



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 13 OF 2010
REPUBLIC.....PROSECUTOR
VERSUS
THOMAS MUTHUI NZII.....ACCUSED

JUDGMENT

Introduction

Thomas Muthui Nzii, “the accused”, is charged with murder contrary to section 203 as read with section 204 of the Penal Code as follows: THOMAS MUTHUI NZII: On the 23rd day of February 2010 at South B, Nairobi Area, murdered W O O. I will refer to W O O as the deceased in this judgment.

The accused was initially charged jointly with S I W (S) who was the second accused. The State entered a *Nolle Prosequi* on 3rd November 2010 in favour of S leading to the termination of proceedings against her and eventual discharge. This was done before the proceedings commenced and S testified as prosecution witness number three (PW3).

The case has taken long to be determined. Four judges have handled this case before I took over the proceedings on 23rd July 2015. By that time almost five years had elapsed from the time the plea was taken. At the time I took over the proceedings five (5) prosecution witnesses had testified before my predecessor Honourable Lady Justice Florence Muchemi. I took evidence of two (2) prosecution witnesses before the prosecution closed its case. I also took the defense of the accused making. A total of seven (7) witnesses have testified for the prosecution.

Facts of the case

From the recorded evidence, the accused and S were friends. The accused lived in South C with his sister and her baby while S lived in South B with her son, the deceased, and househelp. The events giving rise to this case started on 4th January 2010. On that day S did not have her househelp, the latter having gone home and failed to return. S was in dilemma. She had to go back to work but there was no one to mind her son while she was away. She turned to the accused for help. She left her son with the accused and went to work. It seems that the boy stayed with the accused on that day and the following day, the 5th January 2010. On 5th January 2010, the deceased fell and was injured on the face. The accused called S and informed her about it. A cold compress was applied on the deceased and the swelling subsided.

On 10th January 2010 the deceased was left with the accused again to allow the mother time to attend a meeting. He fell and got injured on the head. He was taken to Nairobi Hospital where a minor surgery was carried out to drain the fluid that had accumulated. The deceased stayed in hospital with his mother S

for two days before he was discharged. Sometime after the discharge from hospital, the deceased developed bloody spots in his eyes. He was taken back to hospital and was referred to the surgeon who had earlier carried out the operation. The deceased was admitted in hospital where he stayed with his mother for five days. Two days after discharge from hospital on 27th January 2010 the deceased developed breathing complications. The accused who was minding the deceased at the time called S and both took the deceased to Mater Hospital. The deceased was unconscious at the time. He was resuscitated and admitted in High Dependency Unit (HDU). The deceased was operated on 28th January 2010. On 4th February 2010 the deceased was discharged from hospital.

The deceased's condition did not improve much. He was sickly with fever and vomiting. S kept on taking him to hospital but he did not improve. On 23rd February 2010 the deceased was left with the accused with plans to have the accused take him to hospital where S was to join them. In the course of that day, the accused called S and informed her that he was at Gertrude's Children Hospital in Nairobi West with the deceased. The accused asked S to urgently go there. On arriving at the hospital, S found that the deceased had passed on.

Evidence further shows that the Children's Department, through Esther Mugure Ndung'u (PW5) a Children's Officer, investigated this case. The reason for the investigations was the suspicion of child neglect and child abuse. The deceased died before the investigations were completed. The police took up investigations and arrested both S and the accused. They were jointly charged with this offence before the State entered a *Nolle Prosequi*.

Accused's defence

The accused gave his defense under oath. He told the court that he met S, the mother of the deceased, in 2009 and became friends with her with the intention of marrying her. He said he loved the deceased as a son. He told the court that he had taken care of the deceased on various occasions sometimes overnight and that he would bath, dress, feed and play with him. In summary the accused admitted and confirmed the evidence of S in respect to the injuries sustained by the deceased on various occasions; the numerous hospital visits, surgeries, admissions both at Mater and Nairobi Hospitals and the role he played in all those occasions. He denied killing the deceased and told the court that he took good care of the child and ensured he attended the best hospitals and received the best medical care he could get. He admitted being left with the deceased by S and the child getting injured during those times but denied having anything to do with causing the injuries. He explained the role he played on 23rd February 2010 when the deceased died. He told the court that the deceased got sick and he, accused, took him to Gertrude's Hospital Nairobi West and called S to join him at the hospital but the child died before S arrived. The accused was subjected to detailed cross examination. He denied that he had a problem with the deceased because he was not his biological son.

