

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 63 OF 2011

BETWEEN

REPUBLIC PROSECUTOR

AND

J O O ACCUSED

RULING

1. J O O (“the accused”) is charged with the murder of W O O contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The incident took place on 21st October 2011 at around 12.00pm at East Othany Sub-location, Kisumu West District of then Nyanza Province. The accused pleaded not guilty. Once the trial commenced, he was diagnosed with a mental illness and had to be committed to a psychiatric facility for treatment. After the doctor certified that he was fit to stand trial and follow the proceedings, the trial continued. The prosecution marshalled 4 witnesses.

2. The case against the accused is that on the material day he was left behind with the deceased, his nephew, who was aged 2½ years by the mother as she went to the river. When the child’s mother, E A returned, the child was dead. The information was relayed to Rosa Akinyi Ogutu (PW 2) and Philip Onyango Ogutu (PW 3) by one Calistus Omondi, a work hand employed by the neighbour. Both PW 2 and PW 3 arrived at the scene after the incident. According to PC Stanley Kisang (PW 4), the accused was arrested by villagers and taken to Obola AP Post from where he was re-arrested by the police and charged.

3. A post-mortem was done by Dr Muturi (PW 1) on 24th October 2011 at the then New Nyanza General Hospital. He certified that the deceased died from asphyxia secondary to suspected smothering. He also observed blunt trauma on the anterior-occipital joint which was dislocated.

4. It is clear that the key witnesses, E A, the mother of the deceased, who first informed PW 2 and Calistus Omondi, who informed PW 3 of the child’s death, were not called to give evidence. Both of them could not be traced at the time of hearing. The former had left the home after death of the child while the latter could not be traced as he was merely employed in the village at the time.

5. In the absence of these two critical and first hand witnesses, it is difficult to establish where the accused was at the time of death of the deceased, his proximity to the *locus in quo* and whether he is the only one who could have murdered the child. In these circumstances, I cannot call upon the accused to make his defence even though the suspicion against him is great.

6. I have no option but to enter a not guilty verdict under **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The accused, J O O is accordingly acquitted. He is set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 31st day January of 2018.

D.S. MAJANJA

JUDGE

Mr Taremwa, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.