



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE (MURDER) NO.31 OF 2010

REPUBLIC PROSECUTOR

VERSUS

K O ACCUSED

JUDGMENT

1. K O, the accused person herein first appeared in court on 26th April 2010, charged with one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the 11th day of April 2010 in Gucha South District within Nyanza Province, he murdered H N. When the accused appeared for plea on 4th May 2010, he pleaded not guilty to the charge. The case has been ongoing since then.
2. Briefly, the facts of this case are that at about 4.00 a.m on 12th April 2010, one Samson Onywera Nyamwega, a cane cutter with Sony Sugar, was on his way to work when he came across the body of the deceased lying naked on the footpath. The body was lying near the house of one G. The family of the said G was woken up and when the family members, including E K went to the scene, they discovered that the body lying on the footpath was that of the deceased who was a child to both the accused and E K. A report of the incident was made to Etago police station and investigations, leading to the arrest and subsequent arraignment of the accused in court were commenced.
3. The prosecution called 5 witnesses and from their testimonies, the prosecution case is as follows:- The accused and E K () who testified as PW2 got married in or about 1991. By the time of the incident in April 2010, the couple had six children, among them the deceased who was aged 2½ years old. The couple did not enjoy a peaceful marital relationship.
4. On 11th April 2010 at about 10.00 p.m., the couple quarrelled and the accused beat up E using a walking stick. Believing that there was no good reason why the accused should have assaulted her, E ran for dear life and escaped to her parents' home at [Particulars withheld]. When E left her matrimonial home on that fateful night, she left behind two of her children, N aged 7 years, and NOB aged 2½ years.
5. At about 4.00 a.m. on 12th April 2010, while at her mother's house, E was woken up by Samson Onywera Nyamwega (Samson) who testified as PW1. E was together with her mother E M (E) who testified as PW3. Both E and E got up and went to the place where Samson had seen the new body of an African male child. On arrival at the scene, E recognized the deceased to be her own child whom she had left behind with the accused at the matrimonial home at about 10.00 p.m. on 11th April 2010 as she fled for dear life.
6. According to Samson, the body of the deceased was lying close to the home of one G, the husband of

E, and since he could not identify the child, he woke up the G family to come and witness what he had seen. When E observed the child, she noticed that the child's neck seemed broken.

7. E testified that at about 10.00 p.m. on 11th April 2010, while she was at her home at [Particulars withheld], her daughter E came home. She testified further that E and the deceased were always quarrelling and that the deceased was her grandchild. E also testified that when E came home the night of 11th April 2010, she was injured on the leg. It was also E testimony that E and the accused were always quarrelling.

8. The report made at Etago police station was received by the officer in charge of Etago police station then, Chief Inspector Kirui who also partially investigated the case. The investigations were later taken over by Number 70451 Corporal Odera Okapes of Etago police station. The body of the deceased was taken to the mortuary for postmortem examination. Cpl Okapes who testified as PW5 produced the P3 form on the accused's mental status. The same was marked as **P. Exhibit 2**.

9. Dr. Willis Omwoyo testified as PW4. He told the court that on Monday the 19th April 2010, he was called upon to conduct a postmortem examination on the body of the deceased H N at the Tabaka Mission Hospital. Dr. Omwoyo stated that when he observed the body of the deceased, he noted a strangulation ridge around the neck and a bruise on the right lateral aspect of the neck and another bruise on the right region right below the eye. While all other systems in the deceased's body were normal, Dr. Omwoyo stated that the cervical spine at C4-C5 had an obvious damage with resultant damage to the nervous system. Dr. Omwoyo filled and signed the post mortem report which he produced in court as **P. Exhibit 1**.

10. When called upon to defend himself, the accused gave unsworn evidence and stated that on 11th April 2010, he went to work as usual with a contracting company with Kenya Power Company Limited. He was a casual labourer. He worked until 5.30 p.m. before he went to a meeting with his co-workers in the place of work. When the meeting ended at 7.30 p.m., he left for home; but before he went home, he passed by the home of his cousin T K where the two talked for about 3½ hours. He got home at 10.00 p.m.

11. When he got home, he knocked on the door, but there was no response, and eventually he entered the house and slept. On the following day at about 8.00 a.m., he was woken up and asked whether he was aware of what had happened. When he told the people that he did not know what had happened, he was told that his son H N had been found dead at the home of his parents in-law which was not far from his own home.

12. The accused denied that there was any fight between him and E on the night in question as alleged. He also stated that he was utterly surprised when he was arrested as a suspect in his son's murder. He said he did not know how his son had died and who had killed him.

