



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 124A OF 2017

Formerly MACHAKOS HCCR NO. 35 OF 2014

REPUBLIC.....PROSECUTION

-VERSUS-

BV.....ACCUSED

JUDGMENT

1. **BV**, the accused herein, is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on the night of 6th and 7th day of June 2014 in Mbooni West District within Makueni County he murdered **FMV**. The accused pleaded not guilty to the offence and the case proceeded to full hearing with the prosecution calling five witnesses.

2. The prosecution's case can be summarized as follows: **PW1, RKM** who is the accused's mother, testified that on 7th June 2014 at 8.00pm, she went with the accused's wife one **CM** to a ceremony in their village. They left her children and some of the accused's children at home. The accused who had been following them closely joined them a while later. At around 7.00am the following day while the ceremony was still on, her daughter in law **PW3, AMK** came where they were and told them that she had opened the accused's house and found one his children dead.

3. **PW1**, the accused and his wife left the ceremony immediately and went back home. They were followed by other people from the ceremony. On arrival, they found the door of the accused's house open. **PW1** said she had seen the deceased's parents locking the door from inside. They entered the house and found the deceased who was the accused's son lying in bed but she did not see anything unusual.

4. The accused's wife started crying and the accused asked her (**PW1**) to take their youngest child **D** whom his wife had carried to the ceremony from her. She took the child and went away crying.

5. **PW1** denied telling the police that the Accused smelt of medicine when he came from the room. At this point, she was declared hostile by the court upon the prosecutor's application because she was retracting what had been recorded in her own statement.

6. Upon being cross examined by the prosecutor, she said that the statement was recorded for her on 15th June 2014 since she does not know how to read or write.

7. In cross examination by Counsel for the defence, she stated that they all lived in one compound. She remained in one of the rooms in the accused's two-roomed house while the accused and his wife entered the bedroom where the deceased lay naked on the bed. She also stated that the accused loved his children and wife and had never complained about his family.

8. In re-examination, she stated that she did not know what time the accused joined them at the ceremony. She also said that she may have thumb-printed her statement although she could not recall doing so.

9. **PW2, Mathias Katitu Mutuku** is the Assistant chief, Ngai sub-location, Kitungo location, Mbooni sub-county. He testified that on 7th June 2014 at 7.30am, a community person called him and informed him that a child had been found dead in the accused's house. He proceeded there immediately and found many people. He found the deceased's body covered with a blanket. The deceased had vomited on his clothes which were also on the bed. When he asked for the accused, he was told that he had taken poison and had been rushed to the hospital.

10. The deceased's mother told him that she had left the accused in the house with the children the previous evening at 7.00pm when going to the ceremony with **PW1**. The accused joined them at the ceremony at 1.00am. In the morning, they were called and informed that the deceased had been found dead in the house. **PW2** called the OCS who arrived after three hours. The police searched the room and found a brown empty bottle of a chemical which he identified in court. The police took the body to the mortuary. **PW2** had never heard of any

disputes in the accused's family.

11. In cross examination, he stated that when he entered the accused's house, he did not see the brown bottle which the police found under the bed. He also noted that when the bottle was recovered, it was empty and had no writings.

12. In re-examination, he stated that the people who were present are the ones who said that the accused had taken a chemical.

13. **PW3, AMK**, is the accused's sister in law who lived in the same compound with them. She testified that on 7th June 2014 at 7.30am, her husband's brother one KJ told her that the accused's eldest child B had refused to open the door to their house. She went and entered the house where she found the deceased lying in bed. She touched him and found him to be cold. She went to the venue of the ceremony and called her mother in law (PW1) whom she told about the state in which she had found the deceased. She then went back to her house since she had a small child while PW1 went to relay the news to the deceased's mother.

14. She went to the accused's house later on and found him lying down. She heard people saying that charcoal should be ground and given to him in liquid form although she did not know what the problem was. No one was allowed to enter the house until the police came and took away the deceased's body. She did not know why the accused was in court since no one was arrested in respect to the deceased's death.

