



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Case 102 of 2009

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS KIPKEMOI KORIR.....ACCUSED

JUDGMENT

The accused, Thomas Kipkemoi Korir was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, (*Cap. 63, Laws of Kenya*).

The prosecution alleged that on 1st December 2005 at Ilmotiok Reserve in Mulot in Narok South District within Rift Valley Province, Thomas Kipkemoi Korir murdered Mercy Cherotich (*the deceased*).

Section 203 of the Penal Code provides that any person who with malice aforethought kills another person commits the offence of murder. Malice aforethought, the guilty mind "*mens rea*" in the esoteric Latin, the language of the ancient Romans Empire, is established by evidence under Section 206 of the Penal Code, showing -

- (a) *an intention to cause the death or to do grievous harm to any person whether that 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 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 be caused;***
- (c) *an intent to commit a felony.***

There is a fourth element, 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. We are not concerned here with this element as no person in custody was facilitated by the accused to flee from lawful custody.

To prove the other elements the State or Prosecution called eleven witnesses whose evidence is set out and reviewed in the subsequent paragraphs of this judgment.

PW1 was the child's mother, and husband of the accused for three months. The child was 2 years of age. The accused was not its biological father.

According to the testimony of PW1, she had woken up early and had joined her other in-laws, in weeding a field of maize some distance from the home from about 6.00 a.m. to about 9.00 a.m. After

digging continuously for 3 hours they felt tired and went to the home of Ezekiel one of her brothers-in-law where they took some porridge and she asked for some to take to her child whom she had left asleep with the accused.

PW1 testified that when she went to her house, she called out the child but there was no response. So she called a lady with whom she had been tilling the land, called Ziporah (PW2), to come and look at the child. Ziporah responded, came and looked at the child, then called Ezekiel (PW3) who also responded, and in turn called, Richard (PW4), who was a brother of the accused. PW1, PW2, PW3 and PW4 looked at the child and found no visible injuries. PW1 testified further that the child had no health problems, and that she had had no dispute with her husband (*the accused*) that night or morning. In the meantime, the accused had left home, and never returned to the house the whole of that day and was subsequently found at a place called “*Kimogor*” far the area they lived in.

PW3 and PW4 called the Police who removed the body of the deceased child to Longisa District Hospital Mortuary. PW1 testified that when she asked the accused (*while in custody*) what had happened to the child, she received no answer from him, the accused.

Upon cross-examination by counsel for the accused, PW1 testified that it is possible for another person from the nearby houses to gain entrance to the house when the door is closed but not padlocked as her door was when she brought porridge to her baby from Ezekial's house. PW1 also testified that though they were only 3 months married, the accused had accepted her child as his own.

When re-examined by State Counsel PW1 clarified that there were other houses about 5 minutes walk from the house.

PW2, Zipporah Chepkemoui corroborated materially the evidence of PW1, that they had woken up early to till the land along with Richard and Ezekiel (*PW3 and PW4*). They worked from about 6.00 a.m. to 9.00 a.m. when they went to the house of Ezekiel to take porridge after which they parted.

However on her way to her house, PW1 called her to come and look at the child. She came, and found the child dead, she called PW3 and asked him to take the child to Hospital. PW3 came, looked at the child and found, like her, the child had no visible injuries, and she does not know what happened to the child.

She did not see the accused that day but saw him at Mulot Town Centre after he had already been arrested.

PW3, a pastor corroborated the evidence of both PW1 and PW2. The house in which his sister-in-law (PW1) and his brother (*the accused*) used to stay in was called “*the store*”, and that when PW1 went to work in the shamba he would leave his brother in the store with the child.

