



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 29 OF 2015

REPUBLIC PROSECUTOR

VERSES

JOHN SIMIYU WASIKE.....ACCUSED

JUDGEMENT

1. The accused herein is charged with **the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 7th day of October, 2015 within Trans Nzoia County murdered DD.**

2. The accused denied the same and the prosecution called a set of witnesses to establish its case against the accused. At the end of it the accused was placed on his defence and he gave unsworn evidence but did not call any witnesses.

3. It is appropriate at this juncture to summarise the evidence as presented and thereafter analyse the same to determine whether indeed the same was proved beyond doubt.

4. **PW1 Jackline Chematui** testified that she was the wife to the accused and mother of the deceased. She said that on the material day the accused sent the deceased to buy credit of Kshs. 10, popularly called 'Bamba 10" from the kiosk which was nearby. The child apparently lost the money and did not buy the same. When he came back the accused told him on the room upside down and beat him thoroughly. The rope snapped and the deceased fell down and hit his head and died. The deceased was kept by the accused in the room for 3 days.

5. On the 3rd day the witness went to the posho mill and when she came back she did not find the body. She said that she could not report as the accused threatened her. He said that the accused had killed other children before and their bodies were not recovered.

6. The deceased body was equally not recovered. She told the neighbours including one Margaret who also tried to look for the child in vain. She said that the deceased was their first born child. The police came and were equally unable to trace the body.

7. **PW 2 Margaret Wanjiku Maina** testified that she knows the accused who was her neighbour as well as PW1 whom they had stayed together for over 5 years. She said that his house on the 7th October, 2015 where PW1 told her about the incident. She then went to the neighbour and told them what she had been told.

8. She said that on 10th October, 2015 there was women merry go round where they decided to confront the accused. She said that they were also aware that the accused other child had died and skeleton found in the land when the same was ploughed but nothing was done to the accused. They reported the matter to the village elder where the same was escalated to the police and led to his arrest. She said that she knew the deceased for over 4 years as he was staying with his parents and that she had not seen him since then. She further said that the deceased was schooling with her grant children.

9. **PW3 Margret Nyambura Njoro** told the court that she was a peace keeper and pw 1 was her neighbour and she knew the deceased as well and the accused. She says that on the 7th October, 2015 the deceased came to her kiosk to buy airtime credit called bamba 10 which she did not have. The child went back home and later PW2 came and told her what had happened.

10. She decided to go to the house but did not see the body and she met pw1 who told her what had transpired. They met in the women merry go round on the 10th October, 2015 where they decided to take action. She said that the deceased would come with the father to her shop to buy items.

11. **PW4 Nathan Wanjala Barabara** is the father to PW1. He said that the accused eloped with PW1 while she was still young and all efforts to convince her to come home were fruitless. Her brothers attempted to do so were repulsed by the accused who seriously assaulted them and it led to the death of one of his sons as a result of the injuries he sustained. He said that he received a phone call from one of his neighbours concerning the incident but generally he did not know how the incident occurred.

12. **PW 5 PETER BARABARA** is the brother to pw1. He generally narrated how the accused eloped with PW1 and his attempt to bring her back was met with resistance from the accused who assaulted him with his late brother who died as a result of the said injuries. He did not however get to know the deceased.

13. When put on his defence as earlier stated the accused gave unsworn evidence and stated that he was a polygamous man. He said that when he came back from his timber splitting business on the 6th October, 2015 he was told that there were many police officers at his home whom he accompanied to the local AP post. They questioned him concerning the deceased and he said that he had no idea of where he was. He was then charged with the offence which he continued to deny.

ANALYSIS AND DETERMINATION

14. The court has carefully read the proceedings herein as well as the rival submissions by counsel for the parties. This is indeed one of the rear matters where the accused is charged with the offence of murder and there was no prove of death, that is, by the production of certificate of death. The same does not in my view fetter the ability of this court to make a determination.

15. The evidence adduced by the deceased mother as well as that of PW2 and PW3 corroborated each other in some way. The evidence by PW1 explained the fact that the child had been sent by the accused to purchase airtime card for Ksh.10 popularly called bamba 10. That was explained also by PW3 the owner of the shop who saw the child and was unable to sell to him for she did not have it.

16. The airtime. The accused according to the wife tied the child to the rafters of the house and began disciplining him. In the process the rope snapped and the child fell to the ground and as a result of the injuries died.

17. What was shocking however is the fact that instead of taking him to the hospital or seeking treatment of the child the accused decided to keep the body in the house for 3 days and thereafter disposed it to a place known to him alone.

18. The big question is whether the accused was present at the scene that fateful day. I have read and heard the evidence of PW1 as well as his unsworn evidence during the defence case. There is no doubt in my mind that the accused was not at the scene that day. If he had not sent the child to buy the airtime, PW3 would not have seen him in her shop. The only item he went to purchase was the airtime credit and nothing else.

19. The child was well known to all the witnesses and none of them since then has ever seen the child. The above evidence then lent credence to the irresistible conclusion that the deceased after the child died disposed the body to a place only known to him. This must have occurred while PW1 had gone to the posho mill a fact attested to by PW2.

20. In the premises, and although the body was not traced the accused in particular owes an explanation to where he disposed it to. This burden of prove is what was anticipated by parliament in enacting section 111(1) of the Evidence Act in which the burden essentially shifted to an accused person to explain the existence of the circumstances.

21. The accused in his unsworn evidence which was not of much probative value did not deny that he was home on the material day. He only explained what happened on the day he was arrested but did not deny the assertion by his wife that he assaulted the deceased. Neither did he deny the other allegations that he killed and secretly disposed off the other 2 children as alleged by the wife and PW2 and PW3.

22. Further the violent tendency of the accused was explained by his father in law as well as the brother in law in which it was alleged that he assaulted them and one of the boys died. There was no much empirical evidence but in my view and considering the evidence of his wife the accused appeared to be a violent man generally.

23. In *Sawe VS. Republic (2003)KLR 364*, the Court of Appeal in its famous quotes stated that,

“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 of guilt...”

24. Circumstantially therefore and taking into consideration all the facts of this case the deceased met his death at the hands of the accused his father who was I presume attempting to discipline him in a most cruel manner. The worst thing was for the accused failure to take him for treatment but to stay with the body in the house for three days and thereafter disposed it without the knowledge of his stressed wife and the neighbours.

25. The conclusion of the fact that he died is buttressed by the fact that nobody including the mother or the neighbours has ever seen the child dead or alive.

26. In the premises I hold that the case has been proved beyond any shadow of doubt. The accused is found guilty of the offence of Murder pursuant to Section 203 of the Penal Code.

Dated, signed and delivered in open court at Kitale this 19th day of June, 2019.

H K CHEMITEI

JUDGE

19/6/2019

In the presence of:-

Mr Omooria for State

None appearance for Accused

Acused present

Court Assistant – Kirong

Judgment read in open