Submissions

Mr. Wandugi, counsel for the accused, submitted that the evidence by the prosecution is weak, scanty and discredited and that there is no evidence adduced to show what specifically the accused did on 23rd February 2010 to cause the death of the deceased. He submitted that the Investigating Officer, PW6, did not adduce evidence connecting the accused with any unlawful act or omission that would have led to the death of the deceased. He submitted that the evidence of S completely exonerated the accused. He submitted further that the investigations carried out by Esther Mugure, PW5, were in regard to information she had received that the child had fallen and got injured but this was not connected with what happened on 23rd February 2010 when the accused is alleged to have caused the death of the deceased and that there is no evidence connecting the incidents of deceased's falling, from 5th January 2010 onwards, which may have led to the death of the deceased. Mr. Wandugi submitted that the deceased was taken care of by the mother and the accused and was taken to the best hospitals; that despite this he developed complications after the operation and that the cause of death was due to medical negligence. Mr. Wandugi submitted that the prosecution has not proved this case beyond reasonable doubt and told the court that suspicion alone no matter how strong cannot be a basis for conviction.

Two authorities have been cited by the defense to support their case. The first one is **Cr. Appeal No. 2 of 2002 Joan Chebichii Sawe v. Republic** on circumstantial evidence and **Cr. Appeal No. 179 of 1964 Okethi Okale & Others v. Republic** on burden of proof.

The Prosecution Counsel filed her submissions and highlighted them briefly. She rightly pointed out that the prosecution case revolves around the evidence of S who told that on different dates and occasions she left her son the deceased with the accused and in most of those occasions her son would get injured either by falling or experiencing other health complications. She submitted that the deceased succumbed to the injuries he sustained under the care of the accused. She submitted that the prosecution has proved the case of murder against the accused and urged the court to convict him.

Analysis and determination

Section 203 of the Penal Code defines murder in the following terms:

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

This definition contains the ingredients of murder that must be proved before an accused person can be convicted. The law places the onus of proving a criminal case on the prosecution. The standard of proof is proof beyond reasonable doubt. The prosecution must prove that death of a human being has occurred; that the death was caused by an unlawful act or omission perpetrated by the accused person before the court; and that in causing that death the accused person was of malice aforethought. Malice aforethought is defined under Section 206 of the Penal Code 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 the 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.

In determining this case I have turned to the evidence of the seven witnesses who testified for the prosecution and the defense of the accused. Doctor Peter Muriuki Ndegwa (PW7) examined the body of the deceased on 2nd March 2010 after J W (PW1) and Z M (PW2), both grandfathers to the deceased, identified the body of the deceased to him. The doctor found the following injuries:

- (i) An old abrasion on the right fronto-temporal junction;
- (ii) An old abrasion on the left cheek;
- (iii) Horizontal ligature impression on the front anterior of the neck;
- (iv) Laceration on the lower lip;
- (v) Healing surgical incision on right temporal scalp;

- (vi) Old subcutaneous and sub-aponeurotic bruises frontal scalp;
- (vii) Burr-hole right temporal skull;
- (viii) Global subdural haematoma; and
- (ix) Raised intracranial pressure.

I have examined and analysed the evidence of Dr. Ndegwa. After he examined the body of the deceased, he formed the opinion that the deceased died due to increased intracranial pressure due to intracranial haemorrhage (subdural haematoma) due to a head injury due to blunt force trauma. The doctor filled a report which he produced in court as exhibit 3. From the cross examination of the doctor it is apparent that he did not have the treatment notes from both Mater and Nairobi Hospitals in respect of the deceased. The doctor confirmed that the deceased had been operated on as this was evident to him after examining the body. The doctor could not however confirm whether the surgery was successful or not. At one time during cross-examination the doctor thought that the operation had not been successful but he changed his opinion on that issue and told the court that without knowing the circumstances of the case in regard to the deceased he could not say that the treatment at Nairobi Hospital was successful or not.

