



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 37 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

LUCAS GITHUKA GATIBA.....ACCUSED

JUDGEMENT

1. The accused **LUCAS GITHUKA GATIBA** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 14th day of February, 2013 in Thika District within Kiambu County murdered **LICKSON GATIBA**.

2. He pleaded not guilty to the said charge and to prove its case against him the prosecution called a total of five (5) witnesses. When put on his defence, the accused gave unsworn statement of defence.

PROSECUTION CASE

3. The accused was married to the mother of the deceased who was not his biological child. It seems that he was not happy with the said situation according to the prosecution case. **PW1 EUNICE WANJIRU KIGO** testified that the deceased had been enrolled in a baby care which was in someone's house. On the material day while on her way from work, the accused asked her to meet with him on the way home so that they could proceed thereat together which he did. The accused then asked her to give him one of the items she was carrying so as to assist her and along the way he decided to branch into a "soup den" where he stayed while she proceeded to get the child at the baby care. Upon reaching home, she put the child to sleep while she was preparing supper. The accused then came home at 9.30 p.m. and asked where the baby was and why she had left him at the soup place.

4. It was her evidence that the accused entered into the bedroom where the baby was and she heard him crying. When she went to check, she found that he had bitten him on the fingers. He then took the child by the hand and dropped him down. He then got hold of her and strangled her. She raised alarm and neighbours responded. The accused then set her free having bitten her on the lower lip. The accused then followed her outside with a knife which she identified in court. It was her evidence that there was a time when the accused had beaten her and the child and she left him for her maiden home. The accused followed her after two weeks and she went back with him.

5. In cross-examination she testified that they were in a come-we-stay marriage and that the accused started drinking after their marriage. She stated that the accused did not deny the paternity of the child and had no hatred for the child. **PW2 BETH WANJIKU KIGO** a sister of **PW1** was on 14/02/2013 called by her friend **Zena Mwangi** with information that her sister's child had been hit on the floor by her husband. She went to their home but found that they had taken the child to the clinic. She called the accused and **PW1** on phone but they did not answer. When the accused answered he told her that they were at Thika Level 5. When she told him that she was following them thereat, the accused told her that there was nothing she could do since he had done what he had wanted to do. She followed them to Thika where she met the accused outside the gate crying. She asked the guards to guard him and he was arrested. She was later on told that the child had died.

6. It was her evidence that in the year 2012 **PW1** had called her with information that she wanted to leave the accused who had bitten the deceased on the face and she told her that the accused doubted the paternity of the child. They also had domestic issues on money. It was her evidence that before the accused started a relationship with **PW1**, he was her boyfriend and that his actions showed that he had issues with her child. She stated in cross-examination that there was a time the accused threatened her and stated that he would not marry someone with a child.

7. **PW3 PC JOHN LIMIRI** re-arrested the accused at Thika Level 5 and viewed the body of the deceased before proceeding to the house of the accused and **PW1** but found the scene already interfered with. He interviewed neighbours who told him that the couple used to quarrel on daily basis since the accused used to come home daily drunk. He recorded statements from witnesses and confirmed that the mother of the child (**PW1**) found that he had been bitten with teeth marks on his fingers before the accused took him by its legs and threw him down

before the neighbours came and took him to hospital on a motor cycle. It was his evidence that when asked why he had a knife the accused said that it was for security reasons.

8. **PW4 DR. EUNICE MUGWERU** produced post-mortem form in which she confirmed the injuries on the deceased head – a fracture of the skull involving bones (hematoma beneath the scalp temporal parietal region, skull occipital region, temporal parietal bone and subdural hematoma). As a result of the examination she formed opinion that the cause of death was cardiopulmonary arrest due to severe head injury caused by blunt force trauma. She confirmed that a fall was one of the mechanisms of blunt force trauma.

9. **PW5 ALEXANDER MBUGUA KARIUKI** a security guard in charge of Thika Level 5 was called to the Casualty area where the accused was causing disturbance since he wanted to see the deceased which the mother **PW1** did not want on account of having thrown the child down. He was inspected and a knife was found on him. The police re-arrested him and took him away.

