



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE NO. 8 OF 2009

REPUBLIC**PROSECUTOR**

VERSUS

B S O**ACCUSED**

JUDGMENT

The accused person 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 4th of February, 2009 in Butere District of Western province murdered T K S.

The prosecution called Seven witnesses. PW1 PETER MAUMO ANDERE is the assistant chief of Shitavi sublocation. On 5th February, 2009 at 6.30am he was in his house when the village elder Alfred Juma Otieno (PW3) went to inform him that the accused had poisoned his child. He went to the accused's home and saw the deceased's body. He notified the police. The accused had been taken to hospital. PW1 had known the accused for a long time and testified that the accused had not been involved in crime before the incident.

PW2 R O is the accused's mother. On 4th February, 2009 she went to the posho mill and left the accused with the deceased. The deceased was the accused's child but her mother had left the accused. PW2 returned at 7.00pm and decided to prepare supper. The accused told her that he had already eaten with the deceased. The deceased had been suffering from malaria and used to sleep with PW2. The accused took the deceased to her so that she could sleep and the accused went to sleep. Shortly the child started having fever. They rushed her to hospital but she died on the way. The accused had gone out that day to attend a funeral. The deceased had been vomiting for two days. The accused was later found unconscious on the road.

PW: ALFRED JUMA OTIENO is the area village elder. On 4th February, 2009 he got information at midnight from the accused's brother about the deceased's death. He went to the scene and saw the body. He smelt diazone poison coming from the deceased's mouth. He decided to report to the assistant chief (PW1). The following day at about 1.00pm he found the accused lying on the ground. He had vomited *omena* and *ugali* and was very weak. They took the accused to hospital.

PW4: DR. FLORENCE WANANGWE conducted a postmortem on the deceased on 9th February, 2009. The deceased was three years old. The body was dehydrated. The stomach contained porridge which was smelling and contained poison. She opined that the cause of death was poison. PW4 removed some

specimen for further examination. PW5 J O O is the accused's brother. He got a phone call on 5th February, 2009 about the deceased's death while he was working at Lurambi. He went home for the funeral.

PW6: CORPORAL MAGDALENE LUBAE was based at the Butere Police station. She investigated the case. On 5th February, 2009 she got a call from PW1 and went to the scene. She saw the deceased's body. They searched the accused's home and found a bottle of Triatrix. The accused had been taken to Butere hospital. The Triatrix bottle was dry but in a box. Vomit was flowing from the deceased's mouth.

PW7: WANDERA CRISPUS LUDERO works with the government chemist. He got an exhibit memo on 26th February, 2009 and specimen from PC. Fredrick Mutula. The specimen included a piece of kidney and intestines of the deceased. Vomit from the deceased and the accused. They found that diazinol, a pesticide, was used and traced it in the deceased's vomit and the piece of intestine. The accused's vomit had no pesticide. However, according to PW7, the lack of pesticide in the accused's vomit does not mean that the two did not eat the same food.

In his sworn defence, the accused testified that the deceased was his daughter. He had lived with her for two years. The deceased's mother left him with the child. He denied killing his child. On 4th February, 2009 he went for a burial ceremony and came back in the evening. The deceased had fever the previous day. He gave her panadol. The deceased used to sleep with his mother (PW2). His mother had gone to the posho mill and when she came back she gave him maize flour and *omena* to cook. He cooked food and ate with the deceased. His mother did not eat as she told him that she had taken lunch and she was okay. The accused took the child to his mother so that she could sleep and he went to sleep. His mother later went to inform him that the child was sick. He was also in pain as his stomach was aching. He was feeling dizzy too.

It is his further evidence that he was sent to go and get a motor cycle. He left but fell on the road and started vomiting. Two of his relatives picked him and took him to Bukura hospital. The child was taken to the hospital but died. He was transferred to Butere hospital. He further testified that he had not contemplated to commit suicide. He does not drink and the deceased was his only child.

Mr. Shifwoka, Counsel for the accused submitted that the prosecution evidence is circumstantial. It is purely suspicion which cannot lead to conviction. Counsel cited the case of **AGNES KASYOKA IBRAHIM -VS- REPUBLIC CRIMINAL APPEAL no. 116 OF 2008 (C.A) NYERI**, Case of **REPUBLIC V NICHOLAS IRISHA; ELDORET CRIMINAL CASE NO. 7 OF 2005** and that of **REPUBLIC V LESHAN OLE SAPUR NAKURU CRIMINAL CASE NO. 143 OF 2003.**

The main issue for determination is whether the accused poisoned his child. The prosecution case is that the accused poisoned the deceased and also took poison. There is no eye witness who saw the accused poisoning the deceased. The evidence is circumstantial. According to PW6, the investigating officer, she recovered a bottle of triatrix pesticide from the accused's house. The bottle was in a box and was dry. The evidence of PW7 is that traces of diazinol, a different pesticide was found in the deceased's vomit and intestine.

The picture that comes out from the prosecution case is that the accused and the deceased seemed to have taken food that contained poison. In his defence, the accused testified that he also felt weak and dizzy and fell on the road. It is not for me to simply conclude that the accused wanted to commit suicide and also kill his only child. The defence evidence is that the deceased's mother left the child with the accused. The accused had lived with the child for two years. There is no evidence to prove that the accused had intended to kill himself

The circumstances of this case can be explained in a different way. It is possible that someone else could have mistakenly poured some poison on the maize flour used to cook the food. No traces of diazinol were found in the accused's house. According to the area assistant chief (PW1), the accused had not been involved in crime.

Given the evidence on record, I do find that the prosecution has not proved its case beyond reasonable doubt. The accused is entitled to the benefit of doubt. The accused is not found guilty of the offence of murder as charged. He shall be set at liberty unless otherwise lawfully held.

Dated and signed this 23rd day of February, 2015.

Said J. Chitembwe

JUDGE

Delivered and countersigned this 19th of March 2015

Ruth Sitati

JUDGE