This evidence by the doctor medically confirms the death of the deceased. I have no reason to doubt this evidence and therefore it is my finding that the death of the deceased has been proved beyond reasonable doubt. The opinion of the doctor as to the cause of death of the deceased proves beyond reasonable doubt that the act causing the death was unlawful. The deceased was subjected to blunt force trauma to his head. This caused subdural haematoma leading to increased intracranial pressure that ultimately led to the death of the deceased.

I have examined the evidence of the other witnesses to determine whether it proves the other ingredients of murder, that is whether the accused is the one who inflicted injuries to the deceased leading to his death and whether in so doing he intended to kill the deceased. I have examined the evidence of Dr. Dan Ochiel (PW4). He did not attend to the deceased when the deceased was taken to Mater Hospital on 27th January 2010. The report he presented to court Ex. 1 was prepared by him after reading treatment notes and other documents related to the treatment of the deceased. The report presented in court by Dr. Ochiel and his evidence in court portrays a very sad situation. The information given to Mater Hospital captured the history in respect of the deceased's medical condition prior to being taken to Mater Hospital. When the deceased was received at Mater Hospital he was unconscious and had to be resuscitated and admitted at the High Dependency Unit (HDU). The report further shows that a brain scan was performed at Mater and it showed an acute fronto-parietal subdural haematoma which was drained.

The totality of the evidence of Dr. Ochiel is that the admission in Mater Hospital of the deceased and what was noted by the doctors during the treatment of the deceased "raised a red flag" to the doctors there. It was obvious to them that something was amiss. The report by Dr. Ochiel shows attempts to hold counseling sessions with the accused and S were made on 2nd and 3rd February 2010 but S declined. On 4th February 2010 the father of the deceased requested to change the hospital leading to the discharge of the child. It is not specified here whether by referring to the "father of the deceased" the doctor meant the accused or another person.

The condition of the deceased made the administrators of Mater Hospital suspect that all was not well with the child. The Director Mrs. Were, not a witness, called Esther Mugure (PW5), a Children's Officer based at Nyayo House Nairobi and informed her about it. Mugure told the court that she went to Mater Hospital on 12th February 2010 and saw the mother and the child who were admitted in the ward. Mugure interviewed S. The information given to Mugure was that the child had fallen and hurt his head at first when the father was bathing him and secondly when he was riding his bicycle. S also alleged that the househelp may have injured the child. The report of Dr. Ochiel confirms that the deceased and his mother were admitted again at Mater Hospital on 9th February 2010 and discharged on 12th February 2020.

Mugure told the court that Mater Hospital formally wrote to the Children's Department on 17th February 2010 to investigate the matter. On 19th February 2010 Mugure she made an application to court for an order that the deceased was a child in need of care and protection. Her intention was to rescue the child. She obtained the order on 25th February 2010 but the order was not executed because it was obtained two days too late. The deceased had died on 23rd February 2010.

The evidence of the prosecution so far does not shed light as to what really happened to the deceased. The only witness who seemed to explain the circumstances surrounding the child from the time he sustained the initial injuries to the time he died is his mother S and to some extent the accused in his defense. The summary of the evidence of S is that the deceased used to fall and injure himself. All the incidents when this happened, S was not present. In all those incidents the deceased was always left under the care of the accused. I have not come across evidence showing that at any of those times the child was left under the care of the househelp. S did not seem to suspect the accused. She actually spoke well of him in her evidence. She seemed to trust him to an extent that she would leave the deceased with him sometimes overnight.

I have agonized over the evidence of S. It is not lost to me that she was jointly charged with the accused for the murder of the deceased. The prosecution applied to have her discharged. The reasons behind this are not clear to me since by the time I took over this matter S had been discharged and had testified as PW3. Could it be that the prosecution had no other witness to testify against the accused and therefore had to withdraw charges against S and convert her to a witness? I have no answer to this question since I am wary of advancing a theory that is not supported by evidence. Evidence shows that there was sister of the accused and her househelp. These were not called as witnesses. There was also the househelp of S. She was not called to testify. The doctor(s) who attended to the deceased in Nairobi and Mater Hospitals were not called to testify either. Why was this omission made by the State?

