



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO.2 OF 2016

REPUBLIC

VERSUS

LKINKIYON LEATHI

JUDGMENT

The accused is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 laws of Kenya. The particulars of the offence are that the accused on the 21st day of April 2016 in Laisamis Sub-County within Marsabit Country, murdered T L.

The state called five witnesses in support of its case.

PW1 MUGET LEATHI is the deceased's mother and the accused's wife. She testified that the deceased was five months old. On the 21.4.2016 at about 11.00am they were in their house when the accused took a chair which they used as a pillow and hit the deceased once. The child died immediately. This was their only child. She had not disagreed with the accused. It is her evidence that the incident was unusual and it was like the accused's mind was affected at that moment. The body was taken to Isiolo District hospital.

PW2 LTNESIANOI LEMAKARA testified that he is a Kenya Police Reservist(KPR). On the 21.4.2016 at about 11.00am he had gone to town when he received a phone call and was informed that the accused had killed the child. The accused is his brother in-law. The police went to the scene which was in a manyatta and took the body. The accused was also arrested. **PW3 N N** is the accused's mother-in-law. On 21.4.2016 she was in her house when she heard PW1 screaming. She went to their house and found that the child had been killed. The accused was also there. This was their only child. It is her evidence that the accused and his wife were living peacefully.

PW4 CPL ALBANUS MUGAMBI was stationed at Laisamis Police station. He investigated the case which was reported on the same day of 21.4.2016 at about 12.45pm. His colleagues visited the scene and went back to the station with the accused and a wooden object which was alleged to be the murder weapon. The deceased was five months old. A postmortem was done and the accused was charged with the offence. PW1 didn't tell him that she had quarreled with the accused before the incident. The child was hit while being held by PW1. **PW5 DR. STEPHEN KILUVA** was stationed at Isiolo County Referral Hospital. He produced a postmortem report prepared by **Dr. Abdi** on the same day of 26.4.2016 at Isiolo county referral hospital. **Dr. Abdi** was his colleague who had gone back for further studies. The deceased was five months old. The injuries were on the head. There was bleeding from the nose, ears and depression on the occipital area of the head. The cause of death was cardiopulmonary arrest due to the head injury.

In his sworn defence the appellant testified that on the material day he was in the fora herding cattle when he received phone call to go home. He was told that his child is sick. When he reached home he found that the child was not sick. He disagreed with his wife and was annoyed. He tried to hit his wife but accidentally hit the child. He did not intend to hit the child but wanted to punish his wife. He used a small chair which they use to put on the head of their bed. He had no intention of killing the child.

Mr. Biwott, counsel for the accused submitted that the prosecution did not prove the offence of murder. The appellant in his defence stated that he never intended to hit the child but wanted to discipline his wife. There was no *means rea* the appellant was called while grazing his cattle and went home. Considering the age of the child death was instant.

Mr. Chirchir, prosecution counsel, submit that the case was proved beyond reasonable doubt. The accused admit that he killed the deceased. The postmortem report indicate that the injuries are serious. The child must have been hit severally even if the accused intended to hit the wife, that shows that he had the intention to cause grievous harm to PW1. The accused used excessive force. He was not provoked.

The issue to be determined is whether the accused killed the deceased. According to the prosecution evidence, it is the accused who hit the deceased with the wooden pillow cum chair. The eye witness to the incident is PW1. According to the evidence by the investigation officer,

the child was being held by PW1. The circumstances of the case do not show that the accused went to where the child was and hit him on the head. The evidence is that after the child was hit, PW1 let the child to fall presumably on the ground. That explains why the injuries on the head could have been made worse through that aspect of falling down.

The accused's defence is that he had no intention to kill his child. Section 203 of the Penal Code states as follows: -

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

According to PW1 she had not disagreed with her husband. From the evidence of PW1, it is her feeling that the incident was unfortunate. Mr. Chirchir contends that if the accused did not intend to kill the child, he intended to cause grievous harm. Section 206 of the Penal Code states as follows:

Malice aforethought shall be deemed to be established by evidence providing 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.

The evidence show that what was used was a small wooden three legged wooden instrument. It is not a big object and is used on the bed as a pillow. The accused's position is that he was called from the fora and told that the child was sick. When he went home he found the child was not sick. In an attempt to discipline his wife, he hit the child. The child was only five (5) months old. The child suffered fatal injuries.

Given the evidence on record, I do find that the accused had no intention to kill the child. Equally he had no intention to cause grievous harm to PW1 or commit a felony. It is evident that PW1 was holding the child. The accused seemed to have thrown the piece of wood out of anger. By throwing the piece of wood he did not intend to cause serious injuries to his wife. To him it was a simple attempt to discipline his wife. There was no other action on his part. The accused did not ran away. He stayed at home until the Police went to take the child. The Police were called soon after the incident and went to the scene. According to PW1, the incident was unusual and it seems the accused's mind had been affected at the moment. This shows that the accused did not have malice aforethought. The incident took place very fast and the child was hit once on the head. It would be imprudent to conclude that the accused intended either to kill his wife or the child or to cause either of them grievous harm.

I am satisfied that the accused had no intention to kill his child. The prosecution evidence does prove that it is the accused who killed the deceased. The accused in his defence admit that he is the one who threw the piece of wood and it hit his child. I do find that the accused is not guilty of the offence of murder Contrary to **Section 203** as read with **Section 204** of the Penal Code.

The accused did confirm that he threw the piece of wood which led to the death of the child. The child died out of the accused's uncalled for action. I do find that the accused is guilty of the offence of manslaughter Contrary to **Section 202** as read with **Section 205** of the Penal Code. It is the accused's unlawful act which caused the deceased's death.

In the end, the accused is not found guilty of the offence of murder as charged. The accused is however found guilty of the offence of manslaughter Contrary to **Section 202** as read with **Section 205** of the Penal Code and is hereby convicted of that offence accordingly.

Dated, Signed and Delivered at Marsabit this 29th May, 2018

S. CHITEMBWE

JUDGE