DEFENCE CASE

10. The accused gave unsworn statement of defence to the effect that on 14/02/2013 he went home and found **PW1** breastfeeding the baby and sat next to her. She then put the child on a seat as she prepared supper. Since he was tired he fell asleep and at that stage the child fell down. He was woken up by the child's cry and when he checked, he had head injury. He covered him with a *leso* and put him on bed. He then went to ask for assistance from the neighbours who called a *bodaboda* to take the child to hospital. The first went to the clinic at St. Mulumba before being referred to Thika Level 5 and the doctors told him to wait outside the casualty. After three hours they were told the child had died. On the way out of the hospital he was arrested. He confirmed that he was in a relationship with **PW2** before they broke up and he entered into a relationship with **PW1** the mother of the deceased. He stated that **PW1** and **PW2** planned the matter so that he could be arrested since he did not have parents to assist him. He confirmed having no issue with the child.

SUBMISSIONS

11. At the close of the prosecution case, the accused filed written submissions while the State through Mr. Naulikha made oral submissions. It was submitted by the accused that **PW1's** evidence did not indicate that the accused took any measures to keep the deceased unsafe or to restrain or delay in seeking medical assistance. It was submitted that the accused had good relationship with the deceased and **PW1** and that the only allegation of bad blood came from **PW2** which is uncorroborated. It was submitted that the doctor **PW4** confirmed that the injuries sustained by the deceased could be caused by a fall. It was therefore contended that malice aforethought had not been proved and therefore the accused should be acquitted.

12. On behalf of the prosecution, Mr. Naulikha submitted that **PW1** demonstrated the mindset of the accused who first bit the deceased before dropping him down on the floor head first. It was submitted that the action of the accused was uncalled for since the accused was examined and found to be of sound mind.

ANALYSIS AND DETERMINATION

13. To sustain a conviction on a charge of murder the prosecution is under legal and evidential obligation to prove beyond reasonable doubt the following elements of the offence:-

a. The fact and cause of death.

b. That the said death was caused by unlawful act of omission or commission on the part of the accused person.

c. That the said unlawful act of omission or commission was committed with malice aforethought as defined in Section 206 of the Penal Code as follows:-

“Malice aforethought shall be deemed to be established by evidence proving one or more of the following circumstances:-

a. An intention to cause death 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, by a wish that it may not be caused.

3. Intention to commit a felony.”

14. In this cause, the fact and cause of death of the deceased is not in dispute. The prosecution placed before the court the evidence of **PW1** the mother of the deceased who confirmed that the same was taken to the hospital after being thrown down on the floor by the accused which evidence was corroborated by her sister **PW2** and was subsequently pronounced dead at Thika Level 5 hospital. The accused in his defence confirmed the death of the deceased which was further corroborated by **PW5 ALEXANDER MBUGUA KARIUKI** a security guard at the said hospital, **PW3 PC JOHN LIMIRI** who proceeded to the said hospital where he viewed the body of the deceased and the cause of death was proved through the evidence of **PW4 DR. EUNICE MUGWERU** who performed post-mortem examination thereon and confirmed the cause of death as severe head injury caused by blunt force trauma. She confirmed that there was no sign of medical intervention meaning that the deceased was dead on arrival at the hospital. I therefore find and hold that the fact and the cause of death was proved beyond reasonable doubt.

15. On whether the said death was caused by unlawful act of omission and commission on the part of the accused person, both the accused and **PW1** placed the accused and the deceased together. The said unlawful act occurred in the confines of a one roomed house which **PW1** the mother of the deceased and the accused shared together. The deceased was on the material day left at a baby care on 14/02/2013. **PW1** on her way home from work picked him up in good health. She met the accused who decided to go into a soup place before getting home where **PW1** left him. The child was placed on the bed and the accused came to the house at 9.30 p.m. and went to where the child was, who started crying. When she checked on the child he had human bites on the fingers. The accused thereafter took the deceased from **PW1** and threw him down on the floor headlong.

