



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT LODWAR**

**CRIMINAL CASE NO 10 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MOSES LUCKY EVERESTE.....ACCUSED**

**JUDGMENT**

1. The accused was charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of which were that on the 12<sup>th</sup> day of November 2017, at Kakuma Refugee Camp in Turkana west sub County of Turkana County, murdered **NIYONZIMA JOSHUA**.

2. He pleaded not guilty to the charges and to prove its case against him, the Prosecution called and examined six (6) witnesses. When put on his defence the accused offered sworn statement in defence, without calling any refugee witness.

3. The prosecution case was that the accused who was a refugee from CONGO, moved in with **PW4 VIDELIWA EZABELA**, a fellow refugee and the mother of the deceased, who was then aged four (4) years, on 1<sup>st</sup> September, 2017. As is the norm in this kind of relationships, the accused promised to love her child, the deceased, as much as he loved her.

4. It was her evidence that after two months of their being together, the child started to be scared of the accused, and when she asked him what he had done to the child, the accused who was not the deceased biological father, stated that he had done nothing to the child.

5. It was her further evidence that on the 12<sup>th</sup> of November, 2017, the accused woke up at 7.00 am and informed her that he was going to look for some charms (magic) and when he returned to the house at 12.00, he declined to eat the food he was served, stating that he wanted to eat meat instead. He then gave her money for meat and remained with the child in the house, whom he gave money to go and buy sweets.

6. When she came back from the market, she found the accused carrying his bag and he informed her that the child had died. When she checked on the child, who was then naked, she noticed that he was bleeding from the nose and mouth and his clothes were kept in the charcoal bag. She alerted neighbours who called on the security personnel and arrested the accused.

7. In cross examination, she stated that they had initially lived in peace with the accused and the deceased, but at some stage, the accused said that he will take the deceased to heaven, and she did not report him to the camp security, as he had asked for forgiveness. It was her evidence that the deceased was not epileptic and that when he left him with the accused, he was well and in good health.

8. **PW3 GEDU JOHN YUFFUS** testified that he was at home together with his wife, their child and the deceased who were playing together, when the accused came and gave his wife money to go and buy food. It was his evidence that when PW1 came back and found the child dead, she called him and he went to the scene together with his wife, where they found the body and the accused. He reported to the security at the camp who arrested the accused.

9. In cross examination, he confirmed that the accused and PW1 were his neighbours and that they did not have any issue. He stated further that the deceased was earlier in his house before the mother took him away and that he was in good health at that time.

10. **PW2 RAIL NJOKA** a security guard at the camp, testified that he was called and went to the scene, and saw the body which had a cut on the fore head. He called the police who arrested the accused.

11. **PW1 UNAN LATALA LAMINA** a security Guard at the Refugee camp went to the scene, where he saw the body of the deceased, which had visible injuries, with blood oozing from the mouth and nose. He reported the matter to the police, who arrested the accused and took away the body. He interrogated the mother of the child, who informed him that the child had not been sick. It was his evidence that he

had not known the accused, who was new at the block, before the material day.

12. In cross examination, he stated that he did not know the child, his mother and the accused, before the material day and neither did he see the accused commit the offense. It was his further evidence that no weapon was recovered from the scene.

13. **PW6 DR. KINARA KINYORO** produced the post-mortem report on the body of the deceased, which had multiple bruises on the face and head, bleeding from the nose and mouth, and the abdomen was greatly distended. As a result of the examination, the cause of death was stated to be severe head injuries and internal abdominal bleeding.

14. **PW5 INSPECTOR JOHNSON MUTUA** the Investigating Officer recorded statements from witnesses and confirmed that the deceased had been left with the accused, while his mother went to buy food and when she returned back, she found the accused at the door ready to leave the scene. The accused then informed her that the child was dead and did not account for the time the same had died.

15. He visited the scene where he found the deceased clothes placed inside a charcoal sack. In cross examination, he stated that he did not arrest the accused and that the information from the neighbours was that the child was happy. It was his further evidence that the photographs taken at the scene could not be processed.

16. When put on his defence, the accused testified on oath and stated that on 12<sup>th</sup> November, 2017, he woke up and proceeded to his place of work as a hawker within the refugee camp. At 11.00 am he received a call from his wife that there was a problem at home and on his way back home, he met his wife with the police who asked him to identify himself, which he did. He was arrested and taken to the police station.

17. It was his evidence that he was locked in for two weeks, when he was informed that the child had been known to be sick at the camp. After being held for a further one week the Investigating Officer came with the picture of the deceased on his mobile phone and said that he had strangled the deceased, which he denied.

18. In cross examination, he stated that he was living together with the deceased and his mother. He denied that he had been left with the child and that he was not at home when he died, since he had left him with the mother. It was his evidence that there was a time when the mother of the deceased had told him to look for another job, rather than being a beautician or else she would deny him conjugal rights. It was therefore his evidence that the mother of the child did not like what he was doing and that is why she accused her of killing her child.

#### **SUBMISSIONS**

19. At the close of the defence case both the defence and the prosecution though directed, did not make final submissions.

