REPUBLIC OF KENYA

High Court at Nakuru

Murder Case 55 of 2009

REPUBLIC…..…….PROSECUTOR

VERSUS

GEORGE OTIENO WALONGA……...…...….ACCUSED

JUDGMENT

George Otieno Walonga is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code.** It was alleged that on 15/6/2009, at Njoro Njokerio Estate, Nakuru District, he murdered Brian Omondi. The accused denied the offence. The prosecution called a total of 9 witnesses in support of their case.

PW1, George Osia Kira, recalled that on 15/6/09, a person by name Jared Ogutu went to his office to solicit for funds to burry Esther Onyango's (PW7) son, the deceased. The same Ogutu informed him that it was rumoured that the accused, George Otieno had caused the death of the child because the child was not his. He went to Ahero Estate where the friend lived, saw the body of the child. Because of the rumours, he had heard, he decided to report the matter to the police station. The police went to arrest the accused and carried away the body of the deceased.

Evans Matwere (PW2), a resident of Njokerio recalled that the accused was his neighour and that on 24/5/2009, he found accused's wife (PW7) in his house with a child, the deceased. He noticed that the child's hand was swollen. PW7 informed him that the accused had beaten the child and he showed him more scars on the child's back. He went to accused's house that evening and told him that what he was doing to the child was wrong and the accused promised to stop. On 16/6/09, he came from work when he found people gathered and he heard that the child had been taken ill and had been taken to hospital. On 18/6/09, he learnt that the child had died.

PW3, Margaret Akinyi, a resident of Nyokerio also recalled that on 15/6/2009, the accused went to her house and informed her that the child was critically ill and that he wanted PW3 to go and look at it. She went to accused's house and found the child diarrhearing. She denied seeing any injury on the child. PW3 advised the accused to take the child to hospital.

PW4, APC Jacob Mutunga and APC Kalicha Mohammed of Nyoro Njokerio Police Post testified that on 17/6/09, they received a call from one George Kira (PW1) that a person had injured a child and they wanted to hurriedly bury it. He went to the house the next day where he found the mother of the child, interrogated her and later met accused, and arrested him. He took the body of the child to the mortuary. Post mortem was conducted on the deceased on 19/6/09 by Dr. Noah Oloo Kamidigo who found that the child had superficial bruises on the upper portion of the chest, deep bruise 1½ cm on the posterior auxiliary line and mucus membranes were remarkably pale. Internally, he found free blood in the tissues, and one litre of blood in the abdomen wall cavity and a ruptured spleen. He formed the

opinion that the child died as a result of hypovolumic shock due to internal abdominal haemorhage from the ruptured spleen due to blunt force injury to the abdomen.

PW7, Esther Anyango was the mother of the deceased. She recalled that when she was living in Egerton the accused was her boyfriend and she went to live with him when her relative chased her away. She recalled that on 15/6/09 she prepared breakfast and left the deceased playing with other children in the neighbourhood and the accused was in the house and was supposed to take care of the child. When she arrived back home that evening, she found the accused had taken the child to hospital. She went to hospital and confirmed that the child was sick and on oxygen. She went back home leaving accused behind and at 11.00 p.m., she learnt that the child had died. She said that the child could not talk but he was very afraid of the accused. Whenever he saw the accused, he could cry. She denied ever seeing the accused do anything bad to the child.

PW8, Rose Adongo, the mother of PW7 and grandmother to the deceased is the one who identified the deceased's body to the Doctor before post mortem was conducted.

PW9, PC John Chacha is one of the police officers who went to take the deceased's body from the house to the mortuary and also identified the body of the deceased before post mortem was done. He observed that the deceased's body had dark spots on the left side of the body and the chest.

When called upon to enter his defence, the accused gave an unsworn statement. He said that on 15/6/09, PW7 prepared breakfast for all of them and both him and PW7 left, the house leaving the child with the neighbours' children. He left work at 2.30 p.m., went home and found the deceased had vomited on himself and diarrheared on himself. He informed Akinyi, PW3, who told him to take the child to hospital which he did. The child was admitted. He was found to be dehydrated, was added water, given medication but died the same night. The accused told the court that he is the one who sired the child with PW7 and denied having done any harm to him.