On the material day, he together with the sister-in-law (PW1) and others went to plant maize as it was planting season, and then went to his home where they had some porridge and that his wife, gave a little of that porridge to PW1 to take to her child. PW3 corroborated PW1's evidence of how she tried to wake the child up and found it lifeless, then PW1 called PW2, who called him (PW3), and he responded promptly. However as he took the child, and after looking at it he found the child was dead, and confirmed it when he took the child outside. Along with his elder uncle called Kibiwott Joseph, they decided to report the matter to the A.P. Camp at Mulot Trading Centre, who in turn called the Police quickly, and they had the body removed to Longisa District Hospital Mortuary.

PW3 testified that all this time his brother, the accused was “*no where visible and was found 20 km away*”. He also testified that there was no one else who had access to the store it was only the couple, PW1 and her husband, the accused who had access to it.

When cross-examined by counsel for the accused, PW3 admitted that though there could be a possibility of someone else having access to the house, that possibility was remote because from about

400 metres away where they were tilling the land, they could see the house clearly, but did not see the accused leave the house.

PW4 was the team of oxen driver, PW3 and PW1 were planting maize. He otherwise corroborated the evidence of PW1-PW3. He heard wailing from PW1 and PW2 but ignored them as he had a visitor, and PW3 was with PW1 and PW3. He became concerned only when the child was removed to the house of PW3, when he found the child was already dead, and his brother, the accused was no where to be seen. He ran and caught up with his brother at a place called Kimogor 15 km away from their house and was surprised that his brother had already covered such a long distance. He lured him to have tea while help was sought from the local AP Camp. However when the accused saw APs he bolted away, but they ran after and arrested him and was taken to the Police Station. He found the child had already been taken to the mortuary upon his return.

When cross-examined by counsel for the accused PW4 testified that thought they were digging in a field between 150-200 metres away, they could see the house but did not see the accused escape. In other occasions the accused would bring the child to the mother in the field if he was going away.

PW5 was the first AP to receive the report of the murder and visited the scene, and called the OCS Mulot Police Station. He found the child with wide open mouth but no visible injury. The accused was not at the scene when he visited, he received information later that the accused had been found and arrested at Kimugor Market Centre about 15kms away from the scene of the crime.

PW6, a Doctor who carried out the postmortem on the child – 48 hours after the incident found peripheral cyanosis of the extremities, blood on the nostrils and mouth – oral cavity, tongue bitten and conjunctivitis haemorrhage present, on the genito-urinary system he found external genitalia - hymen was broken, *lacerations on the vulva, all features of penetrative sexual assault, he found a dislocated neck, spinal column was also dislocated, likely to have been twisted on the neck and strangled.*

He put the cause of death as cardiopulmonary failure (*arrest*) as a result of being strangled after penetrative sexual assault, injuries inflicted from an assault.

In cross-examination, PW6 explained the absence of bloodstains in the private parts due to cleaning after assault.

PW7 and his colleagues collected the body from the scene and took it to Longisa District Hospital Mortuary. He did not check on injuries nor did he notice any blood at the scene.

PW8, was the Investigating Officer. He recorded the statements from witnesses. He also interrogated the accused who admitted to him that he had committed the offence, and being a Corporal he was not competent to take a confession from the accused. He admitted in cross-examination that no person saw him commit the offence. He was however arrested at Kimugoro while taking tea, a long distance from the scene of the offence. He had been arrested at about 10.00 a.m. following efforts by his brothers PW4 in particular, and also PW3.

PW9 arrested the accused at Kimugoro while taking tea, and upon realising PW9 was going to arrest him, tried to flee but was restrained by his coat, and subdued, and taken to Mulot Police Patrol Base from where he was later transferred to Mulot Police Station and charged with the offence of murder.

PW10, a Clinical Officer, trained in assessing patients mentally, found the accused who was smartly dressed to be well oriented in time, place and person, he had coherent speech and normal gait, no bruises on his body, head or hands, or other parts of the body. He was brought to him after 9 days. He had no bloodstains on him.

PW11 was one of the officers who visited the scene of the crime. He confirmed that the accused was arrested with the help of relatives, about 20km away from the scene of the crime. He was escorted to Longisa District Hospital for mental assessment.

