



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 47 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

A O O.....ACCUSED

JUDGMENT

1. A O O is charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of offence are that on 15th day of June 2012 at Gachie Trading Centre within Nairobi County murdered P O.

2. The prosecution case is that the accused was the step father of the deceased having married the deceased's mother one J O (PW1). The couple and their two minor children 2½ year old P O (the deceased) and 6 month old sibling, lived in River road area of Gachie. The deceased was said to be a sickly child living with sickle cell anaemia. He could not talk or walk at his age. On the evening of 14th June 2012, the accused told the wife that he wanted to take the child to hospital for treatment. She obliged and the following morning (15th June 2012) the accused left the house with the deceased around 6.00a.m. He came back home in the evening without the child and told the wife that the child was admitted at the Kenyatta National Hospital and would be taken care of by nurses.

3. Subsequently and for several days, the accused maintained a lie that the child was still admitted. He ensured that the mother did not get an opportunity to go and see the child. Two weeks later on 30th June 2012, the mutilated and decomposing body of the child was found by one Simon Wabwalaba Anyembe (PW3) in a thicket off old Ruaka Road. He made a report at Kihara Police Post.

4. The accused was arrested after the wife (PW1) who was by then in emotional distress was encouraged by a neighbour one Winfred Nyaga to make a report to the police. From PW1's evidence, it was the said Winfred Nyaga who assisted her contact police officers on a mobile patrol and led them to the accused's house. The officers found the accused at home and questioned him on the whereabouts of the the child. According to one of the arresting officers PC Samson Kirong (PW4), the accused told them that the child had died on the way to hospital and that he abandoned the body in the bush near Karura forest. The accused was arrested and later charged with the offence of murder.

5. The court found sufficient evidence to put the accused on his defence. He gave an unsworn statement. He told the court that the deceased P O was his son and that doctors in his home county Kendu Bay, Rachuonyo had told him that the child had sickle cell anaemia. He admitted that he told the wife that he was taking the child to hospital on 15th June 2012. He further said that he told her to remain behind to mind their 6 months old baby and also because they did not have enough money for fare for both of them. He boarded a matatu (van providing public transportation) and a short distance away, he realized that the

child was not comfortable and asked to disembark. The child was by then shivering and vomiting. After a short while he observed that the child was no longer breathing. He got scared and left the child in a shrub and proceeded to his place of work.

6. The accused further narrated that he later went home in the evening and lied to the wife that the child was admitted in hospital. He persisted in the lie for days until the wife borrowed money from his relative one D O and insisted that they go and see the baby. The accused obliged and they boarded a bus to town. He however did not take her to the hospital but instead he treated her to a soda in town and after taking the soda, he told her that he had just taken her out and they returned home. He was arrested the following day. The accused further told the court that upon his arrest he led the police officers to the place where he had dumped the child but they did not find the body there. He denied having killed the child and explained that he abandoned the child only because he was afraid of the reaction of the mother and also because he had never seen some body dying.

7. This being a murder case, the prosecution must prove all the elements of the offence. It must prove the death of the deceased and the cause of such death. It must prove that the accused and no one else caused the death of the deceased, and that in so doing, the accused had malice aforethought.

Death of the deceased

8. The death of the deceased was proved by the prosecution. Indeed it was not disputed by the defence. The Prosecution led evidence through PW1 who is the mother of the child to the effect that the accused took the child from home on 15th June 2016. He did not bring the child back. On 30th June 2013, a child's decomposing body was discovered by Simon Anyembe (PW3). Police removed the body to city mortuary where scenes of crime officer Inspector Gervia Mameti (PW5) took 5 photographs showing the badly mutilated and decomposing body. Chief Government Pathologist Dr. Johansen Oduor (PW9) conducted a post-mortem examination on the deceased's body on 6th July 2012. He observed that the body was already in a decomposing state. The right arm was amputated and there were multiple lacerations on the face which was already maggot infested. Dr. Oduor made a finding that the cause of death was multiple injuries due to penetrating sharp and blunt trauma. He produced the post-mortem report as Exhibit No. 5.

Who caused the death of the deceased?

9. None of the prosecution witnesses saw the accused killing his child. The evidence against him is therefore largely circumstantial. That being the case, the evidence must be tested on well settled principles. These were stated by the Court of Appeal in **R. v. Kipkering Arap Koske & Another, 16 EACA 135** as follows:

'(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.'

10. In this case, it was clearly established by evidence that the accused left home with the child on the morning of 15th June 2012. This was the undisputed evidence of the child's mother (PW1). The accused also admitted in his defence that he left home with the baby alive to take him to hospital. The accused was therefore the last person seen with the baby alive. Other than that evidence, the accused himself told the court in his unsworn testimony that the child became restless in the matatu on the way to hospital and he asked to disembark. He said that when he alighted with the child, the condition of the child got worse and that the child died right before his eyes. That he abandoned the body in a shrub by the road side and

proceeded to his place of work until evening when he went back home. There is therefore no doubt in the mind of the court that the child died while in the sole care and custody of the accused.

11. That said however, the outstanding question is what caused the death. The accused in his defence denied having killed the child. He said that the child died because he was sick. PW1 told the court in her testimony that the child was sickly. Her understanding of the ailment of the child was limited to the fact that the child could not walk even at 2 years. She however said that when the accused informed her that he was taking the child to hospital, there was nothing wrong with the child. PW1 said that the baby could not walk otherwise the rest of his body was okay. In final submissions defence counsel told the court that the child died as a result of the ailment he had been living with that is, sickle cell anaemia. Counsel submitted that the condition was life threatening if not managed. He invited the court to consider medical literature on the disease (annexed to his submissions).

12. The assertion by the accused that the child died on the way to hospital is not credible at all. He says that when he realized that the child was restless, he decided to disembark from the matatu. The question I am forced to ask is, why would he choose to alight instead of quickly and urgently proceeding to hospital to seek emergency medical intervention in the child's condition? Even if one were to believe that the child died of illness, there is the post-mortem report to consider. Dr. Oduor who conducted the post mortem made the observation that the body was mutilated. The right arm had been amputated at the mid-upper arm position. It had multiple laceration on the face with maggot infestation of the wounds. Dr. Oduor formed the opinion that the cause of death was multiple injuries due to penetrating sharp and blunt force trauma. The question then is, if the child died of sickness and was left on the road side who inflicted injuries and mutilated his arm?

13. There was overwhelming evidence that the deceased's body was mutilated and dismembered. Other than the pathologist's evidence on the cause of death which I found conclusive, other witnesses testified to the state of the deceased's body. The mother PW1 told the court that when she saw her child's decomposing body in the mortuary, she observed that some body parts were missing. She stated "*...one eye was removed, the tongue was not there, one hand was also missing the private parts were not also there. On 15th when Asher took him, he had all his body parts*". Besides PW1's testimony, No.86152 Cpl. Lukas Juma (PW8) of CID Gigiri who was one also of the investigators viewed the body at the city mortuary. He testified that the body was in a decomposing state with eyes chopped out.

14. I observe from the pathologist's report and findings that he makes no observation of missing body parts other than the right hand. I however observed that the post-mortem was done a few days later. Dr. Oduor observed during the post-mortem that the body was already decomposing. It had discoloured and there was skin slippage. Internally the organs had decomposed. Dr. Oduor's evidence on the cause of death was not challenged by the defence and was admitted. His evidence was also supported by the photographic evidence given by Inspector Mameti (PW5). PW5 photographed the deceased's body at the city mortuary on 4th July 2012 at around 11.30hrs. He said in his testimony that the body was partially decomposed and swollen and the skin was peeling. That the face was deformed and the right hand was missing. He produced 5 photographs (Exh.2 (a)-(c) and the report (Exhibit No. 3)

15. The photographic evidence corroborates the oral testimony of PW1, PW8 and the post-mortem findings in material aspects. I am convinced that the body of the deceased was indeed mutilated. The question then is, if the child died in the accused's hands, who mutilated the body? And if the accused had no hand in the death of the child, why would he abandon the body in a thicket by the roadside and keep lying to his wife concerning the whereabouts of the child. The evidence before me can only point to one conclusion that is, that the accused had a hand in the death of the child. Had the child died of disease, the accused would have had no reason not to tell his wife that their child had passed on.