The evidence of S leaves some gaps. She concealed to the court that she had met the Children's Officer while she was at Mater Hospital. She also concealed attempts by Mater Hospital to counsel both her and the accused who the hospital thought were the parents of the deceased. Why did Susan hide this fact from the court? In my view S was not a credible witness. She was close to the accused and obviously she was trying to protect him. The defense of the accused agrees with the evidence of S. The accused painted the picture of a caring person who took the role of a father to the deceased and took great care of him. I am alive to the fact that the accused does not have a duty to prove his innocence. The burden of proving the accused guilty lies with the prosecution and does not shift at any time.

I have considered all the evidence including the defense. This is a very sad case. I have no doubt in my mind that this child, the deceased, was not receiving all the care and attention he deserved as a child of tender years. Evidence shows that the deceased was about 2 years old at the time he died. This is the time most children of that age are very inquisitive and curious wanting to explore everywhere. Neither S his mother nor any other caregiver left with him when S was away, including the accused, seem to have taken good care of the deceased. It is not lost to me that S was mostly away from home. In all the times S was away the deceased was either left with the accused or sometimes with the househelp when one was available. Most of the evidence by S shows that she did not have a househelp on most occasions hence her actions of seeking out the accused to take care of her child when she was away. Evidence shows that the deceased suffered numerous injuries most of which were localized around the head. This is a very vulnerable part of the body. Almost all these injuries, as far as evidence shows, were sustained when the deceased was under the care of the accused. From 5th January 2010 to the time the deceased died on 23rd February 2010, he was in and out of hospitals almost every week. He was admitted in Nairobi and Mater Hospitals more than once in each hospital.

I have considered the evidence in total. I agree with defense counsel Mr. Wandugi on the position of the law that the prosecution bears the onus of proving a criminal case beyond reasonable doubt. In the **Okethi Okale & Others case**, above, cited by the defense it was held by the Court of Appeal that:

“(i) In every criminal trial a conviction can only be based on the weight of the actual evidence

adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches; (ii); (iii) the burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of the trial judge to look at the evidence as a whole."

As submitted by the defense, the case for the prosecution rests solely on circumstantial evidence. In order to base a conviction on circumstantial evidence such evidence must meet certain legal parameters as held in various decisions including ***Joan Chebichii Sawe v. Republic*** cited above where the Court of Appeal cited with approval ***R. v. Kipkering arap Koske & Another 16 EACA 135*** where it was, inter alia, held that:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

This is further amplified in the case of ***Simoni Musoke V. R. [1958] EA 715***, which cited with approval the following passage from the Privy Council decision in ***Teper V. R. [1952] AC 480 at P.489***, where the following was added:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".

It is obvious to me that the accused is highly suspected to have unlawfully acted in a certain manner or omitted to act and as a result this led to the deceased sustaining fatal injuries that ultimately led to his death. S may have known about it and failed to take an action and instead protected the accused. I however remind myself that suspicion alone not matter how strong cannot amount to prove beyond reasonable doubt. As cautioned in the ***Okethi Okale case*** above I desist from putting forward a theory that is not supported by evidence. In the ***Joan Chebichii Sawe v. Republic case*** cited above the Court of Appeal had no evidence to connect the accused person with the offence save mere suspicion. The judges of that Court had this to say in respect of suspicion:

"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove a case against the accused beyond reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No. 17 of 1998 (UR), suspicion however strong, cannot provide a basis for inferring guilty which must be proved by evidence."

My careful analysis of all the evidence of the prosecution and the defense, the law and the rival submissions as well as the cited authorities leads me to conclude that the prosecution has failed to prove a case of murder against the accused. Firstly, investigations were poorly conducted. Edward Kamau (PW6) who is the Investigating Officer did not seem to have done much in his investigations and secondly he failed to summon key witnesses including the doctors who attended to the deceased and the househelp who lived with S. The evidence on record does not meet the legal threshold of proving this case beyond reasonable doubt. At the end of the trial what this court is left with is suspicion that the accused caused the death of the deceased. I have addressed the issue of suspicion in this judgment. My duty therefore is to come to the conclusion that is supported by evidence and the law. I find that the accused is not guilty for lack of evidence to support a different finding. It is my order therefore that the accused be and is hereby acquitted of the offence of murder. Unless he is held for any lawful course he shall be free to enjoy his freedom as the law has exonerated him. Orders shall issue accordingly.

Delivered, signed and dated this 23rd November 2017.

S. N. MUTUKU

JUDGE