



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL CASE NUMBER 81 OF 2012**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS**

VERSUS

**J M B.....ACCUSED**

**RULING**

1. The accused **J M B** was Charged with the offence of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code.**

The particulars are that on the 15<sup>th</sup> November 2012 at Ngata Farm in Nakuru District within Nakuru County murdered **M M O**. He pleaded not guilty to the charge.

2. The prosecution called three witnesses.

**PW1 was E G O** the mother of the child and wife of the accused. She testified that on the fateful day she stayed with the deceased, a minor child, 2½ years and another child and came home about 6.00p.m. She testified that she beat the child at the legs as she had soiled herself and ten minutes thereafter the accused came home, about 6.30p.m. It was her testimony that she then left the children with the accused, her husband to go to fetch maize flour. When she returned about fifteen minutes later, it was her evidence that she found neighbours at the house mourning that the minor child had died. She testified that she did not look at the body of the child and was later summoned to record a statement at the police station. It was her testimony that she only beat the child with a small stick, and did not change her soiled clothes and did not know what killed the child.

**3. PW2 and PW3** respectively are nurses and neighbours of the couple. They visited the house upon being called by the accused to help him as the child was not responding to his calls. It was their testimony that the accused was emotional when they went to the house. They could not ascertain the cause of death nor did they know what happened to the child.

4. The Post mortem conducted on the body of the deceased child showed and concluded that the child died of manual strangulation at the neck. It was prepared by **Dr. Ndulungu**.

The prosecution did not call the investigating officer to shed light as to its investigations as to who or what may have caused the child's death.

5. Upon the above very scanty evidence, the accused was charged with the murder of the child.

The mother of the child (PW1) did not say or testify that she suspected the accused of having murdered the child. She simply testified that many times she used to leave the two children with him and she did

not know what happened. She however admitted having beaten the child, 10 minutes before the accused arrived at their house where the child died.

6. None of the other witnesses suspected the accused of having committed the crime. From the evidence on record, the accused was with the child for less than 30 minutes when he discovered that something was wrong with her and called neighbours and nurses (PW2 and PW3) for help.

7. The courts finds the behaviour of the mother of the child (PW1) suspicious. She testified that she beat the child ten minutes before the accused arrived, that she did not change the child from the stool soiled clothes she was wearing and left her sleeping and that when she came back fifteen minutes later she did not look at the body of the child and never did upto the burial.

It is not clear why the investigating officer was not called to testify. There are too many questions that went unanswered.

The above evidence does not show any participation remotely or directly to the death of the child by the accused. In my very considered view, he is a victim of circumstances, circumstances set in motion by either the mother of the deceased (PW1) or in conjunction with others, not named.

8. The offence of murder is a serious crime and before one is charged, proper and in depth investigations must be conducted. I must state here that no investigations or in the alternative very shoddy investigations were conducted. This is evidenced by the prosecutions failure to procure production of the investigation report, if any.

The offence of murder must be proved beyond a reasonable doubt. None of the prerequisite ingredients of murder were proved – see **Section 206 of the Penal Code**.

Malice aforethought was not established against the accused. *Actus reas* too was not proved. See **Charles Jativo Iresa -vs- R (2015) e KLR, and Criminal Appeal No. 100 of 2014 Stephen Ondieki Ongeto -vs- R (2016) e KLR**.

9. Having found no act or omission connecting the accused to the murder of the minor child, I find that no sufficient evidence was adduced to warrant the accused to being called upon to answer to the charge.

10 Pursuant to the provisions of **Section 210 of the Criminal Procedure Code**, I hereby dismiss the charge of murder against the accused and forthwith acquit him.

It is so ordered.

**Dated, Signed and delivered this 27<sup>th</sup> Day of July 2017.**

**J. N. MULWA**

**JUDGE**