



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 81 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

NM.....ACCUSED

JUDGMENT

[1] The accused person NM was charged with murder contrary to section 203 as read with section 204 of the Penal Code CAP 63 of the Laws of Kenya. The particulars of the charge were that on 17th day of July 2005, in Imenti North District, within Meru County murdered NK. The accused denied the charge and the case proceeded to full hearing. The prosecution called 5 witnesses.

Defence

[2] After close of the prosecution's case, the accused was placed on his defence and opted to give a sworn statement. In his defence, the accused person denied killing the deceased and stated that on the material day he was at Mutuati. He testified that his mother in law had come and taken his wife away and that he remained alone for 9 years. In the year 2012, he came to his wife's home and found that they had relocated only to be arrested the following day for allegedly killing his child in the year 2005.

ANALYSIS AND DETERMINATION

[3] I have carefully considered the evidence which was adduced by the prosecution and also the defence of the accused. The prosecution's case was heard by Wendoh J and I only heard the defence. Nonetheless, I should determine on the basis of evidence adduced, whether the accused caused the death of the deceased and if so, whether:

The accused, of malice aforethought, caused the death of the child herein by an unlawful act or omission.

Elements of offence of murder

[4] The accused person is facing a charge of murder. Section 203 of the Penal Code defines the offence of murder in the following terms:-

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

[5] Arising from the above definition are four elements of the offence that the prosecution must prove beyond reasonable doubt, to wit:

1. The fact of the death of the deceased

2. The cause of such death

3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and

4. Proof that the said unlawful act or omission was committed with malice aforethought.

Of fact and cause of death

[6] Therefore, the prosecution bears the burden of proving beyond any reasonable doubt the fact and cause of death. Ordinarily, medical evidence would suffice to prove these elements. But, this case presents difficulty scenario as shall come to bear below.

No postmortem: Sheer negligence

[7] I must lament that this is one of the cases where sheer negligence on the part of the police officers is manifest. The Investigations Officer, a PC Abura did not do his duty as required in law. Despite warrants of arrest being issued against him he did not avail himself to give evidence in this case. I note with a lot of concern that he filed police records in the matter, but in it I do not see any postmortem report on the deceased. The prosecution said it had been misplaced. There is absolutely no medical evidence on the deceased. But, the prosecution submitted that conviction for murder is not strictly dependent upon post mortem report being availed. They stated that there is overwhelming evidence to support a conviction. This forces the court to resort to case law on such scenario. I am content to cite the case of **WAHIIH & ANOTHER vs. UGANDA (1968) EA 278** where Spry JA had this to say.

“There have been cases in East Africa where persons have been convicted of murder although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death...”

[8] Is this a case of such clear evidence as to prove that the accused died and was killed by the accused with malice aforethought? Direct evidence on the account of events of 17th July 2005 is available. PW1, Geoffrey Kinyua Sambu stated that on 17th July 2005, he was at home when he heard screams at about 7:00 PM coming from the house of MN. He rushed to M's house which was about 300 meters from his house to find out what was happening. He found a child's head had been cut into 2; the brain matter was out and blood was scattered all over. PW1 knew the child and it belonged to MN (PW4); M lived in the home of MN (PW5) and that M was grandmother to the child. It was his further evidence that the mother of the child (MN) had also been cut on the legs, hands and knees. He assisted to remove her from the bed so that she could be taken to hospital. The child's body was in the sitting room.

[9] PW1 had a torch of two batteries with which he used to spot the body as well as those present. He also called the OCS Meru police station who came and took the body of the child to the mortuary.

[10] PW2, Harriet Nkatha testified that on 17th July 2005, at about 7:00 PM she was in her house when she had screams coming from the direction of her neighbours house (MN). That, she went to M's house and found N screaming together with her mother and that she saw a dead child and its body had deep cuts on the neck and the head. It was her evidence that many people came in response to the screams and they later took N to hospital as she had deep cuts. She later recorded her statements when the accused was arrested. It was her further evidence that she did not see the accused on that day.

[11] PW3 was Peter Gituma Athiru. His testimony was that on 17th July 2005, he was at home when he heard screams from the house of his neighbours MN. He went to the scene to see what was happening. PW3. The Witness stated that he had a torch that had two batteries and he was able to see the accused who was about 30-40 metres away from him. It was his further evidence that N had deep cuts on the hands, knees. He also stated that, in the same room he saw a minor with 2 deep cuts on the head and that the minor was dead.

[12] More evidence was adduced by PW4, NN. She confirmed that on 17th July 2005, she was at home when the accused came and cut her on the left hand. She stated that followed her to her father's bedroom where her three year old child was sleeping and continued to cut her and also until she lost consciousness. The accused also cut the child. She later learnt that the child had died.

[13] PW5, MN also gave relevant evidence. She stated that, on 17th July 2015, a child called K was murdered at her home. It was her evidence that the accused had come and cut N on the hand and N ran to the bedroom where the child was sleeping. She said that the child was cut in the middle of the head; the head was cut into two.

[14] All the foregoing evidence was not controverted in cross examination. The evidence is consistent that the child died. The evidence also shows that the child's head was cut into two and brain matter was splashed all over the place. The assault was violent and the splitting of the head into two could only mean one thing: death. Accordingly, despite absence of medical evidence, there is sufficient direct evidence of an assault so violent that it could not but have caused immediate death of the child. Therefore, the prosecution has proved to the required standards the fact and cause of death of the child herein.

