



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL (MURDER) CASE NO. 10 OF 2017

REPUBLIC PROSECUTOR

VERSUS

MOSES OUMA ACCUSED

JUDGMENT

1. **Moses Ouma**, the accused herein is charged with two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the 1st count are that:

On 8th January, 2017 at Wawaria village within Seme District, within Kisumu County murdered Emmanuel Ochieng

The particulars of the 2nd count are that:

On 8th January, 2017 at Wawaria village within Seme District, within Kisumu County murdered Eunice Adhiambo

2. The prosecution summoned a total of 3 (three) witnesses in support of its case while the defence called only the accused.

Prosecution Case

3. **PW1 Gordon Ochieng Obina**, recalled that at 6.00 am on 8.1.17, accused, who is his nephew went to his house and pleaded with him to open let him in because he was allegedly dying. That he went to the door but before he could open, accused ran away. The witness stated that he reported the matter to the area assistant chief Richard Jaoko Odongo and went back to sleep. That 15 minutes later, M, accused's wife went to his home and reported that her 2 children had been murdered. That he went to the home of the assistant chief and together they went to accused's house where they found two children lying dead on a mattress. That police later visited the scene and removed the bodies to the mortuary.

4. **PW2 Richard Jaoko Odongo**, assistant chief Othany Sub-location stated that accused was his nephew. He recalled that on 8.1.17 at about 7.00 am upon receiving PW1's report regarding information he had received from accused and his wife accompanied PW1 to accused's house where they found two children lying dead on a mattress. That police later visited the scene and removed the bodies to the mortuary. He recalled that on 1.1.17, a man had gone to his home and reported that M, accused's wife was his estranged wife and that she had ran away with two of his children. That he discussed the matter with accused and his wife who denied that she had married any other man. That he asked accused's wife to go back to her home and get a chief's letter confirming that she was not previously married and didn't see her again until 8.1.17 when she reported that she had returned home to find her children dead. He said he interrogated M, the mother of the children who informed him that he had quarreled with accused on 7.1.17 concerning the paternity of the two children and that she had ran away and slept in a neighbor's house but returned to the house on 8.1.17 to find her two children dead.

5. **PW3 CPL Nelson Kiplagat**, the investigating Officer stated that on 8.1.17, he visited the scene of crime at Wawaria village and found two children who were identified as EO (5 years) and EA (10 months) lying dead on a mattress in a one roomed house. The witness stated that he attended the postmortem of the two children's bodies at Jaramogi Oginga Odinga Teaching and Referral Hospital. With *the consent of the defence counsel, he produced the autopsy reports made by Dr. Rukia Aksam who had gone for further studies and who could not be found without delay. The postmortem report (PEXH. 1) in respect of EOchieng shows that he died of severe head injury with subdural hematoma due to blunt force trauma to the head The postmortem report (PEXH. 2) in respect of EA shows that she died of severe head injury with linear occipital skull fracture with bilateral subdural hematoma due to blunt force to the head. The witness furthers stated that he had been unable to trace the children's mother to testify since she had moved house and her phone number went unanswered.*

The Defence Case

6. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on his Defence. Accused

conceded that he was married to M, the mother of the two deceased children. He also conceded that he severally quarreled with M after a man claimed to be her husband and father of the two deceased children. He denied murdering the 2 children or going to the house of PW1 on the morning of 8.1.17. He stated that he went fishing on the night of 7.1.18 and was arrested from the beach on the morning of 8.1.17 by police who were in company of PW1.

ANALYSIS AND FINDINGS

7. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows:-

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

(a) The death of the deceased

8. The death of the two deceased children has been proved by the PW1, 2 and 3 who saw their bodies and by the postmortem forms **PEXH. 1** and **PEXH. 2**.

(b) Proof that accused committed the unlawful act which caused the death of the deceased

9. None of the prosecution witnesses saw accused commit the unlawful act that caused the death of the two deceased children. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence taking into consideration the fact that the accused being an interested party may have lied to save himself.

10. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20**

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

11. In **SAWE –V- REP [2003] KLR 364** the Court of Appeal held:

“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 that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused”.

12. In **Abanga alias Onyango v Republic CA CR. Appeal NO. 32 of 1990 (UR)**, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

13. In order to establish the accused’s culpability, the prosecution led evidence from PW1 who stated that accused, who is his nephew, went to his house and pleaded with him to let him in because he was allegedly dying. That he went to the door but before he could open, accused ran away. The witness stated that 15 minutes later, M, accused’s wife went to his home and reported that she had returned home to find her 2 children dead.

14. PW1 informed court that accused was the son of his sister. He was well known to him. There is no evidence that there was a grudge between accused and PW1 upon which PW1 would give false evidence against accused. Accused’s claim that he had quarreled with PW1 concerning sand harvesting is in my considered view an afterthought since PW1 was not questioned about the alleged grudge when he testified. PW1 told court that his house is 200 metres away from accused’s house. It is therefore apparent that accused was seen a few metres from his house on the morning of 8.1.17 and his evidence that he was at the lake from 7.1.17 until when he was arrested on the morning of 8.1.17 cannot be factual.

15. PW2, the area assistant chief testified that a man had reported to him that accused had taken away his wife and two children (now deceased). Accused conceded that as a result of that man’s claim, he had been quarrelling with his wife concerning the paternity of the two

deceased children.

16. The evidence on record creates a strong impression that accused had every reason to murder the children. The children had been left in his custody. He had a duty to explain what happened to them while they were in his custody and that, he failed to do.

17. From the foregoing, I have concluded that circumstances in this case are of a definite tendency unerringly pointing towards the guilt of the accused (See ***Bhatt v Republic [1957] E.A. 332***). The evidence tendered against accused overwhelmingly points to his guilt. I therefore find that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the two deceased children which constitutes the 'actus reus' of the offence.

(c) Proof that the said unlawful act or omission was committed with malice afterthought

18. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the two deceased children. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. The ingredients of murder were explained in the case of ***ROBA GALMA WARIO VS REPUBLIC [2015] eKLR*** where the court held that;

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

19. Malice aforethought was defined in the following cases;

(a) ***NZUKI VS REPUBLIC [1993] KLR 171*** where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- ***Intention to cause death***

- ***Intention to cause grievous bodily harm***

- ***Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.***

(b) In the case of ***DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR)*** cited in the case of ***REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR***, (Bosire, O’kubasu and Onyango Otieno JJA.), while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

20. I have considered the injuries occasioned to the deceased. *EO died of severe head injury with subdural hematoma due to blunt force trauma to the head while EA died of severe head injury with linear occipital skull fracture with bilateral subdural hematoma due to blunt force to the head.* The attack on the helpless children was so brutal that it leaves no doubt in the mind of the court that accused must have known that the attack would either cause them grievous harm or death.

20. In my considered view, the prosecution evidence effectively dislodged the defence offered by the accused. I am therefore satisfied that malice aforethought has been established in terms of Section 206(b) of the Penal Code.

Disposition

21. Consequently, I find that the state has proved its case beyond reasonable doubt. Accused is found **GUILTY** of the two counts of murder and he is accordingly convicted. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 27th DAY OF September 2018

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistant - Felix

Accused - Present

For Accused -

For the State - Mr.Barasa