



IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 8 OF 2013

(FORMERLY KISII HCCRC NO. 62 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

BERNARD ODHIAMBO OGWANG ACCUSED

RULING

1. The accused, Bernard Odhiambo Ogwang, is charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge are that on 1st April 2012 at Kombogo Village in Kachwanya Sub-location in Ndhiwa District within Homa Bay County in the Republic of Kenya he murdered David Ouko Odhiambo.
2. The prosecution case is that the accused murdered the deceased who was his step-son. The accused pleaded not guilty and the prosecution called 6 witnesses to prove its case. At the end of the prosecution case, counsel for the accused and the prosecution called upon the court to determine whether a prima facie case had been made to warrant the accused being put on his defence.
3. PW1, David Otieno Oluoch, testified that on 1st April 2012, he saw the accused and the deceased pass by his house at about 9 am. At about 5 pm he heard that that the child had died. On 2nd April 2012, at about 11 am, he followed the police to the home of the accused and saw the body of the deceased.
4. PW 2, Lydia Awuor Okumu, a relative of the accused and a neighbour testified that on 1st April 2012 at about 2 pm, the accused came and told her that the deceased had malaria. She went to the accused's home. She found the child and observed that foam was coming out of his mouth and he was groaning as if he was in pain. She stated that after 10 minutes, the child died. When the child's mother, Josephine Onyango, came and found the child dead she started wailing causing people to come to the homestead. PW 2 further stated that when the accused came to see her, he informed her he was going to look for means to take the child of the hospital. By the time he returned the boy was dead. She did not notice any injuries on the deceased's body.
5. Wilson Otieno Odanga, PW 3, the Assistant Chief of Kachwanya sub-location testified that he was called to the accused home on 2nd April 2012. He went there and found the child lying and observed bruises on the thigh and neck. He called the police who came to take the body. PW 4, Emanus Oluoch Ndambe, a villager who is a cousin of the accused, testified that he knew the child and he found the child lying dead and attended the post-mortem.

6. Dr Ayoma Ojwang, PW 5, is the doctor who conducted the post-mortem. He testified that when he examined the body, it was already peeling off. He observed multiple bruises on the scalp and all over the body. He did not detect any fractures. He stated that the body appeared to have undergone a lot of torture. He concluded for the bleeding within the scalp and the brain substance that the deceased died as a result of a head injury.
7. PW 6, Sergeant Nicholas Kipkoech Langat, the investigating officer, testified that although he recorded a statement from the accused wife and mother of the deceased, Jane Anyango Obilo, he could not find her to give evidence as she left her matrimonial home and could not be found despite various efforts to trace her as she did not have a national identity card. He stated that he recorded various statements which showed that the accused went with the deceased in the morning and returned carrying him when he was in great pain with a lot of injuries. He found that the deceased mother and the accused had disputes concerning the deceased's child whom the accused claimed disrespected him.
8. At the close of the prosecution case, the defence called upon the court to acquit the accused on the account of lack of evidence while the prosecution submitted that called upon the court to consider the evidence in totality and find that there was sufficient evidence to put the accused on his defence.
9. It is the duty of the prosecution to lead evidence pointing to the fact that the accused committed the act for which he is charged. None of the prosecution witnesses saw the accused kill or inflict injuries on the deceased. The evidence shows that the deceased died on 1st April 2012 in the presence of PW2 who testified that she saw the deceased foaming from the mouth and groaning in pain. She did not see any injuries or bruises on the deceased's body. She did not see the accused inflict any injuries on the deceased either. At that time she had left the accused at her place where he had gone to look for help.
10. PW 5 confirms that there was evidence of injuries inflicted on the child. The question to be answered is who inflicted the injuries that resulted in death? The evidence presented by the prosecution is that PW 1 saw the accused with the child in the morning. No other person saw him coming back with the child. PW 2 testified the child was sick and subsequently died in her presence. The testimony of PW 6 is largely hearsay as no witnesses were called to confirm that the accused was seen coming back with the child or that the accused, his wife and the deceased had any problems that would point to the accused as being the one who inflicted the injuries. Even if PW 6 is to be believed, either the accused or his wife, who did not give evidence, could have inflicted injuries on the child.
11. Though I appreciate that the life of a young boy has been lost, justice demands that I consider whether there is evidence that the accused person killed him. The burden of proof is on the prosecution to tender evidence that connects the accused to the offence of murdering the deceased.
12. I have analysed the evidence tendered by the prosecution and I find that the prosecution has not demonstrated that the accused has a case to answer as it has in no way established any evidence to link the accused to the murder of the deceased. According to the provisions of **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, I record a finding of not guilty.
13. The accused is set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 25th July 2014

D.S. MAJANJA

JUDGE

Ms Ongeti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.

Mr Ondari instructed by Ondari and Company Advocates for the accused.