



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL NO. 4 OF 2015

REPUBLIC..... APPELLANT

versus

HMG.....RESPONDENT

JUDGMENT

1. The teenager **CKM** (deceased) unfortunately lived a very short life on this earth. In that short life he seemed to have endured untold suffering and neglect by the very person who should have being his protector and provider, his father **HMG (H)** the accused in this case.

2. H is charged with the offence of **murder Contrary to Section 203 as read with Section 204 of Penal Code, Cap 63**. The Particulars of that offence show that he is charged of **murdering CKM (Deceased) on 16th March 2013**.

3. The prosecution's evidence was adduced by a total of seven witnesses. It was to the effect that H was first married to HW with whom they were blessed with two children one of those was a girl, **NW**, who is now 11 years old. The other was the deceased who was older and at the time of his death was said to have been 10 years old. The marriage of H and the mother of those children was turbulent. According to P W 4 BN, the mother of HW, H used to assault HW frequently. This often led to HW seeking refuge at her mother's home. Eventually HW deserted the marriage leaving behind the two children in the care of H. The child **NW (P W 1)** when she testified seemed to be fearful of H. When asked about her relationship with her father she stated:

“I like dad even though he used to beat us.”

Evidence clearly showed that the deceased son often received chastisement from H which led to his seeking refuge in the streets. He at one time became a street urchin.

4. H began to live with another lady namely Faith Karimi (**P W 5**). According to Faith when she began to live with H and his two children she found that the two children were so neglected that they used to fend for themselves by getting provisions from the dustbin. She found that at other times the children were fed and clothed by neighbours.

5. On 16th March 2013 H arrived at his home after work at around 5p.m. He asked for the hoe. **NW** told him that the hoe had been sold by the deceased to street urchins. The evidence of **NW** and Faith was to the effect that H took a stick and beat the deceased. The beating was so severe that **NW** in her testimony repeated the action of H and said that Harun beat and repeatedly beat the deceased.

6. As a consequence of that beating the deceased lost consciousness. H asked NW to give him water in a basin, which she did. H poured that water on the deceased. The deceased did not revive. H picked up the deceased and put him in the house. On being asked by Faith how the deceased was H said that was the way the deceased pretended. Later Faith said she heard the deceased, who was in the next room, groaning as though he was dying. She went to check and indeed found him dead. She informed H, who on confirming the death put the deceased's body in a sack, tied the body unto a bicycle and took the body away. This was at 2a.m. On his return he informed Faith that he had thrown the deceased body by the road side in order to give an impression that the deceased had been killed by the street people.

7. The evidence of Dr. Kinyua who performed the post-mortem was to the effect that although the examination of deceased body revealed whip bruises on the trunk and thighs of the deceased there was however no evidence of any fracture caused by the beating. The doctor concluded that death of the deceased was due to asphyxia due to inhalation of water.

8. H in his defence confirmed that on 16th March, 2013 on his arrival home from work asked for the hoe. He was informed the deceased had sold it. He stated that, that disclosure annoyed him. As a consequence he took a stick and beat the deceased which led to the deceased fainting. H stated in attempting to revive the deceased threw water at the deceased and also used a cloth to wipe deceased on his body with water. The deceased failed to regain consciousness. H placed deceased on the bed but later learnt he had died. H then stated that it was not his intention to cause deceased's death. He again said that he had no intention to harm the deceased. That when he discovered deceased was dead he got confused which led to him deciding to throw deceased's body.

ANALYSIS

9. **Section 203 provides** a person would be guilty of murder when with malice aforethought he causes death of another person. What would constitute murder was discussed in the case.

REPUBLIC V ANDREW MUECHE OMWENGA [2009] eKLR where it was stated:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

10. Whereas H, even on his own admission, caused the death of the deceased, the evidence does not show that he had malice aforethought.

11. Malice aforethought is defined in **Section 206 of Cap 63** as follows:

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, 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;

12. The Court in the case **REPUBLIC V ANDREW MUECHE OMWENGA (supra)** in discussing malice aforethought stated this:

What is “Malice aforethought? Malice aforethought describes the mens rea or the mental element required for a conviction of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If “malice aforethought” is lacking the unlawful homicide will be manslaughter.

13. On a thorough consideration of the prosecutions and defence evidence it is clear that Harun did not have malice aforethought. It is clear H had not contemplated that the use of water on the deceased would kill him. As it would be recalled that Doctor Kinyua on carrying out post-mortem found that the deceased died of inhalation of water. That was the water that H used in attempt to revive the deceased. The deceased inhaled that water which filled his lungs upto the bronchus. That inhalation led to his death.

14. In view of the above finding, that H did not intend (**no malice aforethought**) to cause the death of the deceased I reduce the charge of H to manslaughter. **HMG is therefore acquitted of murder and is hereby convicted of manslaughter contrary to section 202 as read with section 205 of the penal code.**

DATED AND DELIVERED AT NANYUKI THIS 29th DAY OF MARCH 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Ndungu

For the State:

Accused: Harun Mureithi Guchu

For Accused:.....

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE