



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO.66 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

J K T.....ACCUSED

J U D G M E N T

1. **J K T**, the Accused herein, was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 21st day of November, 2015 at Majengo Estate within Narok County, he murdered **R. K.** He denied the charge and was represented by Mr. Ombati
2. The prosecution case through five witnesses is as follows. The Accused was at the material time living with the mother of the deceased, one **N A (PW1)**. **PW1** had a 3 year old girl named **R. K.** (deceased). Although **PW1** and the Accused lived together as man and wife, together with the deceased child, the latter had been sired by one **J N (PW4)** a former husband of **PW1**. **PW1** and **N** had parted ways after a five year cohabitation. Before then, a second child born to them had died.
3. The Accused and **PW1** subsequently became lovers and got a child who died, also in infancy. Although the Accused retained a room of his own at Majengo, Narok, he had moved in with **PW1** at the material time after **PW1** proved reluctant to move into his room. **PW1** worked as a hairdresser while the Accused carried on a hawking business in Narok town.
4. On 16th November, 2015, **PW1** had to leave early for work. She asked the Accused to take care of the deceased child as she herself left for work at 9.00am. The Accused was agreeable. However, when **PW1** returned at 3.00pm, the door to her house was latched on the outside and the Accused was not home. Upon entering the house, she found the deceased lying in bed and covered in beddings. However the child was very weak. The Accused was nowhere to be seen. An examination revealed severe stripe marks on her back. The girl only managed to utter the words: "*mum nimechapwa*" (mother I have been assaulted). She then closed her eyes.
5. The child was rushed for first aid in a local facility, before being taken to Narok District Hospital where she was declared dead on arrival. The Accused stayed away from **PW1's** house and was traced a day later in Narok town and arrested.
6. A post mortem examination conducted by **Dr. Ngulungu** on the body of the deceased revealed multiple bruises and abrasions to the front and back of the torso, buttocks, thighs and calf all which were linear in nature. In his conclusion, death was occasioned by multiple pulmonary thrombo and fat emboli resulting from the assault.

7. In his defence, the Accused gave a sworn statement. To the effect that, **PW1** was his wife and that they lived together with their 3 children, one of whom had died previously, and the second in June, 2015. That on 16th November 2015 he was left by **PW1** to mind the deceased child. He fed her and left her playing with other children, at noon, when he left for work. He said he loved and used to care for the child whenever she was left in his care. He said he left the child in good health as he went to work but on return at 5.00pm did not find **PW1** or the child.

8. He went to his room therefore, but **PW1** did not call him about the child. On the next day, she accosted him in town demanding that he accompanies her to the police station. He complied. He said he did not know **PW4** as husband to **PW1** and that **PW1** was his (Accused's) wife.

9. There is no doubt that during the material period the Accused and **PW1** were in cohabitation as man and wife. And that, **PW1**'s daughter **R. K.**, aged 3 years lived with them. It is not in dispute that on 16th November 2015 **PW1** left the deceased in the care of the Accused as she went to work.

10. I have noted from the evidence of **PW1**, **PW5** and the Accused himself that the correct date of the offence is 16th November 2015 and not 21st November 2015 as stated in the charge particulars. This discrepancy however does not prejudice the Accused in any way as the defence clearly understood the charge facing the Accused. (See also Section 214 (2) of the Criminal Procedure Code).

11. The prosecution case through **PW1** is that when she returned home at 3.00pm, she found the child in the throes of death, lying in bed in the house, with severe injuries. She was all alone in the house. The child stated to **PW1** that:- “*mum, nimechapwa*” – mum I have been assaulted. Those were her last words as she was pronounced dead on arrival at the hospital where she was rushed for treatment. **PW1** stated:

“(At the hospital) child was undressed and she had stripe marks on the back, buttocks and behind the neck. It is as if she had been whipped because the injuries looked like lash marks, some like burns....”

12. These injuries are captured in the photographs taken by **CPL Kiilu** on 25/11/2016 and produced at the trial as **Exhibits 1 a – d**. The post mortem form (**Exhibit 3**) documents *inter alia*, linear bruising on right chest and abdomen and abrasions on both buttocks. Also noted were a large bruise on the back and scapula region extending to the right rear thigh and calf. The lungs were collapsed and showed “**multiple fat and thrombo emboli**”. Brain swelling and cyanosis were also noted.

13. **Dr. Allan Soita (PW3)** testifying on behalf of **Dr. Ngulungu** explained the injuries in his evidence-in-chief as follows:-

“Body had cyanosis meaning that there was lack of blood circulationAbrasions on both buttocks necrosed. Subcutaneous fat on the buttock necrosed, meaning injury had occurred before death. The strokes were linear across buttocks and the skin and subcutaneous cells were dead or necrosed before death.....meaning that injury inflicted before death, else it would not show. Large bruise on the scapular region extending to the right thigh – as if one weapon used.....Lungs were collapsed and show multiple fat emboli and blood coming from other parts of body. Emboli of clotted blood and fat found stuck in lungs from other parts of body.....Fatty tissues and blood dislodged from the site of the assault and ended up in the lungs and brain. Even if trauma not severe, this itself can block heart and cause stroke and also heart attack.”

