



**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE NO.24 OF 2009**

REPUBLIC

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PROSECUTION

~VRS~

AMOS WEKESA SIMIYU

ACCUSED

JUDGMENT

The accused Amos Wekesa Simiyu faces a charge of murder contrary to section 203 as read with 204 of the Penal Code. It is alleged that on the 10th day of April 2009 in Bungoma District, he unlawfully murdered A.S. He pleaded not guilty to the offence.

The facts of the case are that PW1 Mildred Wanjala had a marital relationship with the accused from which they were blessed with two sons namely A.W and A.S. At the time of the incident which led to this case, A.W was aged eight years and A.S six. The parents had separated after the children were born and each of them re-married. PW1 and her parents stayed with the deceased A.S until he attained six years. It was in the year 2007 that PW1 re-married. She left her own parents looking after the children before returning them to their father (accused) on 17/3/2009. A month later PW1 was informed that the deceased was sick and in a critical condition. She went to the home of the accused where she found the child dead and mourners present in the home. PW1 then reported the matter to the police.

It was the testimony of PW1 that when she arrived at the home of the accused, she observed the body of the deceased and found injuries on the neck and the back. The elder child Augustine also had injuries on his body. Augustine told PW1 that the accused had assaulted him and the deceased. PW1 took A.W with her as she left the home but the accused assaulted her in protest. The accused has two other children with his current wife. PW2 the father of PW1 did not witness the incident. He testified that after PW1 and the accused separated, the witness looked after the children in his own home at Misikhu in Webuye division. The mother of the children re-married and left the boys with him until March 2009 when they were returned to their father. PW2 also testified that when the children were taken back to the accused, both were in good health.

PW3 produced the postmortem report. The doctor formed the opinion that the cause of death was cardio-pulmonary arrest due to sub-dural hemorrhage caused by the head injury due to trauma.

PW4 is the police officer who received the report of the death of deceased at Bungoma Police Station. He visited the home of the accused and was shown the body which had whip marks on the back. The accused was arrested and the body taken to Bungoma District Hospital Mortuary. Under the guidance of IP Gituma the Officer Commanding Bungoma Police Station, the witness PW 4 conducted investigations in this case and charged the accused with the offence.

The accused in his defence said that on 10/04/2009, he was at home. He went to graze his cattle with his two sons the deceased and A.W. He was called to his house about 150 metres from the grazing field. He went home and returned a short while later just to find the cattle in the shamba. The accused became furious and decided to discipline his two children for letting the cattle loose to destroy his crops. He beat them up on the legs with a stick but none of them collapsed due to the beating. The children walked home on their own and ate supper that evening. The two boys slept in the sitting room and woke up in good health the following day.

In the defence, I note that the accused did not tell the court what happened on the 11/04/2009 when

the deceased died. The accused ought to have explained whether the deceased developed complications that morning or died suddenly. The prosecution's evidence is that the deceased died in the morning of the 11/04/2009. This was one day after the assault by the accused. The accused admits assaulting the deceased and his brother which according to him was for the purpose of disciplining them. It was his testimony that he only hit them on the legs with a stick. The accused says the boys walked home on their own which is possibly true. The boys ate supper with him that evening and slept. I do not agree with him that the deceased woke up in good health the following morning. This could not have been so because the deceased died that very morning. The deceased's condition must have deteriorated in the night and no one bothered to rush him to hospital. Even after his death, the accused did not report the matter to the police. Police and PW1 found mourners at the home of the accused preparing for burial of the deceased. Had PW1 not gone to the home, the deceased would have been buried like he died a normal death.

The deceased died of a head injury which accused denies inflicting. The accused in his defence confirms that the deceased did not leave his custody that evening after the beating. The family ate supper together and the deceased slept in the sitting room. The accused said he saw the boy wake up the following morning. There is no one else who came into contact with the deceased after the accused assaulted him and inflicted the head injury. The accused had the opportunity to inflict the head injury when he was disciplining the deceased a day before the deceased died. An inference can correctly be drawn that the accused and no other person assaulted the deceased on 10/04/2009 causing a severe head injury which led to the death of the deceased. The injury inflicted ended the life of the deceased within less than 24 hours from the time of the assault. PW1 was informed by her son A.W (who also had injuries) that their father had assaulted the deceased and himself.

There was no witness who saw the accused inflict the fatal injury on the deceased. However, the evidence of the four prosecution witnesses is clear that the deceased was in good health on 17/03/2009 when he was handed over to the accused. It is also clear that the deceased had been assaulted prior to his death on 11/4/2009 by the accused. The accused admitted he beat up his two sons to discipline them for letting his cattle enter the shamba. After the assault, the deceased remained in the custody of the accused until he died. The cause of death was as a result of the head injury. The only opportunity for inflicting the injury was during the assault of the deceased by the accused. Had the accused taken the deceased to hospital when his health started failing, he could have saved the life of his son. He neglected to take up that important parental task of providing healthcare to the boy and watched him die. After the death, the accused did not notify the police. It took the mother who traveled from Webuye to Bungoma to report the matter. I find that the circumstantial evidence on record points the guilt in the murder of the deceased at no other person but the accused. All the foregoing facts put together work in favour of the prosecution. I find that the prosecution have proved beyond any reasonable doubt that the accused committed the act which led to the death of the deceased.

The accused in his defence said he was disciplining the deceased. The deceased was aged six (6) years born by a woman with whom he had separated. The mother went home with the child after separation and looked after it until 2006 when she remarried. PW1 left her father PW2 to look after the children which he did for three years. On 17/03/2009 PW1 took the children to the accused. The accused has two other children with his wife. The only children who appear to have been assaulted were those of PW1 who had been returned home three (3) weeks before the death of the deceased. PW1 explained to the court that she discussed the custody, education and maintenance of the children. She made it clear to him that she was not financially empowered to maintain and educate the children with the accused. It was agreed that the children to go and stay with their father at Sirare in Bungoma. From the conduct of the accused of assaulting and disciplining the two children in exclusion of the other two children, the accused could have been protesting the parental burden that he was carrying. The accused said that he was a farmer in his defence. He did not describe the intensity or otherwise of the farming. It is possible that without any gainful employment, the accused was not comfortable staying with the children leading to his uncalled for actions in the guise of instilling discipline. The accused used excessive force to beat the deceased. A six (6) year old child should be discipline using reasonable force or merely by talking to him. The intensity of the injuries inflicted are evidence of no other intention but to kill the deceased. His failure to seek medical care for the child confirms that the accused had the intention to bring the life of the deceased to an end. I find that the prosecution have proved beyond any reasonable doubt that the accused had malice aforethought when he assaulted the deceased. I find him guilty of the offence of murder as charged and convict him accordingly. I sentence him to suffer death in the manner authorized

by the law.

**F. N. MUCHEMI
JUDGE**

Judgment dated and delivered at Bungoma on the 25th day of November 2010 in the presence of the accused, Mr. Murunga for Luyali for accused person and the State Counsel Mrs. Leting.

**F. N. MUCHEMI
JUDGE**