



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO 4 OF 2016 (MURDER)

REPUBLIC.....PROSECUTION

VERSUS

MOO.....ACCUSED

JUDGMENT

1. MOO hereinafter referred to as the accused is charged with the offence of murder contrary section 203 as read with section 204 of the Penal Code. The particulars of the offence are that; On the night of 21st and 22nd January 2016 at [particulars withheld] in Kisii South District in the Republic of Kenya the accused murdered VN.

2. The accused pleaded not guilty. The prosecution called 5 witnesses.

3. Pw1 MM testified that on the night of the 21/1/2016 they had a disagreement, the accused wanted to kill her with a knife she ran away and spent the night in her mother in-law's kitchen. They disagreed because the accused was beating the child because of urinating on herself. She left the baby with the accused in the house. On the morning of 22/1/2016 her mother called her to go check on the child. When she went to her house the accused told her that the child was not talking nor was she breathing. On checking the child she found the child's clothes had been changed and she was dead. The child neck had been squeezed and she had been defiled through the anus. Her screams attracted people to the scene. The deceased was not the accused's child.

4. Pw2 PMO testified that on the 22/1/2016 she woke up at 6am and found M standing outside her door. M told her that she had not slept in her house and that she had slept in her kitchen. She told M that she had just closed her kitchen door and that she had just opened it. M told her that they had disagreed with M. She asked M to go back to her house. Then she heard screams and ongoing to the place she found the child in M hand. She asked her what they had done to the child. The child was dead. M asked her to ask M and M told her to ask M. People came M was beaten a lot.

5. Pw3 Doctor Odour Omondi produced the post mortem report. The date and time of death is indicated as the night of 21st and 22nd January 2016. The deceased was a two and half months. She had multiple bruises on the face, scalp and hands. The anus was torn and lacerated and was open body stained with mud, she had bruises across the neck. On the respiratory system she had a crushed thyroid cartilage, thyroid gland and traches. On the cardio vascular system she had edema around the carotid arteries and thyroid gland. On the digestive system she had a lacerated and torn anus, this could have been a forceful penetration into the anus by a blunt object. On the head she had bruises on the face and scalp about 2cm long. The cause of death was asphyxia due to strangulation.

6. Pw4 Inspector Leyrice Ligaka Mukusi a scenes of crime officer testified that on the 22/1/206 at around 9.30am together with some officers from Gesonso police station they went to the scene and found 2 bodies on the ground, one was of a male adult and the other a child. The male body had several injuries he took photographs which he produced in court as exhibits 2 a, b, c and d.

7. Pw5 No. 87827 P.C Joshua Mwau testified that on the 22/1/2016 at 7.30am together with other officers after receiving a report of murder they went to the scene and found a crowd of people. The accused was lying beside the road and the deceased was beside him. The accused had injuries her clothes were torn and blood stained. They interviewed his wife. They escorted the accused to hospital and took the body of the deceased to the mortuary, later the accused was charged with murder.

8. The accused elected to give an unsworn statement in his defence. He did not call any witnesses. He testified as follows; on the 21/1/2016 he was at work at [particulars withheld]. On the 22/1/2016 he was called by his wife MM that the child was sick and that she should go back home to take the child to hospital. On reaching the home he knocked the door and on entering the house his wife began screaming that he had killed the child. He did not kill the child. He found three motor bike persons outside his house. They said that the child should be taken out, he was in pain he carried the child outside. On going out with the child one of them hit him on the head with a chuma and he fell with the child on firewood which was outside the house. He was tied and taken to the road and he was beaten. The child was lying on the road.

9. The accused's lawyer choose to leave the matter to court to decide on the evidence adduced. The prosecution relied on the evidence on record.

10. The accused is charged with the offence of murder. Section 203 defines the offence of murder and requires proof of the following if the offence of murder is to be established, malice aforethought on the part of the accused, death of the deceased, the cause of the death and an unlawful act or omission on the part of the accused resulting in the death of the deceased. **Section 206 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.

11. The first issue I will consider is the cause of death of the deceased. The post mortem report indicated that the deceased's cause of death was asphyxia due to strangulation. The doctor who did the post mortem noted that the deceased had a crushed thyroid cartilage, there was edema around the carotid arteries and thyroid gland. She also had a torn anus and lacerations. The deceased died due to asphyxia due to strangulation.

12. The next issue is whether the accused caused the death of the deceased. Pw1's evidence is that on the night of 21/1/2016 she had a disagreement with the accused and she left her house when the accused threatened her with a knife. She left the child in their house with the accused and on returning the next day she found the child dead on the bed. The accused raised an alibi in his defence. He did not talk of the events of 21st night. His defence was that Pw1 called him the next morning and informed him that the child was unwell. In the case of **Kiarie vs Republic [1984] KLR** the Court of Appeal held that:-

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable”.

13. I have to weigh the alibi against the evidence of the prosecution. I have compared the alibi by the accused and the evidence by the prosecution. In my view the accused is not telling the court the truth. Pw1 testified that she left the child in the house with the accused. There was no one else in the house when she left. The next day in the morning she found the accused in the house together with the child and the child was dead. She even gave details of accused's conduct on her return to their house. She noted that the child has been strangled and had been defiled through the anus. Her evidence was corroborated by doctor's evidence who did the post-mortem. The child died due to strangulation and the child had been penetrated through her anus. The accused's evidence that he was called the next day was not put to Pw1 doing cross examination, it was an afterthought. I am persuaded that Pw1 left the child with the accused after their disagreement and that she did not spend the night in her house on the night of 21st and 22nd January 2016. The accused was the only person with the child in the house on the said night. I find that the accused strangled the deceased. Pw2 evidence indicates that the accused was at his home.

14. The next issue is whether there was malice afterthought. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a) to (e) is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that *an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.* The accused on the night of 21st had a fight with Pw1 over the child and she ran away when he wanted to stab her with a knife. The child had urinated and he beat her up. He was not happy with the child. The child was molested from the medical evidence was strangled and died due to strangulation, the accused by his actions and conduct demonstrated that he had no good intentions against the child. I find that he had the motive by his action to get rid of the child and did so when he was left with her on the night of 21st and 22nd January 2016. He strangled the child to death. I find that the prosecution has proved malice aforethought on the part of the accused and find him guilty of the offence of murder and convict him accordingly.

Dated signed and delivered at Kisii this 31st day of January 2019.

R.E.OUGO

JUDGE

In the presence;

Accused In person

Mr. Nyangacha for the Accused person

Mr.Otieno for the State/Prosecution.

Rael Court clerk