REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 33 OF 2006

REPUBLIC ..... PROSECUTOR

VERSUS

T K K ..... ACCUSED

JUDGMENT

The accused T K K was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that on the night of 26th and 27th June, 2006 in Nandi North District of the Rift Valley Province murdered A K K.

EVIDENCE

PW1, Richard Kipyego Saina a businessman in Kapsabet testified that, on the material date, the accused called him to his house where he showed him a child who he said was one-year old lying on a mat on the flat. He then asked PW1 to check if the child was alive.

PW1 found that the child was dead and upon inquiry, the accused said it was likely he fell on the child the previous night.

PW1 stated that he alerted the neighbours who confirmed that the child was dead. He then called the Assistant Chief and the police.

PW1 said that the accused was nervous when he called him. He also told him that his wife had left him.

On cross-examination, he said that the accused was hitherto known to him and used to drink liquor. He said the accused did not tell him that the child was sick but thought that the child had fallen at night.

The court also cross-examined PW1 who stated that, when he went to the accused's house, the accused was alone and there was no bed in the house. Both the accused and the child slept on a mat.

PW2, Joseph Matui, said that on the material date, he was in his house when PW1 went there and told him that he had been at the accused's house and had found him crying. He then asked him to check on a child who was lying on the floor to see whether the child was dead. It is then that he and other neighbours went together to the accused's home where he found the dead child. He said he

noted the head was swollen. Later police went to the scene, took away the child's body as well as the accused.

On cross-examination, PW2 said he had known the accused for at least one year. He said he did not know how he related with his wife. He said he lived only 100 metres from the accused's house. He said the accused looked drunk when they went to his house. He said the accused was sleeping on the floor with the child and seemed not to know what had happened.

PW3, Daniel Kiptubut Ngetich, a farmer who lived in Chipchap said that on 27th June, 2006 he was at his home when one of the accused's children then aged four (4) years, told him that the accused had killed his child. He then proceeded to the accused's house accompanied by other neighbours. They found the accused sleeping with a child on a mat. He confirmed that the child was dead but did not check for any injuries. He said the child was about three (3) years old and had not began to speak. He said he was well known to the accused and is wife, but his wife had run away the previous night.

On cross-examination, he stated he had forgotten to tell the police at Kapsabet Police Station that the accused's son had told him that the accused had killed his son. He said he saw the accused and the child lying down on the floor when he peeped through the window. He said he had known the accused for a long time; but did not know whether he was drunk or what had caused the death of the child.

PW3 said he knew that the accused and his wife often quarelled. That the wife had run away at some point but returned.

In re-examination, PW3 said that, initially he received the information of the death of the deceased through his son and later through the deceased's son.

PW4, Barnabas Kiptoo Singoei, a tea farm supervisor, stated that on 27th June, 2006, he was going to work when he found a crowd of people on the road. He was accompanied by PW3 to the accused's house where they found the accused lying on the floor with the child. He assisted in the arrest of the accused and reported the matter to the Assistant Chief. He returned to the accused's house and found that Administration Police Officers had arrived. The accused then asked people why they had gone to his house and they told him that he had killed his child.

PW4 said he lived some two (2) kilometres from the accused's house. He said the accused was known to him.

He said that, on the morning of 27th June, 2006 he had seen the accused's wife taking milk from his neighbour's compound.

In cross-examination, he stated that he received the information from Joseph Kipyego that the accused had killed his child. He said that it was while in the accused's house that he saw the accused's wife carrying milk from the neighbour's house. He said he did not know if the accused was drunk and if he had any disputes with his wife. He also said that he did not know how the child died.

PW5, William Kiplimo Kemboi testified that on the 27th June, 2006, he was at home when PW4 went to his house and informed him that the accused had killed his child. He then called the administration police from Chepkome who accompanied him to the accused's house. He said they found the child still lying on the floor. He had injuries on the neck and on the face. He estimated the age of the child at 2 years. He said the accused admitted to having killed the child. He thereafter called the police from Kapsabet who came and carried away the body of the deceased.