15. In cross examination, she stated that she had never heard the accused quarrelling with his wife or the deceased or anyone else. She also stated that there is no land dispute in the family.

16. **PW4, Dr. Lazarus Mutinda** from Makueni Referral Hospital conducted the postmortem on the deceased's body on 9th June 2014 at Mbooni sub-county hospital. Upon examination, he found a lot of vomit on his mouth and nose, his right bronchi was blocked with vomit and the abdomen and neck were swollen. He concluded that the cause of death was the vomit. They sent the deceased's kidney and stomach contents to be tested for poisoning but they did not get any results for the same. He produced the post mortem report as "EXB2".

17. PW4 also produced the accused's discharge summary from Mbooni sub-county hospital, on behalf of his colleague Geoffrey Mwendwa whom he had worked with and knew his handwriting and signature. He produced it as "EXB3". According to the discharge summary, the accused was admitted at the facility on 11th June 2014 and discharged on 12th June 2014. He had been referred to the facility from Makueni Referral Hospital where he had been admitted on 7th June 2014 after consuming 'triatix', a chemical used to kill insects. Upon being discharged, the accused was released to the police station.

18. In cross examination, he stated that the vomiting by the deceased was not caused by poisoning hence the reason why they sought further analysis.

19. **PW5, Moses Kimani** of Government Chemist Nairobi testified that on 4th February 2015, they received a small brown bottle from P.C Davis Kambona with a request to confirm if its contents could cause death. On analysis, the bottle was found to contain diazole insecticide which can be lethal if ingested. A report to that effect was prepared and signed by his colleague Marian Njeri Chege. He produced the report (EXB 4b) on her behalf since she is now deceased. They had worked together for ten years hence his familiarity with her writing and signature. He also produced the exhibit memo (EXB4a).

20. In his unsworn defence the accused testified that on the night of 6th or 7th June 2014, there was a ceremony at Kamau's. He went there at 7.00pm with his mother, wife and youngest baby and left the other children at home. They were there up to 6.00am the following day when his brother's wife (PW3) called them out loudly. They all went home and found his son, the deceased herein, dead. His wife claimed to know the cause of the deceased's death.

21. He later found himself at Ikima police station in Mbooni whereupon he was charged with the offence in question. He was so touched by the deceased's death since he does not know what caused it and why they connected him with it.

Both parties filed written submissions after the close of the defence case.

22. Learned counsel for the prosecution Mr. Muriuki submitted that the fact and cause of death was proved by the postmortem report produced by PW4. He argued that the circumstantial evidence of PW1, PW2 and PW3 overwhelmingly points to the guilt of the accused person. He contended that PW1's evidence that they left the accused at home places him at the scene as the last person who was with the deceased and his brother. Counsel questioned accused's failure to talk to his wife when he arrived at the venue of the ceremony to explain the state in which he had left the children in the house.

23. Mr. Muriuki also questioned how the bottle containing the insecticides found its way under the bed where the deceased was sleeping yet the house had been locked from inside. According to him, it was also strange that the deceased was found dead on the bed the following morning with vomit in his mouth yet no evidence was adduced to show that he had been sick or had any underlying medical condition.

24. Further, counsel took issue with the fact that the accused attempted to take away his life by taking poison on reaching home from the ceremony instead of reporting his son's death to the relevant authorities. In his view, this was the accused's way of trying to conceal his alleged involvement in the murder of the deceased or divert people's attention away from the same. It was also counsel's contention that the accused having been present throughout the hearing of the prosecution case only to state in his defence that he found himself at Kikima police station in Mbooni casts doubt on his credibility.