13. At the close of the hearing, Mr. Omwega, counsel for the accused submitted that the prosecution had totally failed to prove its case against the accused person beyond any reasonable doubt. First that none of the prosecution witnesses saw the accused kill the deceased. Second, that no evidence was adduced by the prosecution to show that the accused had any grudge against the deceased as would make him (accused) kill the deceased.

14. Third, that the investigating officer, C.I Kirui never came to court to testify during the trial and to tell the court why the accused was arrested and why he was charged. Fourth, that the investigations carried out in this case were so shoddy that nothing turns on them. For example, that no sketch plan of the scene was produced in court. Further that since the deceased's body was found near the home of E parents, the investigating officer should have come to court to explain how the deceased's body found its way to that place, and that E family should have been questioned by C.I Kirui to establish how the deceased's body had been found near their home. Mr. Omwega submitted that this court ought to believe the accused's story that when he arrived home at 10.00 p.m. On 11th April 2010, both his wife and children were not at

home. He urged the court to make a finding that the accused person is not guilty and to acquit him accordingly.

15. I have now carefully considered and evaluated all the evidence that is on record and the issue that arises for determination is whether, from the said evidence it can be concluded that the prosecution has proved the ingredients of the offence of murder as set out under **Section 206** of the **Penal Code**. Under the said section, the prosecution must prove the following:-

- a. *the fact as well as the cause of death of the deceased;*
- b. *the fact that the death of the deceased resulted from an unlawful act or omission on the part of the accused person;*
- c. *the fact that such unlawful act or omission was committed with malice aforethought.*

16. A close look at the evidence on record shows that there was no eye witness to the commission of the alleged offence. All that there is that the deceased's body was discovered lying on a footpath at about 4.00 a.m on 12th April 2010 by Samson. No one told the court how the body was taken to that place nor what time it may have been taken there. The other piece of evidence is that at about 10.00 p.m. on 11th April 2010, the accused beat up his wife E for no apparent reason, as it had happened on other days in the past. E ran away to her parents' home that same night, leaving behind the deceased and one other child aged 7 years in the company of the accused, E and her mother E who were woken up by Samson, could not say who had killed the deceased and how the body came to be found on the footpath near E parents' home at 4.00 a.m on 12th April 2010.

17. In his defence, the accused said that when he arrived home at about 10.00 p.m on 11th April 2010, he found the house deserted. Neither E nor the children were at home. The accused also testified that E was in the habit of taking the children to her parents' home which was not very far from where the couple lived. In other words, the accused has, in a very subtle way, raised the defence of alibi; that he was nowhere near the scene of crime and therefore that he knew nothing about the death of the deceased or of those people who killed the deceased.

18. In brief therefore the case against the accused person turns on circumstantial evidence – the allegation that the accused was the last person to be seen with the deceased as E ran for her life when the accused assaulted her at about 10.00 p.m. on 11th April 2010. In this case, like in all criminal cases, the burden of proof lies squarely at the feet of the prosecution, and never shifts to the accused. Even in the case where an accused has raised the defence of alibi, it is the duty of the prosecution to adduce evidence to disprove the alibi. The accused is not required to prove his innocence.

19. Circumstantial evidence can form the basis of the finding of guilt if the evidence is explainable only on the hypothesis of the guilt of the accused and incompatible with any other explanations. See **R. -vs- Kipkering arap Koske [1949] 16 EACA 136**. In **Alexander K. Karanja -vs- Republic [1982-88] 1 KAR 355**, the appellant who was charged with murder was, found to have visited a neighbour of the deceased at a farm that was outside Nakuru on the afternoon of the alleged murder on 6th February 1981. He said he was the deceased's nephew; that the deceased had gone away and that he was intending to sell one of the deceased's cattle. The deceased who was deaf and dumb had last been seen alive at 6.15 p.m. on 5th February. On 7th February, the deceased's neighbour and another man went to the deceased's home and found the appellant removing potatoes. He was wearing the deceased's gumboots and had been wearing these: a hat, trousers and jacket belonging to the deceased when he approached the deceased's neighbour Joel on the 6th. The deceased's remains were found in a pit latrine near his house.

