



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 3 OF 2018

BETWEEN

REPUBLIC..... PROSECUTOR

AND

JOSHUA MABUTA ARUYA.....ACCUSED

JUDGMENT

1. **JOSHUA MABUTU ARUYA** (“the accused”) is charged with one count of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It is alleged that on the night of 4th and 5th day of January 2018 at Nyanderema village, Nyaguta Sub location within Kisii County he murdered his infant son, **JOA** (“the deceased”). The prosecution called 5 witnesses in support of its case while the accused gave unsworn testimony in his defence.

2. The offence of murder is defined in **Section 203** of the **Penal Code** as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution must prove beyond reasonable doubt the following three ingredients; first, it must prove the death of the deceased and the cause of that death; second, that the accused committed the unlawful act or omission that led to the death; and that the accused committed the unlawful act or omission with malice aforethought.

3. The fact and cause of the deceased’s death is not in dispute. Dr Peter Momanyi Morebu (PW 4) conducted the post mortem on the deceased body on 14th January 2018 at the Kisii Teaching and Referral Hospital. He did not observe any physical injuries on the body. He however concluded that the deceased’s death was caused by drowning.

4. The key question for resolution is whether the accused caused the deceased to drown. The accused’s cousin, Justus Mokaya Ondimu (PW 2), recalled that on 5th January 2018 at about 7.00am, he was at home when the accused called him on his mobile phone and asked him to go to the river and assist him take the deceased to hospital. PW 2 sent his wife Esther Kwamboka (PW 3) to the accused’s home. PW 3 went and found the accused’s mother, Imelda Kerubo, at his home but did not find the accused. After a brief chat with PW 3, Kerubo called PW 2 and asked him to go and find out what the accused wanted.

5. PW 2 went to the accused’s home and spoke to Kerubo who asked him to go to the river. He did not find anyone at the river. On his way back home, the accused called him once more and asked him to go back to the river and check again. When PW 2 went back, he found the deceased’s body in the river. He removed the child from the river and raised an alarm which drew a crowd. PW 2 called the accused who told him he could not go to the scene as he was in a bad state. PW 2 testified that the deceased was living with Kerubo, his grandmother, but after he sustained burn injuries following an epileptic incident with Kerubo, the child went back to live with the accused.

6. The accused’s brother, PW 1, heard the commotion on that morning and went to find out what was happening. Kerubo told him that the deceased had died in the river whereupon he rushed there. He testified that the deceased was aged about 1 year, 8 months and had been living with the accused prior to his death. He told the court that the accused’s wife had left him long before the incident.

7. The investigating officer, PC Benard Kirui (PW 5) testified that on 5th January 2018 at about 8.30am, while on duty at the Police Station he was informed of a murder incident at Nyaguta area. He proceeded to the scene with other officers and found a gathering with the assistant chief and near River Gucha. He found the deceased’s body. He removed the body and took it to Kisii Level 5 Hospital Mortuary. The accused was later on arrested and taken to the Police Station.

8. When placed on his defence, the accused person told the court that he used to work at a place called Nyarko and was unaware of what was happening at his home at the material time. In the evening, he found his house had been broken into and his money stolen.

9. The case against the accused is based on circumstantial evidence as no one saw the accused kill the deceased. The guiding principle in such cases was summarised by the Court of Appeal as follows *Abanga alias Onyango v Republic CR. A No. 32 of 1990 (UR)* 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.

10. The prosecution case was that the deceased was a child aged 1 year, 8 months at the time of his death and was in the care and custody of the accused. It was proved through the testimony of PW 2 and PW 3 that the accused called and directed PW 2 to go to the river where the body of the deceased was found. The testimony of PW 1, PW 2 and PW 3 was unassailable. The fact that the accused knew and directed PW 2 to where the deceased body was lead to the irresistible inference that he knew the circumstances that led to his son's death.

11. In these circumstances, the accused had to explain what happened to his son in accordance with **section 111(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)** which provides as follows:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence. [Emphasis mine]

12. When the accused fails to offer a reasonable explanation, the court is entitled to presume what could have happened under **section 119** of the **Evidence Act** which states;

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

13. The accused's defence was simply that he knew nothing of the deceased death and suggested that the death could have been caused by other person who broke into his house. Is this explanation reasonable? At this stage I must emphasise that the accused does not bear any burden of disproving the prosecution case. It is the burden of the prosecution to prove its case beyond reasonable doubt and the accused need only to raise reasonable doubt either by putting forward an affirmative defence or by raising doubt on the prosecution case. In **Mkendeshwa v Republic [2002] 1 KLR 461**, the Court of Appeal stated that;

In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.

14. I would add that the accused's mere denial and the fact that he is the one who informed PW 2 where the deceased's body was definitely tips the scales of proof in favour of the prosecution's version. The Court of Appeal for East Africa in **Rafaeri Munya alias Rafaeri Kibuka v Reginam [1953] 20 EACA 226** observed that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.

15. The totality of circumstances is that between the night of 4th and morning of 5th January 2018, the accused must have taken the child to the river where he killed him by drowning. PW 1 stated that the river was too far and judging by his tender age, the deceased could not have made his way there on his own. If indeed it was an accidental death, the accused statement to PW 2 would have disclosed as much. Further, his behaviour after the incident is inconsistent with his innocence as one would expect a father who has lost a son through an accident to behave differently. The irresistible inference is that the accused also failed to discharge the responsibility of a parent towards his infant son and is deemed to have caused the death of the deceased by virtue of **section 216** of the **Penal Code** which provides;

216. It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life, whether the charge is undertaken under a contract or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and he shall be deemed to have caused any consequences which adversely affect the life or health of the other person by reason of any omission to perform that duty.

16. The last issue for determination is whether the accused killed the deceased with malice aforethought. **Section 206** of the **Penal Code** provides that malice aforethought includes-

(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.

13. According to PW 4, the deceased drowned to death in water. No physical injuries were found on his body. The prosecution did not tender any proof that the accused intended to cause the death of the deceased. I therefore find that the prosecution failed to prove malice aforethought. Having found that the prosecution proved beyond reasonable doubt that the accused caused the death of the deceased, I substitute the charge of murder with that of manslaughter contrary to **section 202** of the **Penal Code**.

14. I therefore find the accused, **JOSHUA MABUTU ARUYA**, guilty of manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code** and convict him accordingly.

DATED and DELIVERED at KISII this 17th day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Nyangacha, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.