25. In the prosecution's view, the tests required to be satisfied in cases based on circumstantial evidence have been met as the evidence overwhelmingly points to the guilt of the accused person and no other inference is capable of reasonably being made in the circumstances of this case. It was also counsel's contention that the circumstantial evidence shifted the evidential burden on the accused person but he failed to

discharge this burden. He dismissed the defence by the accused as a mere denial and argued that in any case, it is unbelievable and urged the court to pay no regard to it.

26. Mr. Mathenge Learned counsel for the accused, contended that the post-mortem report produced by PW4 vindicated the accused and confirmed his defence that he did not kill the deceased. He argued that PW2 and PW3's evidence that the accused had never quarrelled with his wife prior to the death of the deceased shows that the accused was not capable of harming or killing his son the deceased.

27. He further stated that the report from the government chemist produced by PW5 also absolved the accused of any blame as there is nothing thereon that demonstrates that the deceased was given the poison by the accused. Counsel also faulted the prosecution for failing to call some crucial witnesses. He questioned why the investigating officer was not called to testify and why no explanation whatsoever was tendered for such omission. He further questioned why none of the children that were left behind with the deceased were called to testify regarding the events of the material night. He urged the court to find that the failure to call these witnesses was solely because they would have given evidence that would have been adverse to the prosecution's case.

28. It was also counsel's submission that the chain of custody of the chemical bottle was unclear. He faulted the prosecution for failing to document how the chemical bottle was stored from 7th June 2014 when it was allegedly recovered in the accused's house to 4th February 2015 when it was submitted to the government chemist for analysis.

29. Counsel argued that the missing link in the chain of custody of the chemical bottle raises so many doubts which ought to have been explained by the investigating officer. He urged that in the absence of such crucial explanation, the doubts raised should be decided in the accused's favour.

30. Mr. Mathenge contended that PW1 and PW2's evidence is of little or no probative value because none of them was at home when the minor died. In his view, the entire prosecution case was based on speculation since no evidence was directly led that incriminated the accused in the murder of the deceased herein. He submitted that the five prosecution witnesses did not discharge the burden of proof to the standard required in criminal cases which is beyond any reasonable doubt. He therefore urged the court to find any doubts raised by the defence in favour of the accused and acquit him under **Section 322** of the **Criminal Procedure Code**.

Analysis and determination

31. Upon carefully considering the prosecution's evidence against the defence by the accused, I find the main issue for consideration to be whether the prosecution has proved beyond reasonable doubt that the accused is guilty of murder.

32. The accused has been charged under **Section 203** of the **Penal Code** which provides as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

33. **Section 206** of the **Penal Code** provides for the circumstances which constitute malice aforethought as follows:

(a) an intention to cause the death of or to do grievous harm to any person, whether that person 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 person 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 not be caused;

(c) an intent to commit a felony;

(d) 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.”

34. It follows therefore that in order to prove a charge of murder, the prosecution must establish the following elements: -

i. The fact and cause of death of the deceased.

ii. That the accused caused the death of the deceased through an unlawful act or omission. (*Actus reus*).

iii. That the accused had malice aforethought or intention to cause harm or kill (*Mens rea*).

35. In this case, the evidence available leaves no doubt that the deceased died on the night of 6th or 7th of June 2014. According to the postmortem report (EXB2) produced by PW4, the cause of death was vomit which was found in the deceased's mouth and nose and had also blocked his right bronchi. The death of the deceased and the cause thereof has therefore been proved beyond reasonable doubt.

36. The next issue is whether the death of the deceased resulted from an unlawful act or omission of the accused herein. This case rests entirely on circumstantial evidence because there was no eye witness account linking the accused or anybody else with the death of the deceased.

37. It is well settled that in order to place reliance on circumstantial evidence as a basis for a conviction, the inculpatory facts in the prosecution's evidence must be incompatible with the innocence of the accused.

