



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE NO.19 OF 2009

REPUBLIC.....PROSECUTION

VRS

R K C.....ACCUSED

JUDGMENT

1. **R K C** the accused herein is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars are that the accused on the 22nd and 23rd March, 2009 in Bomet within Rift Valley Province murdered D K.
2. The accused pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution called six (6) witnesses while the accused gave an unsworn statement and called one witness for his defence.
3. The prosecution case is that the deceased was the accused's son. His wife had differed with him and left for her matrimonial home with their 2nd and 4th born children. The accused remained with their 1st born son who was physically and mentally challenged and the 4th born who is the deceased herein.
4. On 22nd March 2009, PW1, **S C** who is a sister in-law to the accused and also a neighbour was passing by the accused's home when she heard a child's cry from the accused's house. The child was crying loudly and she went to inquire on what was happening. She found the accused caning the child with a small cane, and the child was naked.
5. The accused on being asked the reason for the caning responded that the boy had the habit of walking around naked. PW1 pleaded for the child and she left as the accused had promised to talk to him.
6. The next day PW1 heard screams from the accused's house. She went with her other co-wives (wives of her brothers in-law) to the house of the accused and found a crowd there. The accused was not there and only the 1st child could be seen. A freshly dug grave was seen, and the Assistant Chief Stephen Chelule was called. He too called the police who arrived at the scene.
7. PW2, **J K K** passed near the accused's home on 23rd March 2009 12.00 p.m. He saw him outside his house with his eldest son which was unusual, as he used to live with two of his children. When he reached home, his mother told him that she had heard that the accused had killed his child.
8. Back at school, he met the Assistant Chief Mr. Chelule hurriedly leaving, to attend to an urgent matter.

He left for home after the meeting. He saw many vehicles at the accused's home. Accused was on the Police Land Rover. At the homestead, he saw a freshly dug grave covered with fresh soil. A carton was recovered from the grave. It was tied with a shoe lace. Inside the carton was the body of the accused's son K (the deceased).

9. PW3, **K K K** a brother to the accused went to the accused's home on 23rd March 2009. He gave similar evidence to that of PW2.

10. PW4, **Dr. James Hamisi** conducted the post mortem on the deceased's body. He found the following injuries:

- **Multiple bruises on the head and left cheek.**
- **Multiple bruises (whip Marks) on the stomach.**
- **Blood clot on the head.**

The cause of death was a closed head injury secondary to blunt head trauma. In cross examination he said there was no history of previous illness of the deceased. That an epileptic fit could not cause death. The same could not also cause whips. He however said it was possible for such a trauma to be caused by a fall.

11. **PW5, I.P. James Saroke**, the Investigating Officer herein was in the station on 22/3/2009 at 4.30 p.m when he was instructed by the Deputy OCPD, Bomet, to interrogate the accused who was at the station with one child. The accused told him his son D fell ill and died at the Hospital and he had buried him that night. The accused led them to the homestead after PW5 had contacted the area Assistant Chief. Scenes of crime personnel took photos before and after retrieving the body.

12. **PW6, CLP David Kiili**, a Scenes of Crimes Officer produced the photos he took (EXB2a-k). He also produced his certificate of compliance (EXB3.)

13. The accused made an unsworn statement of defence. He denied the offence. He stated that the deceased was epileptic. That his wife had left him after a quarrel, but she came home on 22nd March 2009 while drunk. She found him having locked the door after disciplining the child.

14. He left the children with the wife as he went to his 2nd house where he slept. On 23rd March 2009 he went to his place of work and worked up to lunch time and reported back. At 3.00 p.m, he saw five (5) people dressed in black come to him. They handcuffed him and took him to Bomet Police Station after informing him that something had occurred at his home.

15. Later he learnt that his epileptic child had died. He was taken upto his 1st wife's house and left at the road. These people returned with his son's body. He was shocked as he had left everyone well.

16. DW1, **S K K** is his brother. He too testified that the deceased was epileptic. He said he did not know how the child died. He admitted that he did not see the accused on 22nd March 2009. He further stated that the last time he saw the deceased, the latter had an injury on the head and the mother told him the body had fallen down and that he was epileptic. That, he had also witnessed him having fits.

