



No. 164/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 1 OF 2007

REPUBLICPROSECUTOR

VERSUS

JOB MAANZO MUTUKU.....ACCUSED

JUDGMENT

1. **Job Maanzo Mutuku** hereinafter “*the accused*”, is charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars thereof being that on the **31st day of August, 2006**, at **Kambi Mawe Village, Mavoloni sub-location in Machakos District** within the **Eastern Province**, murdered **Mutuku Maanzo**.
2. The facts of the case are that the accused was married to **Patricia Mbeke Mwangangi**, PW2. They had two (2) children. **Mutuku Maanzo** (deceased) and **Ann Mumbe**. They had marital differences and separated. The accused stayed with the children. His parents were the ones assisting him to raise the children. On the **6th August, 2006**, his step-mother passed on. His parents went to the funeral with his other child. They left him at home with the deceased. The child died on **31/8/2006**.
3. At **3.00pm** he went to notify his father-in-law of the child’s demise. The following day PW1, **Anicent Mwangangi Mbatha** his father-in-law visited his home. The accused was not at home. He found deceased’s body covered with soil and iron-sheets; purportedly for preservation. He reported the matter to the Assistant Chief. The matter was reported to the police. The accused was arrested and **PW3 Dr. Danson Muia** conducted a post-mortem on the body of the deceased. Per his findings, externally the body had bruises on the legs bilaterally. It had a dislocation on the neck at the joint. There was a fracture of the left proximal humerus bilateral femoral fractures; on the left mid-shaft and the left upper third (1/3). He opined that the cause of the deceased’s death was complications of multiple body injuries. The accused’s mental status was assessed by PW4, **Dr. Simon Kioko Muli** who found him to be sound mentally. PW5 **No. 65609 Sgt Anderson Kimathi** having recovered the body of the deceased from a shallow grave covered by iron-sheets investigated the case and caused the accused to be charged.
4. In his defence, the accused denied having killed his son. It was his evidence that his own son was sick. He vomited at 11.00pm. They had eaten at 8.00pm then slept. On vomiting he convulsed and slept. He noted that the child had passed on between 12.00 – 1.00am. He waited until morning. He went and notified his father-in-law who advised him to report the matter to the Chief. They went to the Administration Police. He was arrested. It was his evidence that he dug a shallow grave, put the body there and covered it with iron-sheets for purposes of preservation. The house he occupied was incomplete. It had no door or windows and was not properly roofed. He denied having covered the body with soil. His parents had gone to the step-mother’s funeral with his 7 year old daughter. It was further his evidence that he was arrested following an

- allegation by his father-in-law that he had killed his son.
5. He called witnesses. DW2 his father, **Joseph Mutuku Kilonzo** told the court that he was notified of the child's death by the accused as he was away attending his elder wife's funeral. He advised the son to preserve the body lest it be mauled by animals as they were still staying in makeshift structures having recently moved to the area. He travelled back home on **1st September 2006** to find the accused person having been arrested for allegedly killing his child. According to him the accused was incapable of killing his son. He therefore caused a second post-mortem to be conducted on the body of the deceased just before the burial.
 6. DW2, **Dr. Simon Kioko Muli** said he conducted the post-mortem at the burial site on **13th January, 2007** at the request of the child's grandparents. He stated that; He dissected the neck which he found to be intact. He dissected the spinal column. The spinal code was normal. He opened the surgical wound; the deceased had a large liver. He concluded that the deceased child passed on because of severe dehydration and prolonged malnutrition. It was his evidence that if the child had been strangled he could have choked. He could have developed central cyanosis. The cervical bones could have fracture and oedema may have developed. But there was no fracture or dislocation.
 7. I have considered rival submissions filed by the State and defence counsels. Issues to be determined are as follows:-

- **Whether the accused person caused the death of the deceased.**
- **whether he had malice aforethought**