It was PW5's further testimony that he saw the accused's wife in his compound on that day. He knew the accused and his wife had disputes but did not know what they were all about.

In cross-examination, PW5 said he was the Area Assistant Chief and knew the accused for over 5 years. He was shown his statement in which he recorded that the accused had refused to talk to him about the death of the child.

PW6, Julius Kipkorir Bartum stated that on the 29th June, 2006, he returned from work and found the accused's wife at his house where she had spent that night. He said on 30th June, 2006 he was informed that the child had died. He identified his body, although he could not remember his name. He estimated the age of the child to be one year. He said the body had injuries on the neck and eyes.

According to PW6, the accused's wife told him that on the fateful day, after dinner, the accused told her that he would kill her. It is then that she ran away to his (PW6) house.

In cross-examination, he said the accused's wife went to his house on 26th June, 2009 where she spent the night. On the following day, she took tea and left between 7.30 and 8.00 a.m. Later they heard shouts and went to find out what was happening. He said he did not know how the child died.

PW7, Doctor Lubanga Bill, then a doctor at Eldoret West District Hospital said he performed the post mortem on the body of the deceased. He found bruises on upper hip, fracture of the skull, broken cervical and fracture of head. In his opinion, the cause of death was due to strangulation and head injury. He produced the post mortem report as P. Exhibit 1.

PW8, Corporal Victor Kipkemboi, an administration police officer attached to District Commissioner's office, Nandi Central said that on 27th June, 2006 at about 10.00 a.m., one Ngetich reported to him that T was reported to have killed his child and that the villagers wanted to lynch him. He found T being beaten by women who had also tied him up. He arrested him and took him to Kapsabet Police Station.

On cross-examination, he said that Ngetich was a neighbor to T. He said he saw T wife at the scene and that the body of the deceased lay on the floor.

PW9, Seargent Harrison Wesonga of Kapsabet Police Station testified that on 27th June, 2006 at about 9.00 a.m. while on duty, he received a telephone call from A.P Camp at Kapsowar from one APC Cheruiyot. The latter reported to him that T K had killed his child aged around 2 years by the name A K. He was told that members of the public would lynch the accused.

PW9 was accompanied to the scene by Corporal Cheruiyot. They found AP officers and members of the public at the scene. The accused was inside his house. Inside the house, the body of the deceased lay on a mat. It had visible swellings on the neck. They arrested the accused.

PW9 got information that the accused had quarreled with his wife on the previous night. He accused his wife of delaying to buy him cigarettes from a nearby kiosk. He threatened to beat her. The wife ran to a neighbouring home leaving the deceased asleep. They took the body to Kapsabet District Hospital Mortuary. The accused did not tell the police what happened.

In cross-examination, PW9 said that investigations revealed that after the accused's wife ran away, the accused was left alone in the house with the child. He said the accused killed the deceased as an avenue of relieving the anger he had towards his wife. He also said the accused looked slightly drunk.

In his unsworn statement of defence, the accused stated that on 27th June, 2006 at about 7.00 a.m., he was preparing to go to work. He had materials he had been asked to carry by his customers. He said he was carpenter. He had put the materials in the children's bedroom. He then wondered why his son, A K K had not woken up. He started screaming and PW1 arrived. He asked PW1 to check

on the child and he told him that the child was dead.

The accused said that PW1 went to call other neighbours and a crowd of people milled around. The crowd tied him with a rope. He said that he asked the crowd what he had done that was wrong, but nobody answered him.

He said police arrived at the scene as well as the Assistant Chief and administration police officers. He was taken to Kapsabet Police Station where he remained in custody for one month.

The accused also said that his wife had ran away and that he did not know what happened to his child.

