



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 16 OF 2008

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

ASHFORD MWIRIGI THUGURI.....ACCUSED

JUDGMENT

1. The accused **ASHFORD MWIRIGI THUGURI** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on the 27th January 2008 at Kagaru village Ntharene sub-location Imenti South District within Eastern Province, murdered **RONY MWIRIGI**.
2. The prosecution called three witnesses. The facts of the prosecution case are that the accused and his wife and child were at their home which neighbours their uncle, PW1's home. PW1 heard screams from accused wife. He went to their home, jumped over the fence and entered the compound. That is when the accused opened the door of his house and let the wife out.
3. PW1 went with the wife of the accused who was in need of treatment having been cut. The child, who is the deceased, in this case was left behind. Eventually PW1, who was the brother of the father of the accused, called the latter. PW1 and his brother took the accused, the wife of the accused and the child of the accused to Nkubu Police station. The wife and child were later admitted at Meru General Hospital but after four days the child died.
4. The cause of death of the deceased was found to be cardio- respiratory arrest due to head and neck injuries. The doctor ruled out an accidental fall as the cause of the injuries.
5. The accused in his defence by way of a sworn statement stated that on the material day he and his wife parted ways at Ntharene market. The wife proceeded home as he went to see a friend. The accused stated that at 7.30 p.m. he went home but he did not find his wife. He found her drinking in a den with PW1 and others. He asked her why she had started drinking again. The wife was rude to him asking him why he did not chain her. He stated that his wife threw the child on the ground and ran away. He took the child. He said his uncle Douglas attacked him cutting him on the back and forehead as a result of which he fell on the child and fainted. He said that he woke up later at Meru General Hospital.
6. The accused is facing a charge of murder under **Section 203** of the **Penal Code**. The offence is defined under that **Section** as follows:-

“Any person who of malice afterthought causes death of another person by an unlawful act or omission is guilty of murder.”

7. The prosecutor has to prove that the accused caused the death of his son by an unlawful act or omission, and that at the time he did the act omission he had malice aforethought.

8. What constitutes malice aforethought is set out under **Section 206** of the **Penal Code** 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.”

9. The burden lies with the prosecution to prove the case against the accused person beyond any reasonable doubt.

10. The prosecution called three witnesses. PW1 was uncle of the accused and also his immediate neighbor while PW2 was a neighbor. PW3 was the doctor who performed a post mortem examination on the deceased child.

11. There was no eye witness of the incident going by the evidence of the prosecutor. What PW2 stated was that at 5.00 p.m. on the material day he saw the accused complaining, throwing his hands in the air saying that his wife had been taken away from him. He was also saying that he would burn the home of M’Ithima. PW2 testified that he called PW1 and together they managed to cool down the accused.

12. PW2 did not see anything until about 7.30 or 8.00 p.m. when he heard screams from the two wives of PW1 who were complaining that the accused had thrown his son into their compound. When he went out, PW2 found the accused being beaten and the child lying on the ground naked but breathing. He noted no injuries on the child. The child was later taken away with the accused, the wife of the accused, PW1 and others.

13. What PW1 testified about concerned the incident at the accused house where he rescued the wife of the accused from the accused. PW1 said that the wife was saying that she had been cut by the accused and that she needed to go to hospital. Indeed she was admitted that same day, together with the deceased child, at Meru General Hospital.

14. The issue is how the deceased got injured and who was responsible for the injury?

15. There is no direct evidence to show how the injuries which led to the death of the deceased were inflicted. PW1, who rescued the wife of the deceased from the house of the accused where she had been screaming for help did not see the deceased child at that time. PW1 cannot therefore state in what state the child was, whether at that time it was injured or not. He did not see the child until the time his wives started screaming. Just like PW2, PW1 saw the child naked and lying on the ground. No physical or visible injuries were noted by both of them. However the child was already injured because when PW1 and others took him and his mother to hospital, both were admitted.

16. The one who should have testified regarding the child and about the condition in which it was when it was left with the accused is the mother of the child. That mother was a competent

and compellable witness under **Section 127 (3) (c)** of the **Evidence Act**. That section provides as follows:

“(3) In criminal proceedings the wife or husband of a person charged shall be a competent and compellable witness for the prosecution or defence without the consent of that person, in any case where such person is charged –

(c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.”

17. Considering the circumstances of this case, I find that the failure to call the mother of the deceased was fatal to the prosecution case and is fitting for an adverse inference being made against the prosecution as she was a vital witness in the case. I am guided by the case of **BUKENYA & OTHERS Vs. Uganda1972 EA 549** LUTTA Ag. VICE PRESIDENT held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.”

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

18. Indeed an adverse inference is fitting to be made against the prosecution case to the effect that the reason why the prosecution failed to bring the mother of the deceased as a witness is because her evidence would have tended to be adverse to the prosecution case.

19. The prosecution has the burden of proof in this case. As earlier stated, that burden of proof must be discharged by the prosecution to establish that it was the accused that by an act or omission caused the injuries suffered by the deceased, as a result of which injuries the deceased died. There is no evidence adduced to show that the accused did any act or omission that could have caused the injuries found on the deceased.

20. The prosecution case shows that earlier in the evening the accused was seen agitated because his wife had been taken away from him. Those who saw it were PW1 and 2. PW1 did not testify of that incident. However the fact remains that the wife of the accused returned to the home of the accused during the evening of the incident. It is also evident that she was carrying the child in question when she returned. There is no evidence to show the condition of the child at the time the mother brought it to the accused home. The only person who could have shed some light on that point was the mother. She did not come. Neither is there any evidence to show why she failed to be considered a competent and compellable witness in this case.

21. I find that there was insufficient evidence to show who caused the injuries on the deceased. The prosecution relied on mere suspicion that because the wife of the accused was rescued from the accused, he must be the one who caused the injuries that led to the death of the deceased. That is speculative and mere suspicion. It is trite law that suspicion however strong cannot found a conviction. Consequently I find that the charge against the accused was not proved to the required standard. Accordingly I give the accused the benefit of doubt and acquit him of the offence charged under **Section 306** of the **Criminal Procedure Code**.

DATED AT MERU THIS 23RD DAY OF OCTOBER, 2014.

LESIIT, J.

JUDGE