



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL MURDER CASE NO.27 OF 2010

REPUBLICPROSECUTOR

VERSUS

ALBERT TIRIMBA OGATA ACCUSED

RULING

1. The accused person herein, Albert Tirimba Ogata is before this court on one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal code**, the particulars of the offence being that on the 10th day of March 2010 at Onseka sub location in Kenyeny District within the Nyanza Province, he murdered Kevin Isaboke. The accused pleaded not guilty to the charge when he appeared for plea on 19th April 2010. The case has been ongoing since then, though the case only took off in earnest on 6th June 2013.
2. From the record, the facts of this case are that on 9th March 2010, the mother of the deceased left her 2 year old child in the care of relatives as she went to visit another relative in Gucha South District. On her return, the deceased's mother received information that her son had been killed by the accused person herein.
3. It was the prosecution's case that with intent, the accused person herein proceeded to murder the deceased in this case. The prosecution intended to call 10 witnesses to prove that the accused had both the malice aforethought and the mens rea for the alleged offence.
4. The prosecution called only one witness namely Violet Kemuma who testified as PW1. PW1 is the mother of the deceased. She testified that on 9th March 2010 she went to collect her debt from one Kimori and also went to do some casual work before returning home. On her return, she found out that her 2 year old child whom she had left at the accused's parents' home had been killed.
5. On receiving the information that her child had been killed, she screamed and neighbours rushed to her home. She found the child lying naked on the bed with visible injuries on his private parts and buttocks.
6. Thereafter, PW1 informed her relatives of her child's death. The chief of the area was also informed and in turn the chief informed the police who later came to the scene of crime and took the deceased's body to the mortuary for postmortem examination. PW1 also testified that she and the accused are not related though they hail from the same place. PW1 identified the accused herein as the person who had killed her son.
7. The prosecution was unable to call any other witnesses in this case inspite of being given opportunity to do so. They had therefore to close their case after the testimony of PW1.

8. At the close of the prosecution case, counsel for the accused person submitted that the charge of murder against the accused person herein had not been proved and urged the court to acquit him for lack of evidence.

9. Section 203 of the Penal Code defines murder in the following terms: “**Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.**” Thus the central ingredients of the offence of murder are **a) malice aforethought; b) an unlawful act or omission on the part of the accused.**

10. Section 206 defines malice aforethought in the following terms:-

“206. 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 harm to any person, whether that person is the 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.”**

In other words, the prosecution must prove that the accused person herein had the intention to cause the death of or to do grievous harm to any person; that he had the knowledge that his act or omission causing death would probably cause death either to the person intended or to some other person; that he had the intent to commit a felony or that he had an intention by the act or omission to facilitate the escape from custody of any person who has committed or attempted to commit a felony.

The question that arises in the instant case is whether there is any evidence on record tending to prove the above ingredients of the offence of murder against the accused person. In my considered opinion there is neither direct nor indirect or circumstantial evidence tending to prove any of the above ingredients. The only available evidence is that of PW1 who testified that she had left the deceased in the home of the accused's parents' when she went to collect her debts. She testified that when she returned, she found the child lying naked on the bed though she did not say whose bed it was. The prosecution did not adduce any medical evidence to prove the cause of death and whether the cause of that death had anything to do with the accused person's actions or omissions.

13. In view of the above, I find that no evidence has been placed before the court to warrant the accused person being put on his defence. Accordingly, I make a finding that the accused is not guilty of the offence of murder and he is accordingly acquitted under **Section 306 (1) of the Criminal Procedure Code.**

14. Unless he is otherwise lawfully held, the accused shall be released from prison custody forthwith.

15. It is so ordered.

Dated, signed and delivered at Kisii this 30th day of June, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. Shabola (present) for State

Mr. C.A. Okenye for Minda for Accused

Mr. Bibu - Court Assistant