8. According to the evidence on record it is not in dispute that the deceased met his death while with the accused herein. It is also not in doubt that following his death the accused dug a shallow grave interred in the grave the deceased mortal remains, save that he used iron sheets to cover the same.
9. To establish the cause of death of the deceased the police caused a post-mortem to be conducted on the body of the deceased. According to the opinion of the Doctor the cause of death was complications of multiple body injuries sustained by the deceased. The body had a dislocation on the neck at the joint; there was a fracture on the proximal humerus bilateral femoral fractures on the left mid-shaft, and the left upper third.
10. The defence on the other hand tendered evidence of another report of **Doctor Muli Simeon Kioko** (DW2) who opined that the cause of death was due to cardiopulmonary arrest due to severe dehydration secondary to prolonged protein energy malnutrition. In practise where a crime of murder is suspected to have been committed, the police who investigate the case would have the body subjected to post-mortem by a public doctor. Post-mortem reports filled are catered by the police, it is for that reason that they are referred to as Police 23A Forms. In the case of ***Kennedy Moindi Nyabuto versus Republic of Kenya [2008] eKLR*** the learned Judge stated thus:-

“... post-mortems are ordinarily carried out in public hospitals and /or mortuaries by doctors employed in Civil Service. The learned Senior Principal State Counsel did not tell the court that there has been any official change of policy regarding the above practice and it must therefore be assumed that the official practise is and ought to be that post-mortem regarding cases which are being handled by the police are conducted by the police are conducted for free in government hospitals or mortuaries”.

11. In this case it is important to note that DW2, **Doctor Simon Kioko Muli** was fully aware that the matter was a police case. He assessed the accused person's mental status and produced his medical report (*P3 Form*) as prosecution witness No. 4. In court he admitted having been seized of the knowledge that it was a police case and the fact that a post-mortem had already been conducted on the body of the deceased by another doctor. He admitted that due to the nature of the case under investigation it was necessary for the police and the doctor who initially performed the post-mortem to be present as he did the post most-mortem at the burial site. Other than the said irregularity the post-mortem should have been carried out at the hospital. With these facts in mind such a report cannot be relied on by this court. Accordingly, it is rejected.
12. Basing my decision on the authentic post-mortem report produced by the police; it disapproves

evidence that the deceased died of natural causes. In an attempt to discredit the evidence per the post-mortem report, it was submitted that the pathologist was influenced by PW1 and PW2 to implicate the accused. The post-mortem report was admitted in evidence pursuant to provisions of **Section 77** of the **Evidence Act**. Consequently, the pathologist was not called in court to testify. Counsel for the accused was present; the document was produced with his consent. If indeed he believed the pathologist had been compromised he should have demanded to have him called for cross-examination. This having not been done his evidence which stands unchallenged is taken to be credible.

13. There is no direct evidence on record to establish the fact that the accused was seen inflicting injuries sustained on the person of the deceased. We therefore must rely on circumstantial evidence. In the case of *Sawe versus Republic [2003] KLR 364*, it was held thus:-

“i. In order to justify on circumstantial evidence, the interference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

ii. Circumstantial evidence can be a basis of conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

iii. The burden of proving facts which justify the drawing of this inference from facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

14. The prosecution proved that the accused was the only person with the deceased. No evidence was adduced to suggest that he left the child at any point in time. Any injuries sustained by the child were therefore within his knowledge. The onus was upon him to give an explanation of how the child sustained the injuries that caused his death. His defence was simply a denial and an argument that the death was as a result of natural causes. The defence put forward did not weaken cogent evidence adduced by the prosecution. The only plausible inference drawn leads to the conclusion that it is the accused who caused the injuries on the person of the deceased that resulted into his death.

This therefore brings in the question whether he had malice aforethought?

15. A person inflicting injuries on a child or any person as the ones the deceased sustained will definitely have intent to either cause grievous harm or even to death. There was malice aforethought on the part of the accused.

16. For reasons given above, I find the accused person guilty and convict him of the murder of the deceased.

L.N. MUTENDE

JUDGE

COURT – The accused person’s Counsel is therefore called upon to mitigate on behalf of his client prior to the prescribed punishment being meted out.

DATED, DELIVERED and SIGNED this 17TH day of **JANUARY, 2014.**

L.N. MUTENDE

JUDGE