



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 43 OF 2007

REPUBLIC PROSECUTOR

VERSUS

BENARD KIPTOO MWEI ACCUSED

JUDGMENT

The accused is charged with murder contrary to S. 203 as read with S. 204 of the Penal Code, in that on the 29th August 2007 at Lolduga Trading Centre Nandi South District, murdered Ancent Kimutai.

The case for the prosecution is that the accused was married to **EDNA CHEPKOSGEI (PW 1)** and both lived in Morgon Lessos where they formed. On the 26th August 2007, the accused arrived home at 8.00 p.m. and threatened his wife with death if she did not tell him where money went. His wife invited him to eat but he declined. He walked away telling his wife to go and sleep. He threatened to do something in the house. He returned into the house after being persuaded by his wife. He thereafter took a knife and continued to threaten his wife with death. She told him that she did not have any money. He reacted by cutting her on the right shoulder, left thigh, hair and right hand. He insisted on knowing where the money was and was told that it was with a Mrs. Tanui. The two proceeded to the house of Mrs. Tanui from where she was taken to Lessos Hospital. She forgave the accused and did not report to the police.

On the material date (29th August 2007), the accused arrived home at 8.00 p.m. in a state of intoxication. After the door was opened for him, he went into their shop and started packing goods. He asked for the day's sales and was given a sum of Ksh. 95/-. Thereafter, he hit his wife (PW 1) on the right hand with a torch and again threatened to kill her. She made an attempt to run away but was held back by the accused. Their son aged three (3) years called Ancent Kimutai (herein deceased) ran towards her from the bed. The child fell down after being slapped by the accused. She managed to run away to the home of their neighbour, the Tanui's. Mr. Tanui went to the accused's house to get the child but found that the child had been killed by the accused. People arrived at the scene and beat up the accused before he was arrested by the police.

PAUL KIPKETER MUTAI (PW 2), a farmer by occupation was at his home when he was attracted by screams from the nearby centre. He ran there and found a crowd of people surrounding the accused's house. Some of the people were struggling with the accused who was alleged to have killed a child. Paul entered the lighted house and found the dead child lying down with a cut on the neck. He also found a knife on the floor.

FRANKLIN KIPTOO MUNAI (PW 3) was also attracted by the screams and on arrival at the scene found the accused and **DAVID SIONGOEI (PW 4)** outside their houses. The accused screamed and entered his house. He screamed and said that if Edna (PW 1) does not come back he would kill the child.

Franklin instructed Singoei to call the accused's wife but immediately thereafter heard the noise of a child as if the child was being struggled. Franklin (PW 3) entered the house and found the accused biting the child while holding it. He kicked the accused who attempted to cut himself with a knife. He struggled with the accused and took the knife away from him. A school boy assisting him (PW 3) said that the child had already been cut by the accused. The school boy took off on seeing the body of the child. Franklin noted that the child was cut on the neck. Neighbours at the scene then set upon and beat the accused before he was arrested by the police.

Singoei (PW 4) said that the accused had earlier gone to his house to fetch his (accused's) wife. The accused insisted that he (PW 4) should produce his wife. In the process, they argued and were found by Franklin Kiptoo (PW 3). Singoei confirmed that the accused entered his house screaming and saying that if his wife is not brought back, he would do something that day. Singoei also confirmed that many people came and surrounded the accused's house and that K. (PW 3) entered the house and struggled with the accused. The accused's child was found dead. Singoei said that the accused was tied up so that he could not kill himself. His child was cut on the neck and a knife was found at the scene.

JAMES KIMELI KEINO (PW 5) is the father of the accused's wife (PW 1). He was informed of the death of the deceased child on 30th August 2007 and on the following day went to the hospital to identify the body for post mortem purposes.

CPL. PETERSON MUREITHI (PW 6) of Lessos Police Station was in the group of police officers who proceeded to the scene after receiving the necessary report. On arrival, they found the accused tied with a rope and the dead body of the child lying down. He (PW 6) noted that the deceased had a deep cut on the neck and the suspected killer weapon, a kitchen knife, was at the scene with blood stains. There was also a blanket with blood stains. The accused was arrested and found to have injuries on the neck which were inflicted when he attempted to commit suicide.

P.C JOSEPH MOGUSU (PW 7) of Lessos Police Station investigated the case. He arrived at the scene and found the accused tied on the wrists while the dead body of deceased child lay beside him. There was also a knife beside the accused. The knife had blood stains. P.C Mogusu said that his investigations revealed that two days prior to the incident, the accused had quarreled with his wife and beaten her. When she ran away, the accused turned his anger on the deceased child.

DR. LUBANGA MISIKO BILLI (PW 8) carried out the post mortem on the body of the deceased child and opined that the cause of death was cardio respiratory failure due to excessive hemorrhage from deep cut wound to the neck. He produced the necessary post mortem form. He also assessed the accused and found him to be mentally stable. With all the foregoing facts from the aforementioned witnesses, the prosecution closed its case.

On being placed on his defence, the accused made an unsworn statement. He did not avail any witness. His case is that he did not commit the offence. He arrived home on the evening of 29th September 2007 at about 7.30 p.m. and found that the security lights had been switched off. He knocked the door to his house but there was no response. He pushed the door open and gained entry into the house. He switched on the lights and proceeded to the kitchen from where he noticed that his juvenile child was sleeping near the bedroom door. He was shocked and screamed. Neighbours arrived at the scene and without asking him anything, tied him by the hands and called the police. The police arrived at the scene and questioned him. They then arrested and took him to the police station where he was charged. He normally lived with his wife but did not find her at the scene on that date.

A consideration of the evidence in its totality shows that there is no dispute that the death of the deceased was as a result of a violent act of assault committed against him. Indeed, this was confirmed by

the testimonies of most of the prosecution witnesses including the doctor (PW8).

