawful act which caused the death of the deceased (actus reus)**

There is no eye witness to the actus reus. The evidence on record is circumstantial evidence from the testimony of PW2 and PW3 that were in close proximity as at the time of death. PW3 witnessed the accused with blood stains shortly before the body of the deceased was discovered, while PW2 testified she left the minor with his father/accused person. The murder weapon was presumed to be a wet panga that was found in the homestead, however it had no blood stains and there was no forensic evidence to ascertain it was the murder weapon.

21. The accused person denies the allegation that he caused the unlawful death of FKW The defence of the accused person was mere denial,

he adduced no evidence that would accord him reasonable doubt, that he did not commit the offence.

22. Circumstantial evidence has been held to be as sufficient as direct evidence see **Mombasa Criminal Appeal No. 84 of 2012 Erick Odhiambo Okumu vs Republic (2015) eKLR** it was held that

***“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence.”***

In the Court of Appeal **MUSILI TULO V. REPUBLIC (2014) Eklr** it was held that ***“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”*** The court of appeal set out the threshold for circumstantial evidence as follows:

***i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;***

***iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***

23. It also considered a further principle set out in the case of **Musoke v. R [1958] EA 715** citing with approval **Teper v. R [1952] AL 480**:

***“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”***

24. The defence gave reference to the case of **SAWE –V- REP [2003] KLR 364** the Court of Appeal held:

***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 hypotheses than that of his guilt.***

25. The circumstantial evidence as regards the physical state of the deceased freshly killed and trembling, the scene of the crime, the unaccounted moments of which the accused was away from his brother PW3 just before the body of the deceased was discovered on the fateful day unerringly point to the guilt of the accused person. This cannot be deemed as mere suspicion as there is no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused person.

26. From the foregoing, I find that the Prosecution has proved beyond reasonable doubt as regards the identification of the accused person as the perpetrator of the offence, that he did indeed commit the unlawful act which caused the death of the deceased which constitutes the ‘*actus reus*’ of the offence.

### **(c) Proof that accused persons had malice afterthought**

PW1 testified that the accused person suffered from mental illness, as per his report PEXH 1 dated 7.8.2014. However, a subsequent report from Dr. Ngugi Gatere, a consultant psychiatrist, dated 16.10.2014, deemed the accused person as having normal mental status, and fit to stand trial.

The issue of mens rea therefore comes up, the accused person was not drunk when he committed the offence. Malice aforethought in murder is the intention to kill or cause grievous harm as set out in **Section 206 Penal Code**.

The prosecution relied on the Court of Appeal case of **Nzuki vs Republic [1993] KLR 171** and the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63**: That inferred malice aforethought based on the following factors:

**(a) The nature of the weapon used.**

**(b) The part of the body targeted**

**(c) The manner of killing or in which the weapon is used**

**(d) The conduct of the accused before, during and after the attack**

27. PW3 testified that the accused had previously mentioned he intended to kill someone a few months before the incident that led to this charge. Nothing indicates that the accused person had the intention to kill or cause grievous harm to his son. According to the postmortem report the deceased was cut on the neck and as a result of the excessive bleeding he suffered hemorrhagic shock.

28. From the testimony of PW2 and PW3 when the body of the deceased was discovered the accused just stood there indifferent to the incident, his conduct and demeanor do not seem to be that of a caring father who just lost his son. The manner in which the child was killed was also inhumane hacked/slaughtered to death. These elements infer the intention to cause grievous harm and death. The accused was not

mentally incapacitated at the time of committing the offence. It is therefore evident that the accused person had malice aforethought and had the intention to cause grievous harm to the deceased.

29. The prosecution's evidence has effectively dislodged the defence offered by the accused person. The element of malice aforethought has been established in terms of **Section 206(b) of the Penal Code.**

**FINDING**

30. Consequently, for the foregoing reasons the prosecution has proven its case against the accused person beyond reasonable doubt. I find accused person guilty of the offence of murder and I convict him.

**Dated at Kerugoya this 13<sup>th</sup> August 2020.**

**L. W. GITARI**

**JUDGE**