#### **DETERMINATION.**

20. To sustain a conviction on a charge of murder, the prosecution is under both evidential and legal duty to prove the following elements of the offence:-

*a) The fact and the cause of death*

*b) That the said death was caused by an unlawful act of omission and or commission on the part of the accused person*

*c) That the said unlawful act was caused with malice aforethought.*

21. The fact and the cause of the death of the deceased was proved through the evidence of the prosecution witnesses including PW4 the mother, whose evidence was corroborated by that of PW1, PW2 and PW3 all who went to the scene and confirmed the fact of the death. The cause of death was confirmed by PW6 through the post mortem report to be due to severe head injuries and internal abdominal bleeding.

22. I therefore find and hold that the fact and cause of death was proved beyond any reasonable doubt to be unnatural.

23. On whether the said death was caused by unlawful act on the part of the accused person, the prosecution case against the same was purely based on circumstantial evidence. There was no eye witness who saw the accused inflict any injuries on the deceased.

24. For a court to convict on circumstantial evidence the following ingredients must be established as was stated in the case of **SAWE V REPUBLIC [2003] eKLR**.

*“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.”*

25. As regards this cause, the following circumstantial evidence irresistibly points to the accused person's guilt, he is the last person to have been seen with the deceased while alive. PW1 had left the deceased with the accused, when she went to the market to buy food. When she returned to the house she found the accused at the door carrying his bag ready to flee from the scene. The fact that the deceased was alive and in good health, when he was left with the accused, was confirmed through the evidence of PW3.

26. The accused was arrested at the scene contrary to his evidence that he was arrested on the way, as per the evidence of both PW1 and PW2 both security guards at the refugee camp. Having been the last person seen with the deceased will alive, the accused person was under an obligation to offer an explanation as to how the deceased met his death and at the close of the defense case the same failed to discharge the said burden.

27. In this holding I find support in the case of **R v. EKK [2018] eKLR** where the court had this to say:

*“The statutory rebuttable presumption is spelt out under Sections 111(1) and 119 of the Evidence Act. These sections stipulate as follows:*

*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 prosecuting, 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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”*

*“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”*

42. *Having been placed at the scene of the incident as the oldest person who was last seen with the deceased before she died, the accused has a duty to give an explanation of how the deceased met her death, or alternatively how they parted company.*

43. *Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of Moses Jua V. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:*

*“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”*

44. *In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna V. The Attorney-General Of The Federation (2010) 1 iLAW/CA/A/86/C/2009 opined thus:*

*“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”*

45. *Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh, JT 2006 (4) SC 16 the court held:*

*“that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”*

28. Having been the last person seen with the deceased while alive, through the evidence of the deceased mother (PW4) as corroborated with their neighbour PW3, whose evidence I believe to be truthful, the accused failed to discharge this burden thereby pointing irresistibly at him as the person who caused the death of the deceased.

29. This evidence is corroborated in material particulars by PW4 who stated that when she met the accused at the door, the same informed her that the deceased had died, which she confirmed when she entered into the house. There was nobody else with the deceased in the house at that time save for the accused.

30. There is further the conduct of the accused person of hiding the clothes of the deceased in the charcoal sack so as to conceal evidence and his action of remaining with the deceased at home while sending the mother to the market, which I find was to create for him a suitable opportunity of killing the deceased, who at that time, according to the mother had developed a dislike for the accused for reasons best known to the accused, as the deceased can now not offer any explanation to the court as stated in Ecclesiastes 9:5-6:-

*“For the living know that they will die, but the dead know nothing, and they have no more reward, for the memory of them is forgotten. Their love and their hate and their envy have already perished and forever they have no more share in all that is done under the sun.”*

31. I am therefore satisfied and hold that the circumstantial evidence herein irresistibly points to the guilt of the accused person who was found at the door of her house ready to flee from the scene. It is therefore my finding that the death of the deceased was caused by unlawful act on the part of the accused.

32. The final issue is whether the accused had the necessary malice aforethought: from the evidence of PW4 the mother of the deceased, the accused was not the biological father of the deceased, when he moved in with her. After two months of their bliss, in which he had promised to love the child, the same became scared of the accused. At that point in time the accused promised to take the child to heaven, whatever that means.

33. I have also taken into account the conduct of the accused immediately before remaining with the child alone in the house, hiding his clothes after his death and attempting to flee the scene which is a conduct of someone with a guilty mind, when looked at against the nature of the injuries sustained by the deceased, and come to the logical conclusion that the accused had malice aforethought, it is clear that the accused loved the deceased mother but did not want to take her with a child in what has been called 'sofa set' arrangement of where you take all or none and to achieve his intention the same set out to eliminate an innocent child.

34. I have looked at the accused defence to the effect that the bag which he had been found with was for carrying the items which he was selling, looked at against his account that he was a beautician when weighed against the evidence of PW4 that the accused was engaged in some kind of magic practice and find the said defence inconsistent and unbelievable which I hereby dismiss.

35. In the final analysis, I have taken the evidence tendered before me in totality. I find and hold that the prosecution proved beyond any reasonable doubt all the elements of the charge/information of murder and accordingly find the accused guilty as charged and convict the same of the murder of NIYONZIMA JOSHUA on 12<sup>th</sup> November, 2017 contrary to Section 203 of the Penal Code and it is so ordered.

**SIGNED DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2021**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of**

*Mr. Tanui for the State*

*Mr. Pukha for the accused*

*Accused present*