Nobody saw the accused injure the deceased. However, there is no doubt that between the accused and PW7, the accused was the last one with the deceased on the day on which he fell ill and died. Tough the accused claims to have left the deceased with other children, PW7 told the court that the accused was not working at that time and she used to leave the child with the accused to take care and tht is what she did on the fateful day. At no time during the testimony of PW7 did the accused challenge her evidence that he was not going to work for sometime or that he was left at home with the child on the said date. I did not have any reason to doubt what PW7 told the court. I doubt that PW7 would have left the child with other children without a grownup to take care. Infact, PW7 said that when there was nobody to take care of the deceased, she would take the deceased along to her casual job.

PW6, upon examining the deceased formed the opinion that the cause of death was hypovolumic shock due to internal abdominal haemarhage from a ruptured spleen due to a blunt force to the abdomen. It follows that the deceased did not die of natural causes. He had a blow to the stomach. The question is therefore how did he sustain the injury to the abdomen. This case wholly turns on circumstantial evidence. The case of **R. V Kipkering Arap Koske & Another (1949)16 EACA 123** laid down the test on when the court rely on circumstantial evidence to found a conviciton. It was held that in a case depending exclusively upon circumstantial evidence, the court must be satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of guilt; before entering a conviction. In **Simon Musoke v R (1958) EA 715**, the court also said that to base a conviction on circumstantial evidence the court must be satisfied that there are no co-existing circumstances to weaken the inference of guilt.

The Court of Appeal in **Peter Mote Obero & Gideon Kamau Mburu Vs Republic Criminal Appeal No. 177 of 2008 (Mombasa)**, held as follows;

"It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before

drawing the inference of the accused's guilt for circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference…with those safeguards in place circumstantial evidence is as good as any direct evidence which is tendered and accepted as to prove a fact."

In the instant case, PW7 told the court that the deceased was young, was learning how to talk and only knew a few words. She further told the court that the deceased was afraid of the accused and would cry whenever he saw him. She did not, however, attribute it to the accused beating the child or mistreating the child.

PW2, a neighbour to the accused told the court that he knew that the accused used to beat the child for reason that the child was not his. PW7 confirmed that she did not sire the child with the accused. PW3 also said that he had known the accused for long but that the accused had been married to PW7 for a very short while and that the accused married PW7 when she had two children. Although PW2 and PW7's evidence does not directly point to accused as having beaten the deceased, there is prior evidence as to how the accused related to the child. I believe that he was not the biological father of the deceased and that explains why he was hostile to the child. Having found that the accused was left with the child on the fateful day, a child he had therebefore mistreated/abused, I find that he had a duty to explain how the deceased who had been left under his care met his death. In criminal cases the burden is always on the prosecution to prove its case beyond all doubt but there are circumstances when the law casts that burden on an accused person to explain certain facts particularly those particularly within his own knowledge. This burden is cast on the accused under **Section 111** of the **Evidence Act**:-

"S.111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

The explanation given by the accused that he left the child with other children playing as he went to work is not reasonable or believable. There is evidence that he was not working then. I find that the accused has failed to give a plausible explanation as to how the deceased received the fatal blow/injury to the stomach that resulted in the rapture of the spleen. Having failed to explain, a presumption of fact under **Section 119** of the **Evidence Act**, arises that only the appellant could have killed the deceased. In absence of any explanation to rebut that presumption, I do hold that it is the accused who killed the deceased and the circumstantial evidence does point a the accused as the killer.

Malice aforethought flows from the injury inflicted on the child. This was a baby of about 2 years. The spleen was found to have ruptured, I believe the force inflicted on the deceased must haven been excessive. And it seems it was not just one blow. The Doctor also found bruises on the upper portion of the chest, deep bruise 1½ cm on the posterior left ancillary line. Considering the size/age of the deceased, these injuries were meant to cause grievous harm to him, which they did.

In the end, I come to the conclusion that it is the accused who caused the death of the deceased, he is guilty of the offence of murder and is convicted accordingly under **Section 322** of the **Penal Code.**

DATED and DELIVERED this 22nd day of November, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:
The Accused – in person

Mrs Mukira holding brief for Mr. Marete for the State

Kennedy – Court Clerk