Paul (PW 2), Franklin (PW 3), David (PW 4) and the police officers (PW 6 and PW 7) saw the dead body of the deceased at the scene. They all indicated that the body had a deep cut on the neck. A knife (P.Ex.1) found at the scene by the witnesses was suspected it have been the assault weapon. There was indication that the knife had blood stains.

The post mortem report (P.Ex.3) showed that the cause of death was cardio respiratory failure due to excessive hemorrhage from deep cut wound to the neck.

There being no dispute with regard to the cause of death, the basic issue for determination is whether the accused was the person responsible for inflicting the fatal injury upon the deceased and if so, whether he acted with malice aforethought in so doing.

The defence raised is a denial and a suggestion that the deceased was fatally injured by an unknown person if not the accused's wife who according to the accused was not at the scene when he discovered the dead body of their deceased child allegedly on the 29th September 2007. However, it has been established by the prosecution that the incident leading to the death of the deceased occurred on the 29th August 2007 and not 29th September 2007 as indicated in the information. There appears to have been a typographical error thereby causing a mix-up of the dates.

Be that as it may, the defence also suggested that the accused was not at the scene when the deceased was killed.

But, the evidence by the accused's wife (PW 1) showed that the accused was indeed present at the scene on the material date and time. This was confirmed by Paul, Franklin, David, Cpl. Mureithi and P.C Mogusu (PW 2, 3, 4, 6 and 7 respectively). These witnesses found the accused at the scene either before or after the occurrence of the incident. The accused's wife (PW 1) said that on the material date she fled from their house and went to seek refuge at a neighbour's house leaving the deceased child behind after she was threatened with death by the accused. She said that the accused slapped the deceased child when he (child) ran towards her inside the house.

The accused's wife did not see what occurred after she fled from the scene. She was later informed by her neighbour called Tanui that the accused had killed the child. The said Tanui was not called as a witness. However, it is doubtful whether his evidence would have added any value to the evidence already in existence considering that his report to the accused's wife implied that the fact had already occurred when he arrived at the scene.

Although the accused denied responsibility for the death of his deceased child, there was ample and credible evidence from the prosecution showing without a shadow of doubt that he was the person responsible for inflicting the fatal injury upon his deceased child. His wife (PW 1) indicated that even prior to the child's death, he had already assaulted the child by slapping him when he ran towards his mother before she fled from the scene.

The evidence by Paul (PW 2) showed that the accused was involved in a struggle with people who had arrived at the scene after the child had been killed.

The evidence by Franklin (PW 3) was most important in showing that the accused was seen in the act of assaulting and killing his child. This evidence was direct evidence against the accused. Franklin found the accused with Singoei (PW 4) outside their houses. Singoei told him (Franklin) that the accused had beaten his wife who ran away. Franklin heard the accused screaming and saw him enter his house. He also heard him screaming from inside the house and threatening to kill his child if his wife did not return. Franklin entered into the accused's house after hearing noises from the child implying that he was being strangled. On entry into the house, Franklin saw the accused holding and biting the child. He (Franklin) kicked the accused who then attempted to cut himself. Franklin struggled with the accused and wrestled the knife from him. A school boy assisting Franklin intimated that the child had already been cut

on the neck. The schoolboy assisting Franklin did not testify in Court. This did not however lower the credibility of Franklin's evidence against the accused.

David Singoei (PW 4) indicated in his evidence that the accused was under the impression that his wife had hidden in his (PW 4's) house. He (accused) went there looking for his wife and demanded that Singoei produces her. The two then started arguing and it was at that juncture that Franklin (PW 3) appeared at the scene. Singoei also said that when the accused went to his house the deceased's child ran into the house but was pulled back by the accused. He (Singoei) also heard the accused screaming from inside his house saying that he would do something that day if his wife was not produced. From this evidence by Singoei (PW 4) and Franklin (PW 3), it is apparent that the accused not only inflicted the fatal injury upon his own child but did so with malice aforethought. He had already shown signs that he would actualize his threats. He shouted that he would kill the child if the mother does not return. He shouted that he would do something that day if the wife did not return. He had already meted out lesser violence on the child even before carrying out his threats. His defence was completely discredited by the evidence against him. It strongly appeared that he diverted his anger with his wife to their own child who died a very merciful and painful death. This Court has no hesitation whatsoever to find that the accused with malice aforethought caused the death of the deceased by cutting him on the neck with a kitchen knife.

The accused is therefore found guilty as charged and is hereby convicted.

J. R. KARANJA
JUDGE

[Delivered and signed this 19th day of July 2011]

19/7/11

Before – J. R. Karanja – Judge

Court Clerk – Andrew

Mr. Kabaka for State

M/s. Khayo for accused

J. R. KARANJA
JUDGE

Court:

Judgment delivered to accused.

J. R. KARANJA
JUDGE

State Counsel:

Accused does not deserve mercy. His action led to the death of an innocent child.

J. R. KARANJA
JUDGE

M/s. Khayo in mitigation:

Accused is twenty six (26) years old, married with one child. He is remorseful for the offence. It occurred due to family misunderstanding. Accused has been in custody for five (5) years. May leniency be accorded to him.

J. R. KARANJA
JUDGE

Court:

It has been noted that the accused is a first offender and what has been stated on his behalf in mitigation. The circumstances of the case prevails upon this Court to impose the actual sentence provided

under S. 204 CPC.

Accused without any justifiable cause took away the life of his child in a most cruel and beastly manner.

J. R. KARANJA
JUDGE

Sentence:

To suffer death as by law prescribed.

J. R. KARANJA
JUDGE

Right of appeal.

J. R. KARANJA
JUDGE