SUBMISSIONS

The prosecution submitted that they had tendered a water tight case against the accused. They stated that their witnesses gave consistent evidence which proved it is the accused who had killed the accused. Moreso, it was their submissions, that the post mortem exercise revealed the deceased had been strangulated. This was evidence of a human activity. And being that it is only the accused person who was with the deceased immediately the time preceding his death, no other person would have killed the deceased.

Learned counsel, Mr. Okara for the accused, submitted that other than the doctor and the investigating officer, all other witnesses gave hearsay evidence. He said that there were three (3) persons in the house; the accused, deceased and accused's wife. He said accused's wife was not called to testify to shed light on what truly transpired.

He submitted that the doctor found bruises on the deceased's upper lips, fracture of the skull on the frontal head. He said that although the doctor concluded that the deceased died of strangulation and head injury, there was no evidence that the injuries were caused by the accused.

He submitted that, it was of concern to the defence, that although the accused's wife recorded a statement with the police, she was not called as a prosecution witness.

He also submitted that, although the prosecution said that the accused did not give an account of how the deceased died, the burden lay on them to prove their case.

EVALUATION OF EVIDENCE

The case of **REPUBLIC –VS- NICHOLAS ONYANGO NYOLO, MURDER CASE NO. 36/2011 (KISUMU)** learned Justice Chemitei, set out the ingredients of the offence of murder (which I concur with) as follows;

"(a) Proof of the fact and the cause of death of the deceased.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the 'actus reus' of the offence, and,

(c) Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the "mens rea" of the offence."

As regards the first ingredient, that is, proof of the death of the deceased, it is PW6 who identified the body of the deceased before the post mortem was conducted. PW1-5 also were categorical that on arrival at the accused's house, the body of the deceased lay on the floor of the house lifeless.

This fact was sealed by PW7, Doctor Lubanga who conducted the post mortem. His findings as noted in the post mortem form were as follows;

- Bruised upper lip

- Fracture of the skull

- Fracture of cervical spine.

He then concluded that the death of the deceased was caused by "***strangulation and head injury***".

PW8 and 9, also confirmed that the deceased's body was carried to the mortuary while lifeless.

In the circumstances there is no doubt that the deceased died as a result of strangulation and head injury, ultimately there being human contributory factors.

So then, was the death caused by an unlawful act of omission on the part of the accused?

The answer to this question is squarely pegged on the testimonies of PW1-5, 8 and 9. PW1 – 5 all rushed to the scene being the house of the accused where they found the body lying on the mat. PW6 on the other hand confirmed that the body had injuries on the neck and eyes.

The only person who was in that house, apart from the deceased was the accused. As testified by PW6, the accused's wife had fled the house after she picked a quarrel with the accused. She was only to return to the house alongside other neighbours and members of the public who got wind of the heinous death of the deceased. This statement, apparently, was corroborated by PW5 who saw the accused's wife on the morning of 27th June, 2006 leaving a neighbour's house. This of course, was PW6's house where she had spent the night on 26th June, 2006 after fleeing her house.

Therefore, without a shred of doubt, the only person who could have inflicted the fatal injuries on the deceased was the accused. Apparently, when the witnesses asked him what had happened, he pretended not to know. And as a cover up, he had called PW1 to his house to find out if his son was dead or alive. All through, he knew what he had done and wanted the public to believe that the deceased may probably have fallen on the floor.

His defence too that his concern was why his son had not woken up was the most pretentious excuse anyone can believe. That defence was a mere fallacy and I totally disregard it.

Notwithstanding that no one saw the accused killing the deceased, the circumstantial evidence is too strong and leaves no doubt that he was the author of the deceased's death.

In this respect, I refer to the reknown case of **REPUBLIC –VS- KIPKERING ARAP KOSKE & KIMURE ARAP MATATU (1949) 16 E.A., 135**. The then East African Court of Appeal said;

"In order to justify, on circumstantial evidence, the inference 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 guilt, and the burden of proving facts which justify the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the deceased."

This position was reiterated by the Kenya Court of Appeal sitting in Nairobi in the case of **MWANGI –VS- REPUBLIC (1983) KLR, 75**.

