



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 16 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

A K M.....ACCUSED

J U D G M E N T

1. **AKM**, the Accused, is charged with the offence of **Murder** contrary to **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **25th day of September, 2010** at around **8.00 a.m.** at **[particulars withheld], Kilala Location in Makueni District** within the **Eastern Province** he murdered **MMK** (Deceased).

2. The facts of the case are that the Accused cohabited with PW2 **SNM** and they were blessed with a child, the Deceased. They had marital problems and separated two (2) years later. On the **25th day of September, 2010** the Accused went to PW2's maiden home where she was residing with the child and demanded to see the child. He took the child and left with her. PW2 ran to call her uncle, PW1, **JMN**. They ran after the Accused who had gone towards the river. They crossed the river and caught up with him. He threatened to kill the child then kill himself if they moved near him. As they pursued they caught up with him. He put the child on the ground, knelt down and stabbed her. Then he stabbed himself using the same weapon (knife). The matter was reported to the police. They visited the scene and took away the body of the Deceased which was taken to the mortuary while the Accused was taken to hospital. Further investigations were carried out that resulted into the Accused being arraigned in Court to answer the charge of murder.

3. In his defence the Accused who gave sworn evidence denied having committed the offence in question. He stated that he went to his wife's maiden home on the material day after he talked to his mother-in-law and they agreed that he would go to see the child. On arrival he found his wife and her mother inside the kitchen. **M** his brother-in-law took the items he carried for them. They gave him the child then he saw his wife and **M** leave going to their uncle's place. He therefore carried the child and walked towards the Bus Stage. All over a sudden he heard noise. A group of people led by his wife's uncle were accusing him of having stolen the child. He knelt down and explained circumstances under which he took the child. They let him go. He used a shorter route. Prior to crossing the river, he heard a sound and turned only to see PW1 who was with another person. He went towards him holding a long knife which had a black handle. The other person hit him with a club on the head. He regained consciousness to find himself at **Kenyatta National Hospital**. He denied having been in possession of any knife.

4. Issues to be determined are:

- 1) Whether death occurred.
- 2) Whether it was caused by an unlawful act/omission committed by the Accused.
- 3) Whether he acted with malice aforethought.

5. The body of the Deceased was taken to the mortuary. A post mortem examination was done on the body of the Deceased by PW9, **Dr. Jack Nthanga**. She died at about **9.20 a.m.** of the **25th September, 2010**. The Doctor concluded that she died of internal bleeding with cardiac arrest. This was proof of the fact of death.

6. PW9 on examining the body externally found the Deceased having sustained injuries. She had five (5) penetrating cut wounds. These wounds were on the chest wall measuring about **6 cm** long; On the anterior chest wall measuring **3 cm** long; one below the ribs and the abdomen exposing the intestines. Internally, there were penetrative cuts on both lungs with haemothorax; a penetrating cut on the heart exposing the heart chambers and exposed intestines.

7. The Prosecution's case was that the injuries sustained by the Deceased were inflicted by the Accused. In the cited case of **Republic vs. Nyambura and Others (2001) KLR 355** it was held that:

“It is our cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person and the standard of proof is proof beyond reasonable doubt.”

The Accused argued that PW1 and another person followed him and caught up with him after walking for **600 to 700 metres**. PW1 carried a long knife while the other person carried a club, weapons they used to attack him until he lost consciousness. He regained the same while in hospital.

8. In his defence the Accused admits having taken away the child (Deceased) from its mother (PW2). He claimed that they had discussed earlier and they were aware he would go for the child.

9. Prosecution witnesses on the other hand disputed the allegation. According to PW2, PW4 and PW5, the Accused went to their home unannounced and demanded to see the Deceased. He took the child unceremoniously and walked away with her. His action prompted PW2 to seek help from her uncle, PW1. When they caught up with the Accused he warned them to stay away lest he killed the child. PW1 saw the Accused put the child on the ground. He knelt down and stabbed her with a penknife on the chest and abdomen. He identified the murder weapon that he saw being used. PW3 **JMM** was going about his daily duties when he saw the Accused carrying the child and he had a knife. After he ran and escaped from the crowd that wanted to beat him up, he saw him kneel down put the child on the ground and stab her on the abdomen. On seeing many people having gathered he used the same knife to stab himself in the abdomen. On cross examination he denied having seen the Accused being assaulted by any person.

10. The evidence of PW1 is corroborated by that of PW3 as to who stabbed the child causing her fatal injuries that she succumbed to. The defence put up as to how the Deceased sustained the injuries was disapproved by evidence adduced by the Prosecution. In the premises I find that the Accused committed the act that caused the death of the Deceased.

Therefore, the question to be determined is whether he acted with malice aforethought? **Section 206** of the **Criminal Procedure Code** defines malice aforethought thus:

“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.”

11. An emphasis of what malice aforethought is was made by the Court of Appeal in **Nzuki vs. Republic (1993) KLR 171** thus:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:-

(i) The intention to cause death.

(ii) The intention to cause grievous bodily harm;

(iii) Where the Accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to the risk as a result of those acts. It does not matter in such circumstances whether the Accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder (See Hyman vs. Director of Public Prosecution (1975) A C 55.”

12. This is a case where the Accused offered to plead to the lesser charge of **Manslaughter** at the outset, an offer that was declined by the State. In his defence, the Accused did not plead intoxication or provocation. He denied vehemently having stabbed the Deceased. He Accused PW1 as the perpetrator of the offence.

13. The Prosecution adduced evidence that the Accused and PW2 were separated. PW2 returned to her maiden home where she resided with her mother. On the fateful date the Accused went to their home unannounced and took away the Deceased. The cause of their separation was domestic violence. Previously, he visited and went away without any ado. On the material date he went to take away the child. When people pursued him he threatened them. He warned them not to follow him and if they did he would kill the child. The threat was brought

into fruition when he knelt down, put the Deceased on the ground and stabbed her. On completion of his intention he proceeded to rip open his abdomen using the same weapon an act that resulted into his intestines protruding and consequently loss of consciousness.

14. By threatening to kill the Deceased, the Accused had an intention to kill. The act he committed on his person was evidence of an intention to also kill himself (commit suicide). His conduct was evidence of the act having been done with the knowledge of the consequences of his action.

15. From the foregoing I find the Prosecution having proved the case against the Accused beyond reasonable doubt. He is guilty and I convict him of the offence of **Murder** as charged.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 20th day of June, 2017.

L. N. MUTENDE

JUDGE