



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ogwana & another (Criminal Case 17 of 2021)  
[2023] KEHC 540 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 540 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE 17 OF 2021  
JR KARANJA, J  
FEBRUARY 2, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MOSES ANAYIN OGWANA ..... 1<sup>ST</sup> ACCUSED**

**CAREN AMOIT ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The first accused, Moses Anyain Ogwana and the second accused, Caren Amoit, vide the information dated October 4, 2021 are charged with Murder, contrary to S 203 as read with S 204 of the [Penal Code](#), in that, on the September 24, 2021 at Sirisia village Teso South Busia County, they murdered [particulars withheld].
2. The case for the prosecution was that the deceased was a child of not more than five years old and a biological son of the second accused and Richard Oskuta Opili (PW 3) and an apparent stepson of the first accused, said to be a 'husband' or boyfriend of the second accused. The child was left in the custody of his actual father (PW 3) after he and the second accused separated following marital misunderstanding and disputes between themselves. The two lived as husband and wife.
3. On the August 6, 2021, the child was allegedly removed from the custody of his father (PW 3) by his mother (the second accused) and on the September 25, 2021, the father was called by the police and informed that the child was dead.

PC Festo Kutayo (PW 1) was on duty at Airstrip police post on September 24, 2021, when he received a report from Faith Medical Clinic through a medical officer that the child had been taken to the clinic by his mother (second accused) for treatment but appeared to have been offended.



4. On proceeding to the clinic, PC Kutayi found the second accused and questioned her. She gave answers which suggested that the child could have been 'disciplined' by the first accused with whom she was living with at the time and who was not happy with her bringing the child to live with them.

The medical officer, Kevin Odhiambo Odhuno (PW 2), confirmed that the second accused took the child to the clinic when he was already dead and with several injuries on his body suspected to have been inflicted by an individual or individuals. He (PW 2) suspected that the child could have succumbed from those injuries and immediately reported the matter to the police.

- (5) The police through Cpl Margaret Wamboi (PW 4) based at the time at the directorate of criminal investigations (DCI) – Teso North, investigated the matter and gathered that at the material time the two accused lived together as a married couple and both had been assaulting the child even though the second accused implicated the first accused. The two were held responsible for the death of the child based on the conclusions of the doctor in the post mortem report (P Ex 1).
- (6) The report was compiled and signed by Dr Edward Kibochi (PW 5) after he carried out a post mortem on the body of the deceased child on the September 30, 2021. He concluded the cause of death was blunt abdominal trauma visceral injury due to assault by blunt object. The two accused were thus arrested and charged with the murder of the deceased child.
- (7) The defence case respecting both accused was a denial. Accused one testified that the deceased was a child of the second accused, his girlfriend, and on the material September 24, 2021 at about 6.00 pm he was called on phone by the second accused and informed that the child was sick and in hospital. He immediately proceeded to the hospital known as Faith Clinic and found two doctors who told him to wait. Two police officers then entered a room followed by others. Thereafter, they confronted and slapped him before they arrested him together with the second accused. They were taken to Adungosi Police Station where they were forced to record statements on allegation that they murdered the deceased child.
- (8) The first accused denied the allegations and indicated that the child was assaulted and fatally injured by the second accused's husband (PW 3) with whom she lived before she left for her parent's home and then to Kericho to work.

The second accused on her part, testified that she was married to Richard (PW 3) but their marriage was rocky due to her husband's cruel and violent nature. She therefore left their matrimonial home and returned to her parent's home where she left the child and proceeded to Kericho to work. While in Kericho, she received information that the child's father (PW 3) had removed him from the custody of her grandmother.