Again in **ABANGA ALIAS ONYANGO –VS- REPUBLIC CR. APPEAL NO. 32 OF 1990** as cited in **SOLOMON KIRIMI M'RUKARIA –VS- REPUBLIC CR. APPEAL NO. 46 OF 2011**, the Court of Appeal outlined the principles which should be applied in testing the strength of circumstantial evidence. This is what the court said;

"It is settled law that when a case rests entirely on circumstantial evidence, such

evidence must satisfy three tests

(i) the circumstance from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definitive 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."

All the evidence as I have analyzed it above, meets the tests set out in the cited cases and I need not add anything else.

Finally, I address myself on whether the accused was possessed of any malice aforethought at the time he killed the deceased.

Under Section 206 of the Penal Code malice aforethought is defined as follows;

"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 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) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

As testified by PW6, the accused's wife fled their home after a quarrel with the accused. The accused told her that he would kill her. This was just after serving the dinner. The main cause of the quarrel was not quite ascertained, although PW9 alluded that the accused was angry because his wife had delayed in buying him cigarettes from a nearby kiosk. This assertion is not confirmed by any other witness. It is therefore difficult to arrive at a conclusion of what sparked the quarrel.

But the fact that both the accused and his wife quarrelled before the latter fled their home is without a doubt. It is in the night that the accused's wife was away that the deceased met his death. It is possible that the accused's wife would have been a victim save that she fled.

Be that as it may, no amount of anger would have necessitated the accused to visit it against the deceased with such brutality. After all, the cause of the anger was his wife. His wife fled soon after the quarrel. Ultimately, he had sufficient time to cool his tempers. There is no excuse why he should have turned on the deceased, ostensibly to teach his wife a lesson. This clearly demonstrates that he sat, thought through (meditated) about what he intended to do and finally executed it for a purpose. He also knew that his act of strangulating and injuring the deceased on his head would either cause his death or cause grevious harm.

It was also repeatedly said by the witnesses who went to the scene that the accused looked drunk. I have said it before, that drunkenness cannot be used as an excuse to commit an offence. If a person drinks alcohol all knowing too well that it is likely to influence him/her to commit an

offence, he/she must take the full responsibility of his actions.

It is also important to touch on one other issue that was raised by the accused in his defence. He said that he was incarcerated at Kapsabet Police Station for one month before he was charged.

This fact is confirmed by the court record. Clearly, the accused was arrested on 27th June, 2006. His first appearance in court was on 28th July, 2006.

May I however point out that the issue was raised too late in the day when the person responsible for his unlawful incarceration could not be called to court to explain what occasioned the delay in arraigning him in court.

At the time the Old Constitution was in operation it provided that a person charged with a capital offence could only be kept in custody for up to fourteen (14) days. The one month period that the accused was kept in police custody was way beyond this constitutional provision and therefore a violation of his constitutional rights. This violation, of itself, cannot result in an acquittal. Instead, the accused can seek redress against the person who violated his rights by way of damages. See case of **JULIUS KAMAU MBUGUA –VS- REPUBLIC, CRIMINAL APPEAL NO. 50/2008**.

In this case the court noted that the fundamental question of great public importance was;

"…… whether a breach of Section 72 (3) (b) of the Constitution, by depriving a suspect of his personal liberty, by police before being charged in court entitles the suspect to go scot-free for the offence allegedly committed or about to be committed."

The Court of Appeal then concluded;

"***The alleged unlawful detention does not exonerate the Appellant from serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). This is the appropriate remedy which the Appellant should have sought in a different forum."***

So the remedy lies in seeking compensation elsewhere other than in this court.

In the result, I find that the prosecution has prove its case to the required standards-beyond all reasonable doubts. I find the accused guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and I convict him accordingly.

DATED and **DELIVERED** at **ELDORET** this 29th day of May, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Miss Ngelechei holding brief for Okara for the Accused

Mr. Mulati for the State