



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 16 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

BENARD OLUOCH OKELLO.....ACCUSED

JUDGMENT

1. **Benard Oluoch Okello** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 17<sup>th</sup> day of May 2015, at **Yakomatt** area, in **Township** Location of **Busia** County, murdered **Eunice Adhiambo Juma**.
3. The prosecution case was that on the fateful day the accused fatally injured the deceased in their house and left the body there until when some neighbours discovered it and reported to the police.
4. The accused in his defence contended that his wife returned home while drunk. When he asked her about it, she attempted to attack him but he dodged her. She fell down on the floor. He left with the children to buy them food. Later on, on returning home, he learnt that she had passed away.
5. The issues for determination are:
  - a) Whether the accused was the one who inflicted the fatal injuries on the deceased;
  - b) And if so, whether there was any justification; and
  - c) Whether the offence of murder was established.
6. The evidence that implicated the accused to the offence is that of his four years old daughter. She testified that she witnessed her father assaulting her mother using a plastic chair in their living room. She further said that her brother C did not witness the incident for he was in the bedroom.
7. The evidence of children of tender years requires corroboration before a conviction can be founded on it. Section 124 of the Evidence Act, CAP. 80 laws of Kenya provides:

**Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**

On the other hand, section 19 (1) of the Oaths and Statutory Declarations Act (Cap. 15) provides:

**Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.**

A child of tender years was defined by the Court of Appeal in **Kibageny vs. Republic [1959] E.A. 92**, as follows:

**There is no definition in the oaths and Statutory Declarations Ordinance of the expression ‘Child of tender years’ for the purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age of under fourteen years.**

In the instant case, the evidence of PW1 and PW2 is therefore evidence of tender children which will require corroboration before the court can act on it. The Court of Appeal in the case of **Onserio vs. Republic [1985] KLR 618**, it was held:

**An accused can only be convicted on the evidence of a child of tender years if corroborated by other material evidence in support thereof implicating him as set out in section 124 of the Evidence Act.**

I will therefore endeavour to find whether the evidence of these two children is corroborated by some material evidence on record.

8. CO (PW2) was attracted from the bedroom by the cries of his little sister who said that their father had beaten their mother. When he went to the sitting room, she found their mother on the floor. She was not able to speak. He saw some blood on the floor. His father who was outside the house at the time, called him and asked him to call his uncle Paul and tell him to go and pick his sister and take her to the ward or to the mortuary. He did as he was told. Unfortunately, the investigating officer did not record the statement of uncle Paul for him to be called as a witness.

9. Dr. Hillary Kiplagat (PW6) produced the post mortem form completed by Dr. Kubuta who performed the post mortem on the body of the deceased herein. The doctor found a big penetrating wound on the left lateral peri-orbital area. The injury extended to the brain substance.

10. Though the accused contended that she fell down when he dodged her when she attempted to beat him, the medical evidence corroborate the evidence of the two minors on the nature of the injuries the deceased sustained and the only inference to make is that it was the accused who inflicted the said injuries.

11. The evidence of CO (PW2) was that their parents quarreled often though he had not previously witnessed any physical confrontation. For an offence of murder to be established, the prosecution had a duty to prove malice aforethought. Section 206 of the Penal Code provides:

***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.***

In the instant case the prosecution did not discharge its onus. The offence of murder was not therefore proved to the required standards.

12. The evidence on record however proved beyond any reasonable doubts the offence of manslaughter contrary to section 202 of the Penal Code. I find the accused guilty of this lesser offence and accordingly convict him.

**DELIVERED and SIGNED at BUSIA this 30<sup>th</sup> day of April, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**