Did the accused cause the death?

[15] The next element to be proved is that the deceased met his death as a result of an unlawful act or omission on the part of the accused person. What does the evidence portend?

[16] PW1 enquired from PW4 and PW5 as to who had cut the child's head into two. He was informed by the two that N (the accused) had committed the heinous act. PW1 knew the family well as they were his neighbour. He also stated that he knew that the accused was the husband to N and that he lived in the in-law's home. He told the court that the next day, they started looking for accused and they saw him at a hill which was nearby a forest but the accused entered the forest and they never saw him until 7 years later (2012), when he was arrested by community policing.

[17] The foregoing evidence by PW1 was corroborated in a pointed manner by PW4, NN. She gave a vivid account of how the events turned out on the material day. She said that, on 17th July 2005, she was at home when the accused came and cut her on the left hand. She then screamed and ran out and the accused said that he wanted to kill all of them. That, she entered her father's bedroom where her 3 year old child was sleeping and the accused came back and cut her on the left knee after which she fell down and the child woke up. The accused then

cut her child across the head and then cut her again on the right leg whereupon she lost consciousness. She later learnt that the child had died. It was her further evidence that she had gone back home as she could not agree with the accused and her sister and that she could not tell why the accused acted in the way that he did. Thereafter, the accused disappeared till the time of his arrest on 21st November 2012.

[18] PW5, MN also corroborated what PW4 stated. She told the court that, on 17th July 2015, a child called K was murdered at her home. It was her evidence that the accused had come and cut N on the hand and N ran to the bedroom where the child was sleeping. She said that the child was cut in the middle of the head; the head was cut into two. She stated that the accused was her son in-law and that they did not have any grudge.

[19] PW3 was Peter Gituma Athiru He was a neighbour of M. He gave direct evidence that he saw the accused coming from the house where the screams were emanating from; the accused was armed with a panga which was blood stained and was warning that he would kill everybody in that home. The Witness stated that he had a torch that had two batteries and he was able to see the accused who was about 30-40 metres away from him. Upon the quest of the court he confirmed that he was able to see the panga at close range. He also confirmed that they were used to carrying torches at night. He was categorical also that he asked M what was happening and M told him that the accused had cut her daughter. It was his further evidence that N had deep cuts on the hands, knees. He also stated that, in the same room he saw a minor with 2 deep cuts on the head and that the minor was dead. He then mobilized the youth to search for the accused but they did not get him as he had disappeared only to resurface on 21st November 2012.

[20] PW3 was not related to the accused except that they had schooled together. His evidence was unshaken in cross-examination. He was able to see the accused at close range of about 30-40 meters. He knew the accused and identified him. Applying the rules on identification by recognition, I do not find anything which may make him mistaken or deluded as to the identity of the accused. PW3 saw the accused carrying a panga and threatening to kill everyone in the family. PW4 and PW5 gave cogent evidence that it was the accused who split the head of the deceased child. He also cut PW4. PW3 organized for the search of the accused but in vain/ PW1 also told the court that the next day they saw the accused at a nearby Hill but he disappeared into the first and they could not find him despite search thereto. He only resurfaced 7 years later and was promptly arrested. Witnesses herein supported this fact. These pieces of evidence leave no doubt that the accused killed the deceased by cutting his head into two.

[21] The accused in his defence raised the defence of alibi and stated that on the material day he was at Mutuati. His defence was however dislodged by the evidence of all the prosecution witnesses; all of whom placed him at the scene of crime. In fact he seemed to corroborate the prosecution witnesses evidence that he disappeared after commission of this offence in 2005 only to be arrested 7 years later when he stated that he was arrested in the year 2012 and told that he had killed his child in the year 2005. Accordingly, I find that the deceased's death was as a result of the unlawful act of the accused.

Was there malice aforethought?

[22] Now I should find out whether there is proof that the said unlawful act or omission was committed with malice aforethought. The circumstances which constitute malice aforethought are set out under Section 206 of the Penal Code as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving 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.”

[23] The child was just three years old. The weapon used was a panga. The violence applied split the head of the little angel into two splashing the brain matter and blood all over the place. This brutal force applied show that the accused intended to cause grievous bodily harm or the death of the child. See the case of **DANIEL MUTHEE vs. REP. CA NO. 218 OF 2005 (UR)**, where the Court of Appeal stated thus;

“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.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

[24] See also the Court of Appeal in the case of **Joseph Mwangera Rukaria v Republic [2013] eKLR** where the court stated;

“We are cognizant of the statement by the learned Justices of Appeal made in the Daniel Muthee case. In the instant case, when the appellant cut the deceased at the back side of the neck, he must have known that the act of cutting the deceased on the neck would cause death or grievous harm”

[25] Accordingly, I find that the accused of malice aforethought caused the death of NK, the deceased child herein. I find the accused, NM guilty of the murder of NK and convict him accordingly under Section 322 of the Criminal Procedure Code CAP 75 of the Laws of Kenya.

Dated, signed and delivered in open court at Meru this 26th day of November 2018

F. GIKONYO

JUDGE

In presence of

Kiarie for state

Mrs. Ntarangwi for Omari for accused

F. GIKONYO

JUDGE