



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

HIGH COURT CRIMINAL CASE NO. 6 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

LOCHERIA ESEKON.....ACCUSED

JUDGMENT

The accused **Locheria Esekon** is charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence are that on 31st day of July, 2016 at Kapus village Kapus sub-location n Loima District within Turkana County jointly with another before court murdered Lokudasho Eyanae.

The prosecution's case was that on the material day PW1 Ekalale Nangois a minor together with his brother Lokudeshe the deceased went to look after goats at Naregae area. They went towards Lokatui river. At the river they were four in number; among them was the deceased Ekra Esekon. They then entered into the river and started swimming. While so swimming one of the children Esekon was swept away by water and he drowned. The 3 of them tried to save him but were unable. Some of the children went to inform the adults of the tragedy. The parents of Esekon came. They accused the children of having pushed the Esekon into the river. One Longiro Esekon started beating Lokudocha Nanyole. He ran away to his home and left Lokudacha the deceased in this file being beaten.

PW2 Ann Ayeugan was at her home when she received information that a child had drowned at the river. She went there and saw Lokinger Esekon beating the deceased. They rescued him from the assailants and took him to the home of Mzee. While there Locheria Esekon the accused came and took the deceased from the home of Mzee. He took the deceased to the dam where he killed him. The accused while taking the deceased away said he was going to kill him as he had drowned his son.

PW3 Selina Akure a minor testified that she joined her mother (PW2) to go to river where the boy had drowned. On arrival they saw the Lokinar Esekon beat the deceased until he started bleeding. The deceased was taken to the camp. While at the camp he saw the accused take away the deceased. She followed him. The accused then took the deceased to the dam where he tied the deceased on the legs and threw him into the dam, they then removed him and strangled him with a piece of cloth and then threw him into the dam. They again took the body and buried it. She ran away.

PW4 Robert Ikoel the Assistant Chief Kapus sub-location was at the home of Mary Nashoda on 3/8/2016 with other clan elders when accused went there and informed him that he had killed the deceased on 31/7/2016 and that he had received information that the deceased family were looking for him. He advised accused to accompany him to the police station on 4/8/2017 to report. The accused did not turn up as agreed. The assistant chief reported the matter to the OCPD. The accused with his uncle later came and reported to the police station where he was arrested.

PW6 No.81345 corporal Joseph Adongo was at Loima where he was informed that accused had been placed in custody at Lodwar police station. He came and received accused. He interrogated witnesses and received information that accused had tied the deceased and threw him in a dam where the deceased died. The accused volunteered to make a confession but when he was taken before a magistrate he refused to speak. He received orders to exhume the body of the deceased and the other child who had drowned. On visiting the grave where deceased was buried they found the grave open and only bones were recovered. The bones were forwarded to Government Chemist together with blood sample of deceased's mother Christine Kakhoya with a view to determine maternity. The specimen was DNA profiled by PW5 Ann Wangeci Nderitu who formed opinion that Christine Nakhoya was the biological mother of the child whose bones were analysed – the deceased.

The accused when put on his defence gave unsworn evidence. He testified that on 31/7/2016 he woke up and reported on duty at his boda boda business where he worked until 7pm when he went home. On arrival he was informed that there was a child who was thrown into the river. His brother Apaebu had gone to the home of the parents of the child. On 3/8/2016 one Moja came and informed him that he was being sought. He went to the chief and informed him that there were people who wanted to kill him. The chief then ordered that he be arrested.

The accused is charged with the offence of murder contrary to section 203 as read together with section 2014 of the penal code. Section 203 provides:

203 Any person who of malice aforethought caused death of another person by unlawful act or omission is guilty of murder.

Section 204 provides:

204 Any person convicted of murder shall be sentenced to death.

In this case the prosecution has to prove by evidence that Lokudashe Eyanae is dead and secondly that it is the accused who by unlawful act or omission caused his death and lastly that the accused had malice aforethought when he committed the offence.

In this case the deceased body was buried. **PW3 Selina Akure** testified that she saw where the deceased was buried and actually led police to the shallow grave where they found it open but recovered some bones. The body therefore was not exhumed for post-mortem as only bones were recovered. The fact of death can be proved by presentation of post-mortem report, on the testimony of witness as to the death or can be discerned from circumstances as when a person drowns in a river and body is never recovered. Death can also be proved as in this case when only human bones are recovered as it is common knowledge that bones cannot detach from a person and he remains alive.

PW1 Ekaalale Nangou who was with the deceased and other boys at the river testified that after Etire Esekon drowned in the river they sent some boys to go and inform people what had happened. Many people came to the scene. They quarreled the boys alleging that they had pushed Esekon to the river to drown. PW2 Ann Ayengad testified that she was among the people who responded to the alarm that a child had drowned at the river. She went there. She saw Lokingor Esekon beat Lokudacha the deceased. They went and took the deceased away to the camp at the home of mzee Locharia Esekon. The accused then took the deceased from the home to the dam where he killed the deceased for the reason that the deceased had drowned his child. This witness only saw the accused taking away the deceased who has not been seen since.

PW3 Selina Akure was with other members of the public who went to the river where a child had drowned. The deceased was also there and when asked denied that anybody had pushed the child Esekon who drowned to the river. While at the river one Lokinor Esekon beat him until he bled. The deceased was taken to the camp. At the camp they found accused. The accused then held the deceased towards the dam. The witness followed them and saw the accused tie the deceased and threw him in the dam. They then removed the deceased and strangled him with a piece of cloth and throw him in the dam. She noticed where they buried him and when police came. She showed them the place.

From the evidence of these witnesses it is evident that accused is well known to them. That on the material day the deceased was questioned on allegations that he had pushed Itire Esekon to the river in which he drowned. The deceased denied the allegations and was beaten by another person at the river. He was taken to the camp in the house of Mzee. There is evidence by PW2 Anna and PW3 Selina that it is the accused who took the deceased from the camp on that fateful evening. PW3 testified that he followed them and saw accused and another kill the deceased. The one thing that is clear is that the deceased took away the deceased; who was found to have been murdered and buried in a grave where only his bones were recorded.

The accused in his defence only stated any events leading to his arrest and denies anything to do with the death of the deceased. This court upon considering the evidence, is satisfied that the accused together with another did inflict the injuries from which the deceased died and buried him, in the grave where his bones were recovered. It is also clear that the real motive for the killing was the allegations that the deceased had pushed Etire Esekon a relative of the accused into the river where he drowned.

The issue this court has to determine is was the allegations that Itire Esekon was pushed into the river by deceased amount to provocation on the part of the accused?

Under the provisions of section 207 of the penal code and offence of murder can be reduced to manslaughter if certain factors are proved. Section 207 provides

207 when a person who unlawfully kills another under circumstances which, but for the provision of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only".

208 (1) the term provocation means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) when such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.

In my view the information that the deceased had pushed the accused sisters son Itireri Esekon can be established as sufficient provocation as to make this court reduce the charge of murder to manslaughter.

I therefore find the accused guilty of the offence of manslaughter contrary to section 202 of the penal code and convict him accordingly.

Signed and dated at Lodwar this 17th day of November, 2017

S N RIECHI

JUDGE