14. During cross-examination **PW3** reiterated his evidence stating *inter alia* that:-

“If body was alive at time of injury the cells die and there is clotting but if strokes after death only lines [would show] without underneath injury.”

15. The foregoing described injuries and cause of death were deliberately inflicted and are consistent with the last words of the minor: “*mum nimechapwa*”. It seems that whoever assaulted the minor whipped her

body so savagely that the strokes tore off skin from the buttocks and material therefrom were carried to the lungs, killing her. The evidence by **PW1, 3 and 4** is beyond dispute and I accept the same as credible proof of the injuries of the deceased and cause of her death. The question that calls for determination is whether the Accused is responsible for the unlawful act that occasioned the minor victim's injuries and subsequent death, and whether malice aforethought has been established.

16. In that regard, the evidence against the Accused person is primarily circumstantial. Such evidence must be considered within certain long-established principles. In the case of **Republic -Vs- Kipkering Arap Koskei [1949] 16EACA 135** the Court of Appeal stated that:

“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and 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 always on the prosecution and never shifts to the accused.”

The principles were further refined in the case of **Simoni Musoke -Vs- Uganda (1958) EA 715**– quoting from the case of **Teper -Vs- Regina [1952] 2 ALLER 447** held that:

“It is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

17. In the instant case, the Accused admits that the deceased was left in his care by **PW1** on the morning of 16th November 2015. According to **PW1** the Accused agreed to mind the child as he was not going to work that day, and was in fact, sleeping. On her return the door was latched on the outside. Upon entering the house **PW1** found the child lying in bed, covered with beddings. It seems that she was whipped so severely that skin (fat) and blood cells were released into the blood system, choking up her lungs, which collapsed.

18. The child was 3 years old. The Accused's explanation is that he left her playing with other children. Several questions arise from that explanation. Firstly, it is common sense a 3 year old could not be expected to care for herself with no particular adult person responsible, and that is why **PW1** had asked him to stay with the child. Secondly, the Accused allegedly left the house unattended going “to work” as he claimed. Yet **PW1** had left with the assurance that the Accused would not be going to work that day.

19. Section 111 of the Evidence Act provides:

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall-

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to

constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or...”

20. The child could not have caused the gruesome lash injuries on herself and then taken herself into bed and covered up with beddings, after latching the door on the outside. Somebody else did so. It defeats logic that the Accused could have left a 3 year old child he allegedly loved and often cared for all alone and without notifying **PW1**. Seemingly, the neighbours to the couple herein were recalcitrant, refusing to record statements with police. Still, it is upon the Accused who was admittedly left to care for the child to explain how the child ended up with gory bodily injuries from evident lashing.

21. Why, if he needed to leave, did he not notify **PW1** to come and mind the child? And why did he not lock the door to the house to secure it? After all, the couple shared a house, obviously with their earthly possessions that required to be secured no matter how meagre. There are no plausible answers in the Accused's defence to these questions.

22. Not only was the Accused not home when **PW1** arrived, but he also kept away from the home after that day, spending the night in his own room close by. It was **PW1** who mobilized *boda boda* operators in search of him as he had left his room, once again avoiding **PW1**'s home, on the next morning. The Accused and **PW1** had parted on cordial note on 16th November 2015, hence this conduct is intriguing.

23. The Accused claims in his defence that **PW1** did not call him to inform him about the child. He too from his statement did not bother to find out whether **PW1** came home at all or whether the child he allegedly left alone was alright. From **PW1**'s evidence the Accused's room was close to her room. In the proven circumstances only the Accused would be able to explain how **R. K.** sustained the gruesome injuries. He has not. Possibly, the Accused was disappointed about the previous death of his only child with **PW1**, and perhaps unhappy that while **PW1** went off to work he minded another man's child.

24. The injuries suggest a deliberate and savage attack on the child, not merely an incident of disciplining a child. The motive in this case matters not. The injuries clearly demonstrate an intention to cause **R. K.** grievous harm or death. The subsequent conduct of the Accused -disappearing- is a reflection of his guilty knowledge. Malice aforethought can be inferred from the foregoing.

25. The proven facts are that a child left in his care in good health was hours later found, in bed and dying, from injuries sustained from severe lashing. The Accused has not offered any reasonable explanation as to what happened to the child, while his subsequent evasive conduct and defence betrays a guilty mind. How the child came to suffer the fatal injuries are facts within the knowledge of the Accused, but he has failed to discharge the burden cast upon him under Section 111 of the Evidence Act.

26. Having considered all the evidence before me, I am satisfied that the facts proven by the prosecution irresistibly point to the Accused as the person who, for whatever reason, assaulted the minor left in his care by **PW1**. His subsequent conduct too is inconsistent with his innocence, and in this case there are no intervening factors to destroy the inference of guilt on the part of the Accused. I do find the Accused guilty as charged and will convict him accordingly.

Delivered and signed in Narok this 29th day of **September, 2016**.

In the presence of:-

For the DPP : Mr. Koima

For the Accused : Mr. Ombati

Accused : Present

CC : Barasa

C. MEOLI

JUGDE