17. Mr. Motanya in his submissions stated that there was doubt cast on the cause of death. That the caning of the son could not have caused death. He asked the court to accept the explanation by the accused and acquit him.

18. He further submitted that there was no direct evidence adduced against the accused.

19. This is now the case before court for determination. The accused faces a charge of murder contrary to section 203 as read with section 203 of the Penal Code which defines murder as follows:

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

20. The fact of death is not disputed. All the witnesses attest to it. PW4 who carried out the postmortem confirmed the cause of death as a closed head injury secondary to head trauma.

21. I will next proceed to determine whether the accused is the one who killed the deceased. It is true that no one witnessed the killing of the deceased. It is an undenied fact that the accused was found caning the deceased on 22nd March 2009. The boy was naked as he was being caned. He was crying loudly forcing PW1 to come and see what it was.

22. PW1 left for her home when the accused assured her, he would talk to the child. No one knows what happened to the child after PW1 left upto the time his body was retrieved from the shallow grave the next day i.e 23rd March 2009.

23. The accused was at his home with the deceased and his elder brother who is physically and mentally challenged. This elder son had been left locked up in a room. Even if he witnessed anything he does not speak.

24. The accused and his witness insisted that the deceased was epileptic and suffered from such fits. Besides, their word of mouth, there was nothing to show the authenticity of their claims. The doctor (PW4) ruled out the possibility of epilepsy being the cause of death. During the post mortem, he found the child to have multiple bruises on the head and left cheek and multiple bruises (whip marks) on the stomach. All these bruises and whip marks could not have been caused by epilepsy he said.

25. The accused in his defence stated that the mother of this child came home drunk on 22nd March 2009 and he left her with the children upto 23rd March, 2009 after 3.00 p.m when he was arrested. He wondered what had happened to the child.

26. The evidence by the accused's close relatives is that his wife who is the mother of the deceased and others had gone back to her parents leaving the accused with the eldest child and the deceased. They have also confirmed that at the time of this incident the accused's wife was not at this home.

27. As villagers stormed into his home, a fresh shallow grave was found in the home. PW5 I.P James Saroke with P. C. Njagi investigated the case. PW5 confirmed that the freshly dug grave was about 8 metres from the house. It was shown to him by the accused.

28. His younger brother (PW3) heard the report of the murder and went to the accused's homestead. He found a huge crowd there and went round the homestead and discovered a freshly dug grave. The police removed the soil covering it and retrieved a carton with the deceased's body. Photographs (EXB2a-k) were taken. They all show the fresh green plants covering the soil.

29. The accused was seen with the deceased on 22nd March 2009 by PW1. He had beaten the boy but the boy was alive. The next day, the boy was found secretly buried in a grave. The accused was the **LAST** person to be seen with this child while alive.

30. The rule about circumstantial evidence is that it must be such as to be explainable only upon, the hypothesis of the accused's guilt and incompatible with any other innocent explanation. The evidence must point to none other than the accused as the culprit and with no other evidence weakening the chain. See **R. V Kiprening Arap Koskei [1949] 16 EACA 136; Sawe V. R [2003] 364; Nzivo V R. [2005] 1KLR 699.**

31. The cause of death has been clearly stated to be blunt trauma to the head. The deceased was found secretly buried in a shallow grave in the accused's homestead. Again their eldest child who is physically and mentally challenged could not have done that. These children were the only ones in the home with the

accused. The deceased could not have buried himself in that grave. DW1 S K K did not know how the deceased met his death.

32. The chain of events points to none other than the accused as the person who committed this offence.

33. The next issue for determination is whether malice aforethought has been proved. Malice aforethought has been defined in section 206 of the Penal Code as follows:

“206. Malice aforethought shall be deemed to be established by Malice aforethought.

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;

34. PW1 confirms the beating of this child by the accused who said he was disciplining the 4 year old boy. It may well be assumed that indeed he was disciplining him and it resulted in death hence the secret burial. The deceased was a 4 ½ year old boy whose death could not be made secret. The neighbours and relatives ought to have been told about it. The accused never did so. Bad as it is there was really no strong evidence to show that the accused had the intention to kill, the deceased.

35. I therefore reduce the charge from Murder to Manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict the accused accordingly.

Signed, dated and delivered this 24th day of March, 2016.

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H. I. ONG'UDI

JUDGE