With that evidence, I put the accused to his defence. He gave sworn testimony as DW1. He corroborated the evidence of PW1, his wife that his wife left first to the shamba while he herded the cattle and the child was left on the bed sleeping, that he went to a place called Kimogoro, which he had to pass by two hills before getting to that market. He did not find the person he was looking for, and went to a Kiosk to take tea.

DW1 again corroborated the evidence of PW4 that the accused was arrested while taking tea, tied with ropes and was taken to a Police Station.

Again when cross-examined the Accused reiterated his evidence that it was his wife (PW1) who first went to the shamba. He was thereafter with the child for 30 minutes, and that the child has breathing problems, and that his wife had woken him at 3.00 a.m. but that they (*he and his wife*) took no action to take the child to Hospital. He reiterated his story that he had gone to Kimogoro to get money to purchase seeds. His wife would have been lying if she said the child was well. His evidence, he said was not fabricated. He did not strangle the child. He never wrote any statement, and that he was made to sign a piece of paper.

ANALYSIS OF EVIDENCE

The uncontroverted evidence from PW1 and DW1 (*wife and husband*) is that they lived together and slept in the same house as husband and wife on the night giving rise to the morning of 1st December, 2009.

On that morning PW1 and DW1 woke up at 6.00 a.m. PW1 went to the shamba where she and PW3 and PW4 were planting maize. PW1 and DW1 evidence also agrees that the child was left sleeping on the bed. DW1 stated in cross-examination that he stayed with the child for 30 minutes after PW1, (*his wife*) had left for the shamba. After that he does not know what happened to the child. He denies strangling the child. He says that the child was sick and he and the mother (PW1) had been disturbed by the illness and had woken up at 3.00 a.m., but had done nothing to take the child to hospital for treatment. His evidence contradicts that of PW1 (*his wife*) that the child was well, and was left with him while well. I think the little bit that the child was unwell and which came up in cross-examination was part of the made-up story as was his evidence in-chief. This is why.

The Accused admits that he was left with the child when his wife left the house for the shamba. He admits he was with the child for 30 minutes after his wife had left for the shamba. If the child developed signs of serious illness the nature of which the accused did not specify, why did he not call his wife about 120-400 metres away from the house where he was left with the child? Why didn't he inform any of his brothers or uncles PW3 and PW4 who were with PW1 in the field?

In his evidence in-chief the accused testified that he took out the cattle while his wife went to the shamba. What happened to the cattle when he embarked upon 15-20 km journey to Kimogoro Market allegedly to collect a debt from a debtor whose identity he did not disclose? PW4 testified that he caught with the accused at Kimogoro Market where PW4 lured the accused to take tea while a report was being made to the Police that he was a suspect for the murder of Mercy Korir.

PW4 testified that once the accused noticed that he was being stalked for arrest, he abandoned his tea, and took to his heels. It was the evidence of PW9, that the accused was taking tea at Nyota Hotel, and that once PW4 showed the accused to PW9, "*the accused tried to escape and he got hold of him by his jacket and he fell down.*" PW9 had a rope and they tied his hands and took him to Mulot Police Patrol Base from where the accused was collected by the OCS Mulot Police Station, and that the accused was later charged with the offence of murder.

None of the witnesses who testified saw the accused kill the deceased child. The evidence of PW5, the doctor, however described the injuries suffered by the child and the cause of death of the child. PW5 described both the general appearance of the body of the child, that there was peripheral cyanosis of the extremities, the fingers and toes, blood on the nostrils and the mouth's oral cavity, the tongue was

bitten, there was present conjunctival haemorrhage, both conjunctiva were injured, that no abnormalities and none were detected on the respiratory system, the cardio-vascular system had no abnormalities were detected, the heart was normal, the digestive system, the liver, and spleen were normal and so were intestines. The nervous system was also normal.