16. There were only the accused and **PW1** in the house at the time when the child was injured. The accused contrary to his evidence did not go with **PW1** to the hospital but followed her thereafter at 11.00 p.m. as corroborated by the evidence of **PW5** the guard at the Thika Level 5. The fact that the death was caused by unlawful act on the part of the accused was further confirmed through the evidence of **PW2** a sister of the mother who was called by her friend on phone with information that her sister's child had been hit on the floor by her husband thereby corroborating the evidence of **PW1** and who was the accused former lover. She called the accused who informed her that he had done what he had always intended to do.

17. I have contrasted the evidence of prosecution witnesses and the accused's account that he had placed the child on the chair from where he fell down and note that his account is unbelievable as he stated in his defence that he fell asleep when the child fell down. There is no reason why **PW1** would have framed the accused as alleged in his submissions having taken into account their past relationship and I am therefore satisfied and hold that the prosecution proved beyond reasonable doubt that the death of the deceased was caused by unlawful act on the part of the accused.

18. On whether the said death was caused with malice aforethought:- I have taken into account the past conduct of the accused towards the deceased. It was the evidence of **PW1** that there was a time when the accused had bitten both herself and the deceased and she left him briefly. This evidence was corroborated by **PW2** the accused former lover that in the year 2012 the accused had bitten the child on the face and mouth and that he doubted the paternity of the child which issue was settled by the parents. On the material day the accused told **PW2** when asked about the child, that he had done what he had intended to do clearly showing that he had the necessary *mens rea* to cause death or grievous harm to the deceased.

19. I have finally looked at the nature of the injuries sustained by the deceased which was as per the evidence of the doctor fracture on the head and find and hold that the accused had the necessary malice aforethought to cause the death of the deceased and indeed succeeded in doing so. Whereas the accused stated that he had no ill will towards the child before and which was confirmed by **PW1**, it is clear that when the accused came into the house from his soup drinking joint he immediately asked **PW1** why she did not wait for him and whether his anger was aimed at **PW1** or not it is clear that his action falls within malice as was stated in the case of **REPUBLIC v LATIMER [1886] 17 QBD 359** and as was adopted by the Court of Appeal at Nyeri, **PETER KIAMBI MURIUKI v REPUBLIC [2013] eKLR** where the court had this to say:-

“What is the law on transferred malice? Where a person intends to commit a particular crime and brings about the elements which constitute that crime, he may be convicted notwithstanding that the crime takes effect in a manner which was unintended or unforeseen. The intent and the act must coincide. Under the doctrine of transferred malice, where a Defendant fires a gun intending to kill X, but misses and instead kills Y, he will not be able to escape liability for the murder of Y simply because it was his intention to kill X. The Defendant has still committed the actus reus that he intended, namely to cause the death ...”

20. There is evidence on record that the accused came to the house and immediately asked **PW1** his wife why she had left him behind before going to where the deceased was and even if his anger was directed towards **PW1**, he directed the said anger upon an innocent child who ended up losing his life and coupled with the accused past attitude towards the same. I have also taken into account the conduct of the accused who remained at the house while the mother of the deceased took him to hospital and according to the evidence of **PW3 PC JOHN LIMIRI** who visited the house immediately and found the scene interfered with thereby showing a guilty mind and an attempt to cover up. The accused's past conduct towards the deceased as presented by both **PW1** and **PW2** clearly shows that the same had the intention to kill or cause grievous harm to the deceased and on the material day succeeded.

21. Having dismissed the accused's defence herein as an afterthought as he did not put the prosecution witnesses and cross-examined them during the evidence on the alleged framework and conspiracy, I am satisfied and find that the prosecution proved beyond any reasonable doubt all the elements of the offence of murder of **LICKSON GATIBA** by the accused and nobody else.

22. In the final upshot, I hereby find the accused guilty of murder contrary to **Section 203** of the **Penal Code** and accordingly convict the same thereof and it is so ordered.

Dated, signed and delivered at Nairobi this 24th day of September, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Mr. Otieno for Mathenge for the Accused

Accused present

Court assistant- Karwitha