16. I find that the evidence of PW1, PW8 and PW9 clearly demonstrate that the child did not die of illness but in the hands of someone who caused him injury and mutilated his body whether before, during or after killing him. I have already found that the child was at the material time in the sole care and custody of the accused. I find that the cumulative circumstantial evidence unerringly point to him and no one else as the person who caused the unlawful death of the deceased. To borrow the words of the Court of Appeal

in **Sawe V. R.**, (*supra*), I find the inculpatory facts in the present case incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilt. I am convinced beyond any reasonable doubt that the accused ended the life of his helpless child who was rightfully under his care and custody at the material time.

Whether the accused had the requisite *mens rea*

17. The prosecution submitted that the actions of the accused demonstrate that he had intention to kill the child. It postulated that he may not have been happy with the child because of the fact that he was not the biological father and also because the child was sickly. The defence on the other hand submitted that the child was not dead when the accused abandoned it and that if the accused had any intention to cover up then he would not have left the body where it could be seen.

18. Section 206 of the Penal Code provides that 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)

(d)

Malice aforethought can also be inferred from the acts of an accused person. See **Nzuki V. Republic [1993] KLR 171**. Besides, the conduct of an accused may provide circumstantial evidence pointing to malicious intention. See **Mabel Kavati & Anr. V. Republic [2014] eKLR**

19. Under the law, a person is not responsible for his actions unless he possesses the mental capacity to appreciate his actions. In this case, the accused was examined by police surgeon Dr. Zephania Kamau and found to have been mentally fit. Dr. Kamau testified as PW7 and exhibited the mental assessment report of the accused. I therefore have no doubt in my mind that the accused had the mental capacity to form the necessary intention and execute his heinous act.

20. In the present case, the accused decided on 14th June 2012 that he would take the child to hospital the following morning. When the wife expressed desire to accompany him, he declined with the excuse that they could not afford fare for two. That may well be understood because the evidence before court leaves no doubt in my mind that the couple was of lowly means. However, later when the wife expressed concern as to who would care for a 2½ year old admitted in hospital, the accused cheated her that nurses would do it. He also persistently prevented her from visiting the child ostensibly because he had no fare. He persisted in the refusal until the wife borrowed money from PW6 but even then he took her only to town and back home without taking her to Kenyatta National Hospital where he had purportedly left the child admitted. I find the action of the accused of removing the child from home and later continuously misleading the mother to be demonstrative of a cold calculated plan to kill the child.

21. It has already been demonstrated through evidence that the deceased's body was mutilated. The pathologist concluded that the deceased had been subjected to both blunt and sharp force trauma. There were lacerations on the body and the evidence of the right arm having been cut off. From this evidence, I can only conclude that the person who inflicted such harm could have had no other intention than to end the life of the deceased. The prosecution has proved element of *mens rea*. Clearly the accused planned and executed the murder of a young defenceless child. His motive for so doing however remains speculative and not proven. I must hasten to add that the prosecution was not required by law to prove

motive. As suggested by the prosecution, he may not have seen him as a problem child because of his sickly condition; he may have not loved him because he was not the biological father; or he may have had other evil designs on his life and body.

22. It was however clear to the court that the accused took advantage of the circumstances and perhaps naivety of the child's mother to commit the heinous act. The child's mother told the court that she dropped out of primary school when she got pregnant at 15 years old. She met the accused at 16 at their rural home in Kanyadhiany, Kendu Bay. He later brought her to Nairobi. She did not know anyone else in Nairobi apart from the accused and his cousin (PW6). She did not know her way around. She totally relied on the accused and believed him when he said that he had admitted the child in hospital. During her testimony, the court observed her demeanor and noted that though shy, innocent and even naive, she was however candid in her testimony.

23. In the premises, and for the foregoing reasons I find that all the elements of the charge of murder have been proved against the accused beyond any reasonable doubt. I find A O O guilty of the murder of P O. I convict him of the charge of murder contrary to section 203 of the Penal Code.

Judgment, dated and delivered at Nairobi this 30th day of May, 2016

R. LAGAT-KORIR
JUDGE

In the presence of:

.....: Court clerk

.....: Accused

.....: For the accused

.....: For the State