On the genito-urinary stem, the postmortem showed external genitalia – hymen broken, lacerations on the vulva, which PW5 described as features of penetrative sexual assault though the features of internal genitalia were normal.

On the spinal column the Doctor found the ante-axial joint was dislocated, the neck was dislocated, the spinal column was also dislocated, and preferred view that the child was likely to have been twisted on the neck and strangled. The spinal cord was normal but was severed. His final prognosis was that the cause of death was cardiopulmonary failure (*arrest*) as a result of being strangled after penetrative sexual assault, and that injuries were inflicted from such assault.

The question to be answered is who would have inflicted such painful and fatal injuries upon the deceased child? It was suggested by counsel for the accused, following the evidence of PW4 from cross-examination any other person, apart from the accused could have had access to the closed but not padlocked door to the accused's store house. Even granting this possibility it does not explain where the accused left the cows. He testified that he let out the cattle in the morning as his wife left the house for the shamba. It does not explain why he ran away to Kimogoro Market some distance of 15-20 kms. It does not explain why having stayed with the child for 30 minutes before left for Kimogoro Village, he did not take the child to the mother in the shamba.

If the child was sick as the accused testified and died from whatever that sickness was (*and which the accused knew*), it does not explain the injuries which the child sustained and described by PW5 so graphically. Those injuries could only have been caused by the agency or acts of a person, a male person capable of penetrative sexual assault. The question is, who was or could have been that male person?

Section 206 (*supra*), of the Penal Code provides that malice aforethought is established by evidence proving the any one or more of the four circumstances prescribed therein and described at the beginning of this judgment.

In ordinary English “*circumstances*” means that which stands around or surrounds, or surroundings, the adjuncts of an action or fact. In the law of evidence, “*circumstances*” means all the facts and incidents surrounding the matter in issue. The evidence herein is purely circumstantial. From the authorities, presumptive evidence must always be received with caution ...

“It must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicions on another ... It is also necessary before deriving the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – per Lord Norman in TEPER VS. R [1995] AC 480. Similar sentiments were expressed in SAWE VS. REPUBLIC [2003] KLR.”

In what the authors of Archbold Criminal Pleading and Evidence and Practice 34th Edn refer to as “*violent prescription*” if a person runs out of a house wielding a bloodstained dagger, and later a person is found murdered in that house in which the first person was seen running out of, the presumption is that the person running with the bloodstained knife, is most probably the murderer of the deceased person.

In this case, the accused was the last person left with the deceased child. He sneaked away from the house without letting his wife know that he had left the child alone in the house. As it was the practice, he did not take the child to the mother in the shamba. Instead, he stayed with a child for 30 minutes after which he sneaked away from the house and were it not for the quick follow-up by his brother PW4, he might have escaped entirely from the scene and jurisdiction. His evidence does not exculpate the accused from the charge against him, or establish any co-existing circumstance which prove his

innocence. It is only because of the poor and rudimentary level of forensic medicine among our investigators that no vaginal swab was taken for examination for spermatozoa, and the accused subjected to DNA. But even without such scientific evidence, the circumstantial evidence adduced by the prosecution and analysed above clearly shows that it is only the accused, and no other person who had access to the child, and caused the death of the child through strangulation after penetrative sexual assault and other injuries described by PW5.

In the circumstances, I find and hold that the prosecution has established by evidence the circumstances described in Section 206 of the Penal Code, that the accused sexually assaulted the child, and strangled it, twisted its neck with sole intention of doing grievous harm to the child, well knowing that his acts would probably cause and did cause the death of the child; and there is no doubt that the accused intended to commit a felony, to kill the deceased.

In the circumstances, I find the accused guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code, and I convict him of the offence of murder of the deceased Mercy Korir.

I call upon counsel for the accused to address me on why the accused should not be sentenced to death as provided by Section 204 of the Penal Code.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 23rd day of November, 2012

M. J. ANYARA EMUKULE

JUDGE