20. The appellant denied the offence, saying that he had left the farm where he worked on 7th February in order to go to the shops. As he did so, he met three persons whom he accompanied and just found himself in the deceased's house. The appellant was found guilty, convicted and sentenced to suffer death. On appeal the Court of Appeal held, *inter alia*, that:- **“The circumstantial evidence as to the appellant's actions and his possession of the deceased's clothing pointed inevitably to his guilt.”**

21. In the present case, the circumstantial evidence is the following:- the accused came home at about 10.00 p.m on 11th April 2010; he seriously beat his wife E and she had to flee for her life. E left behind the deceased and an older sibling aged 7 years old in the company of the accused as she fled. At about 4.00 a.m on 12th April 2010, the body of the deceased was found on a footpath next to the home of the parents of the accused's wife; the medical evidence shows that the deceased was strangled to death. PW4, Dr. Willis Omwyo confirmed that fact of strangulation.

22. The law is clear that this court will only draw an inference of guilt from the circumstances of this case, if it is satisfied that there are no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused. See **Kimeu -vs- Republic [2002] 1 KLR 756** and **Warui -vs- Republic [2002] 1 KLR 750**. In the **Warui case** (above), the trial court convicted the appellant on the basis of the following facts: the appellant was the last person to be seen with the deceased and that at his place of arrest was found incriminating evidence in his house, namely bloodstained clothes and shoes of the deceased. The appellant in the said case had also made a confession which he subsequently retracted but the same was admitted in evidence. On appeal, the Court of Appeal held, *inter alia*, that **“the fact of the appellant having been the last person seen with the deceased while he was alive coupled with the finding of incriminating evidence was sufficient to support a conviction.”**

23. In the present case, there is evidence from PW2, E that when she ran away from their matrimonial home around 10.00 p.m on 11th April 2010, she left the deceased and another child in the house with the accused. Some hours later, the deceased's body was found dumped on a footpath next to the home of the parents of E. Although no incriminating evidence was found upon the accused at time of arrest, I am satisfied beyond doubt that the accused who was the last person to be seen with the deceased while he (deceased) was alive is the person who strangled the deceased and then carried his body and dumped it near his (accused's) in-law's home to support his theory that PW2 had taken the children with her to her maternal home by the time he (accused) arrived home at about 10.00 p.m on 11th April 2010.

24. Upon careful consideration of the accused's unsworn testimony of having got home at 10.00 p.m and found the house empty and then gone to sleep until he was woken up at 8.00 a.m the following morning only to be told that the body of his son had been found dumped on a footpath, I find the testimony unbelievable and the same does not shake the evidence by E that when she fled from the accused's beatings at 10.00 p.m. on 11th April 2010, she left the deceased in the house with the accused. With the evidence of E before me, the accused herein had a duty under **Section 111 (1) of the Evidence Act, Cap 80 Laws of Kenya**, to show to the court that there were circumstances which were inconsistent with the prosecution's allegation that indeed, it was him who strangled the deceased. I have carefully examined the evidence given by the prosecution both in examination in chief and upon cross examination of all the witnesses, and from such examination, I do not find that any circumstances exist that would place the accused outside the circumstances which are placing him at the scene of crime and the conclusion that it is him and only him who had the opportunity to kill the deceased by strangling him. Further, in my considered view, there was sufficient motivation for the accused to kill the deceased: the apparently frequent disagreements with PW2 and her decision to always run away from him to her maternal home.

25. In the premises and for the reasons above stated, I am satisfied that the prosecution has proved its case against the accused beyond any reasonable doubt. I accordingly find the accused K O guilty of murdering H N on the 11th day of April 2010 and accordingly convict him of the same under **Section 322 (1) of the Criminal Procedure Code, Cap 75 of the Laws of Kenya**.

Orders accordingly.

Delivered, dated and signed in open court at Kisii this 23rd day of October, 2014

R.N. SITATI

JUDGE

In the presence of:-

Mr. Majale (present) for State

Mr. Soire for Omwega (present) for Accused

Mr. Bibu - Court Assistant

28/10/2014

Before R.N. Sitati, J.

Bibu – cc

Mr. Otieno (present) for State

Mr. Nyagwencha h/b for Omwenga for accused

Accused – present in person

Court on Sentecne

The law provides that anybody who is found guilty and convicted of the offence of murder is to be given only one sentence: death. This is what is provided for under **Section 204** of the **Penal Code**.

The court in this case has listened to and carefully considered the mitigating circumstances put forward by counsel on behalf of the accused person. The court also notes that though the accused is being treated as a first offender, the offence he committed against his own child is a most foul offence.

The court also notes that the accused herein has been behind bars since he first appeared in court on 26th April 2010, and there is no doubt that he has learnt his lessons.

Taking everything into account, and although the death penalty still sits pretty on our statute books, I hereby sentence the accused to imprisonment for thirty (30) years.

Right of appeal within 14 days from today.

Orders accordingly.

R.N. SITATI

JUDGE.

28/10/2014