- (9) Later, she (accused two) was informed by an inlaw that the child was seriously sick. She therefore returned to her parent's home before proceeding to the home of the child's father (PW 3) where she found the child in bad condition with a swollen stomach and a broken leg. She then took the child to a clinic in Adungosi but his condition did not improve. She therefore called the first accused, her friend. He directed her to take the child to Faith Clinic in Busia where he was examined while she was waiting outside the room.
- [10] After returning to the room she found her child covered with a piece of cloth. Police officers arrived shortly thereafter and arrested her together with the first accused who had already made his way to the hospital. The two were alleged to have killed the deceased child whose body was removed to Alupe Hospital Mortuary. She denied having killed her child and contended that she found the child injured when she took him away from her estranged husband (PW 3). She further contended that she never did assault and injure the deceased child.



- (11) The facts and evidence foregoing coming from both the prosecution and the defence raise no dispute with regard to the cause of the death of the deceased child.

The report by the pathologist doctor (PW 5) clearly indicated that the deceased died from blunt abdominal trauma with visceral injury secondary to assault by blunt object. This was sufficient evidence establishing the fact that the deceased was a victim of a criminal act of assault which proved fatal. He was mercilessly and brutally assaulted and fatally injured in a criminal transaction which left no doubt from the degree or magnitude of the injuries that the assailant and/or assailants had a clear intention to take away and indeed took away his life.

- (12) The deceased at such an innocent age of about three (3) years suffered a horrifying macabre death which was capable of moving the devil himself.

The big question and indeed the issue for determination in this case was whether the accused or any one of them were the persons responsible for assaulting and fatally injuring the deceased.

The defence raised by each of them was a denial and an indication that they were wrongly framed on account of the unlawful deeds of other persons, in particular the actual father of the deceased (PW 3) with or without help from his relatives. However, this line of defence was rebutted and rendered ineffective by the prosecution evidence through the child's father (PW 3) establishing that the deceased died in the hands of the two accused after he had been removed from the custody of his father by his mother (the second accused) who was at the time involved in an illicit affair with the first accused who assumed the undeserving title of 'step father' to the deceased child.

- (13) Although the second accused alleged that she took away the child from his father when he was already injured she never made such report to anybody or any person in authority thereby casting doubt on the credibility of the allegation.

The post mortem report (P.ex1) indicated that the injuries inflicted on the child were fresh and healing. The doctor (PW 5) in testimony opined that the approximate time of death was one week after the injuries. This was an indication that the deceased was grievously assaulted while in the custody of his mother (accused two) and her so called boyfriend or 'husband' (accused one). This was even established in the evidence of the child's father (PW 3) when he stated that the child was removed from his custody on August 6, 2021 into that of his mother (second accused) and on the September 25, 2021, he (PW 3) was informed by the police that the child was dead.

- (14) Evidence from PC Kutayi (PW 1) and the medical officer (PW 2) clearly showed that the deceased child was taken to hospital when he was already dead or half dead with serious bodily injuries.

The only people who could explain the source of the injuries were the two accused as the child was in their custody when he suffered the injuries and there was no suggestion that strangers confronted the child in their house and assaulted him for reasons known or unknown. However, rather than render a credible explanation, the two accused in their respective defence chose to cast aspersions on the innocence of the child's father (PW 3) in the circumstances relating to the child's death. In so doing, the two accused were 'passing the buck' to the child's father without any justification.

- (15) Although prosecution did not avail any direct evidence against the two accused it did nonetheless avail strong and credible circumstantial evidence which left no doubt that the two accused were jointly responsible for the unlawful act of assaulting and fatally injuring the deceased child. The exculpatory circumstances of the case were incapable of explanation upon any other reasonable hypothesis than that of the guilt of both accused. The inculpatory facts rendered against the accused were clearly incompatible with their innocence.



- (16) In the upshot, it is the finding of this court that the two accused were responsible for assaulting and fatally injuring the deceased child. The prosecution case against them was thus proved beyond reasonable doubt. They are therefore found guilty as charged and convicted accordingly.

**DELIVERED AND DATED THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023**

**JR KARANJAH**

**J U D G E**

