



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL CASE NO. 26 OF 2015**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**FREDRICK OKUMU WABWIRE.....ACCUSED**

**JUDGMENT**

**1. FREDRICK OKUMU WABWIRE** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that on the 27<sup>th</sup> day of September, 2015 at **Amoni village**, Angorom location in **BUSIA** County, he murdered **GRIFFIN OKUMU**.

2. Briefly the facts of the prosecution case are that on 27<sup>th</sup> September 2015, at about midday, the accused returned home drunk and picked a quarrel with his mother. Later he went to his house and returned while holding his child by the neck. He threw this child on his father's grave. The child died. He was arrested by members of public who thoroughly beat him before he was rescued and handed over to the police.

3. The defence of the accused is that on the material day he left home at about 7 am for a chang'aa den. He imbibed chang'aa with three other people until 2.30 pm. He lost his senses until the following day when he came back to himself at about 8.30 am, he found himself at the police station.

4. The issues for determination are as follows:

- a. Whether the accused killed his son as charged; and if so,
- b. Whether the defence of intoxication is available to him.

5. **Florence Mukade Okumu (PW2)** is the mother of the accused. Her evidence is that on the material day at about midday, she was outside her house. She was spreading some maize to dry. She was with her son Titus and daughter Brenda. The accused returned while making noise. He appeared drunk. He accused them of holding a meeting. She said the accused never wanted her to stay with Titus and Brenda. The accused continued with his rants and raves. In the process Titus left the homestead. Later on while she was inside her house, she was attracted by the noise of a person running outside. She saw the accused holding his son Griffin by the neck while going towards her husband's grave. He was squeezing the child's neck but the child was not even crying. At the grave, he threw the child on the grave, picked him and threw him again. She screamed and ran towards the road.

6. **Titus Okumu (PW3)** is the brother of the accused. His evidence is that when the accused returned

home, he started to quarrel their mother. Except for the minor details, his evidence and that of his mother agree as to what mood and state the accused was in when he returned and the fact that he quarrelled. However, there are some material differences.

7. The evidence of **Florence Mukade Okumu (PW2)**, is that Titus Okumu (PW3) had left home by the time the accused killed his son. Her evidence is that he (PW3) left when the accused was still quarrelling. This is given credence by the statement of PW3 to the police. This is what he recorded:

**I left home and proceeded to Ageti Shopping Centre and on arrival my neighbour Jane Juma called and informed me that Fredrick was killing his son at our homestead. I abruptly boarded a motor cycle and proceeded home where I found Fredrick at my father's homestead holding his son Griffin Okumu and on seeing me he told me that he is killing his son and he held him on his legs and hit its head at my father's grave site.**

8. What emerge from the evidence of these two witnesses is that though **Titus Okumu (PW3)** had left home earlier, he returned and found the accused in the process of killing his son. The evidence of mother and son point to no other culprit except the accused.

9. During cross examination, **John Mwasi (PW5)** and who was the investigating officer was asked whether the accused could have been implicated due to the quarrel that was between the accused and his mother. He said he did not see any possibility of the accused being fixed.

For such a proposition to have credence, it must be supported by the evidence on record. The proposition was not supported by any evidence.

10. The medical evidence tendered by **DR. Hillary Kiplagat (PW1)** is that the deceased had the following injuries:

- a) Collapsed trachea; and
- b) Swollen brain.

The doctor's finding therefore corroborated the evidence of mother and son. There is no evidence on record to even remotely suggest that the death of Griffin Okumu was caused by another person and then the accused was falsely implicated. I have no evidence on record to suggest that he was framed due to the quarrel that preceded the act.

11. There is evidence on record to indicate that the accused had taken alcohol prior to returning home. According to the accused, he was not in a position to know what he did. He became conscious of himself on the following day at about 8.30 am and found himself at the police station. This defence was raised for the first time when the accused gave his evidence. I will subject the same to tests with the available evidence to find if the defence is available to the accused. I will be guided by section 13 of the Penal Code which provides as follows:

**(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**

**(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—**

***(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or***

***(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.***

**(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.**

**(5) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.**

**(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.**

12. The accused testified that he went to partake chang’aa on his own volition. The only issue for my consideration is whether he was too drunk as to know what he was doing. When he returned home this is what his mother testified to:

**He later emerged from his house after a short while and came to where I was spreading maize. He was still complaining that we were still holding a meeting. Titus left the homestead. Fredrick went back to his house and came back and sat down. He told me to look him on the face. He was sweating and his eyes were red. I suspected he was drunk and I decided to leave.**

Later during reexamination she said:

**There were times when Fredrick acted and behaved in confused manner. Sometimes he would be normal. Whenever he took alcohol is when he would come and quarrel us. He used to take alcohol before discussing any issue.**

13. The following facts emerge from the evidence of **PW2**:

- a) The thought pattern of the accused was not impaired. He was able to return to the initial accusation where he had alleged that his mother and siblings were holding a meeting;
- b) He was not very drunk for his mother only suspected that he was drunk; and
- c) Whenever he had an issue to raise, he took alcohol for Dutch courage.

14. During cross examination, the accused testified that he was used to taking chang’aa and that at no time had he lost consciousness. He also said that on the material day, he went home unaided and was well oriented in time and space. He could even remember the time he went home. In the case of **MAINA vs. REPUBLIC [2007] 2 EA 279** it was held that:

**If an accused person seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove.**

15. I therefore find that the evidence on record does not support the contention of the accused that he was so drunk and could not know what he did. He has not discharged the burden on a balance of probabilities. He is responsible for his action.

16. From the evidence on record, I find that the prosecution has proved the charge against the accused beyond any reasonable doubts. I find him guilty and accordingly convict him for the offence of murder contrary to Section 204 of the penal Code.

**DELIVERED and SIGNED at BUSIA this 15<sup>th</sup> day of March, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**