38. In Joan Jebichii Sawe v Republic [2003] eKLR the Court of Appeal stated thus:

“In order to justify, on circumstantial evidence, the 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 his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

39. In Abanga alias Onyango v Republic – Criminal Appeal Number 32 of 1990, the Court of Appeal set out the tests applicable in determining whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are that:

“a. the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;

b. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

c. the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

40. In the instant case, the prosecution linked the accused to the death of the deceased for two main reasons. First is because of PW1 and PW2's evidence that he joined his wife and PW1 at the venue of the ceremony a while later. Second is because the accused allegedly took poison the next morning upon seeing the deceased's dead body when the three of them got back home.

41. In my view however, the circumstantial evidence adduced by the prosecution has so many gaps which raises doubt as to the guilt of the accused. To begin with, it is evident that the accused is suspected of having poisoned the deceased thereby leading to his death. The medical evidence of PW4 absolves the accused of this suspicion as it established the cause of the death to be the vomit.

42. PW4 alleged that they took the deceased's kidney and stomach content to be tested for poisoning but never got the results. What is surprising however is that the investigating officer did not make any follow up to establish what became of the deceased's aforesaid organs and/or where or to whom PW4 sent these organs for the alleged further analysis.

43. Further and even more importantly, crucial witnesses were not called by the prosecution to testify in court. The deceased's older brother B who was left with him in the house was not called to testify as to events that unfolded that night when the two of them remained at home while their parents were at the ceremony. The accused person's wife who is the mother of the deceased herein was also not called to testify and neither was her statement recorded. The court was never told whether she personally declined to testify against her husband. Her testimony would have enabled the court establish whether the accused had harboured any ill motives that would have led him to kill the deceased as alleged.

44. Lastly, the investigating officer was not called to testify and produce the brown bottle of a chemical which was allegedly recovered in the accused's house. I also note that no explanation was given for the failure to call these witnesses. In the circumstances, the only inference that the court can make is that their evidence might have been adverse to the prosecution case. See Bukenya & Others vs Uganda [1972] EA 549; Juma Ngodia v Rep [1982-88] 1 KAR 454.

45. It is also my view that the evidence regarding the accused's conduct of taking poison upon seeing his dead son's body is inconsequential in proving his guilt in the absence of other crucial evidence. I do agree with counsel for the accused that the missing link in the chain of custody of the chemical bottle raises doubts on the reliability of the report produced by PW5. The court cannot tell with certainty that the bottle that was recovered under the bed where the deceased's body was found is the same bottle that was submitted to the government chemist, almost eight months later for analysis of its contents, without the evidence of a complete chain of custody of the same.

46. The post mortem report showed the cause of death as the vomit. There is no evidence linking the vomit to the substance that was being examined. The vomit should also have been subjected to laboratory tests. The evidence adduced is to the effect that it is the accused person who took poison. He was admitted in hospital for some days.

47. In totality therefore, it is my view that the circumstantial evidence taken cumulatively does not form a chain so complete that there is no escape from the conclusion that within all human probability, the deceased was murdered by the accused and no one else. The prosecution case is founded on mere suspicion which cannot be a basis for inferring guilt however strong (See Sawe v Republic [supra]).

48. What is clear to my mind is that the deceased's death did not result from a natural cause. Hardly are people killed by vomit and especially in a case like the deceased's who had no underlying medical condition prior to his death that would have made him immobile and unable to position himself properly when vomiting, if at all.

49. The deceased's swollen abdomen and neck further explains why the vomiting could not have arisen from a natural cause. It is very unfortunate that a very young life was lost but no thorough and professional investigation was undertaken by the police in order to get down to the root of the matter and hold the person responsible for the same accountable.

50. The upshot is that the prosecution has not proved its case beyond reasonable doubt. The accused will benefit from the gaping holes in the

prosecution case. He is hereby acquitted of the offence of murder under **Section 322 of the Criminal Procedure Code**. He shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

SIGNED AND DATED THIS 24TH DAY OF FEBRUARY 2021 AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE

Delivered by:

GEORGE DULU

JUDGE

at Makeni this 11th day of March 2021 in open court.