



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER NO. 19 OF 2002

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL OCHIENG ODERO.....ACCUSED

J U D G M E N T

- 1). The accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars were that on 21-10-2011 at Kathieno 'C' Sub location, East Ugenya Location in Siaya District of the Nyanza Province murdered Eugene Otieno Oduor. The prosecution called a total of 12 witnesses to establish its case.
- 2). Briefly, **PW1 Consolata Apondi** left the baby with the accused person as she went to escort her sister at around 3 pm on the material day. When she came back she found her husband burning charcoal but suddenly left towards the river. She then looked for the boy in vain. When the accused came back at around 7 pm and upon inquiry by PW1 he told her that he did not know as he had left the child in the house.
- 3). She told the court that they mounted a search together with the family members as well as the chief. In the process the accused was arrested and placed in the cells. The body of the child was later found at a sugar plantation and it had been partially eaten. The witness identified both the baby's clothes and those of the accused.
- 4). **PW4 Peter Radegu Apollo**, told the court that on 21-10-2001 the accused person reported to him concerning the disappearance of the child.
- 5). **PW5 Sylvester Onyango Ohala**, the area assistant chief told the court that the accused reported to him on 22-10-2001 concerning the disappearance of the child. He promised to advertise at the barazas which he did. The following day the accused came with his wife PW1 but he decided to place the accused in custody as a suspect. On 26th he received information that the body had been traced.
- 6). **PW6 Paul Oduor Ogutu**, is the father to PW1 and the father in law to the accused. He received information on 22-10-2001 concerning the disappearance of the baby. They reported to the chief and later to the police. He participated in the recovery of the body as well as the other exhibits at the sugarcane plantation. According to his evidence it was the accused who led them to the scene.
- 7). **PW8 Constable Jackson Walala**, told the court that after getting instruction from Chief Inspector Charles Kamito he was led by the accused person to the scene where the body was, that is the shamba of one Ambrose Oyak. They recovered both the clothes and the body remains.

- 8).** **PW10 APC Jackson Nyandega**, booked the accused person in the cells and thereafter transferred him to Ukwala which he did the following day.
- 9).** **PW11 Inspector Humphrey Abayi**, witnessed the postmortem being done on the deceased body by one Dr. Karau.
- 10).** In his unsworn evidence the accused denied the charge. He maintained that he did not know where the child went as he left him in the company of Sammy, Hellen and Lucy.
- 11).** Having heard the parties herein and perused the proceedings which unfortunately have taken over 10 years to conclude the substantive issue to determine is whether indeed the prosecution established their case beyond any shadow of doubt. Was there malice aforethought on the part of the accused.
- 12).** From the evidence presented before court PW1 told the court that she had left the baby with the accused as he went to bid farewell to her sister. She further told the court that the accused had never loved the child as he was not the father. Apparently it was PW2 Samuel Ouma who was dispensed with by the prosecution the only other person who would have shed light on whether the accused was left at home with the child.
- 13).** **PW7 Millicent Adhiambo**, PW1's sister did not shed more light concerning the situation and the circumstances under which the child was left with accused. Meanwhile the other witness were external so to speak and only came after the fact.
- 14).** **PW8 Jackson Walala**, was the police officer who picked the accused from the police cells and took him to his home. According to him the accused told him where the body was. The big question is what were the circumstances that led the accused take the said police officer to the scene. Was it after a confession or was there any other source of information. As perhaps expected the accused did not talk about this in his unsworn evidence.
- 15).** If then it was the accused who took the officer to the scene does that amount to self incrimination? PW8 was not an officer who was capable of taking up a confession as provided under section 25 and 25A of the Evidence Act chapter 80 Laws of Kenya.
- 16).** From the above observation I do not find the basis of concluding that the appellant freely took the police to the scene. This conclusion in as much as it is a strong one does not conclusively find for the prosecution. At any rate if the court was to believe the same then it would amount to a confession.
- 17).** More importantly is the fact that the prosecution was not able to produce the postmortem report. I have perused the copy in the statements under inquiry file and on the face of it the cause of death is undeterminable. This lack of production of the report was fatal for the prosecution. Ordinarily for the charge of murder to be established the cause of death must be established. Consequently in the absence of the same it become difficult for this court to arrive at an appropriate conclusion.
- 18).** Before signing off and setting the accused person at liberty there was a constitutional petition filed by the accused person arguing that the entire trial was illegal and a total travesty of the constitution. He argued that he was held for 22 days prior to being taken to court to answer to the charges.
- 19).** From the record herein and the response by the state it appears that he was only held for an excess of about 4 days. This I find cannot be said to be excessive.
- 20).** In the premises I do not find that the charges were proved beyond reasonable doubt. Unfortunately the prosecution of this case has taken close to 14 years to be determined. The accused is released unless lawfully held.

Dated, signed and delivered at Kisumu this 13th day of March, 2015.

H.K. CHEMITEI

JUDGE