



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CRIMINAL CASE NUMBER 1 OF 2018**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**KKM .....ACCUSED**

**J U D G M E N T**

The accused **KKM** is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 13<sup>th</sup> day of December, 2017 at Kaboywo location in Mt. Elgon Sub County within Bungoma County murdered **BKK**.

The prosecution case is that the accused is the father of the deceased **BKK**. On 10.12.2017 **PW6 ECM** who is the mother of accused and grandmother of the deceased was at her home at 12 p.m. when accused went to her house and told her the deceased had died at his home in Kipyomet. She advised him to go with her husband and report to police. She went to accused's house and found the deceased lying down. She did not observe any injuries on body of deceased. Police came and took away the body. **PW7 Samuel Ndiema Chesore** a boda boda rider, on 13.12.2017 at 11.a.m he was near his home when he saw people gathered at a home. He went there and was informed a child had died and were looking for the mother. He and another lady went to the forest to look for her. He was in company of Jackline and one Cheboi. They went into the forest where they found the mother and brought her to the home.

**PW4 EM** the father of accused testified that accused has a wife called S and a child who was the deceased. On 13.12.2017 he received information that deceased had died. He went to the accused's house where he found accused and the body of deceased. Accused told him the child had slept and died. They took the body to Kapchorwa. Both accused and S were arrested. S was released and accused charged with present offence. S went away after the burial and has never been seen to date.

**PW8 Dr. Edward Wafula Simiyu** performed a post mortem on body of deceased. He did not observe any injuries on body. Upon opening the body he noticed that the liver was greenish and formed opinion that cause of death was due to poisoning. He removed liver, and stomach samples which he handed over to the investigating officer. **PW11 Emmy Akheri Otieno**, a Government analyst carried out toxicological screening of the body parts and found a propoxa pesticide in the liver and gastric sample.

**PW9 No. 50444 Cop1 Titus Mutunga** the Investigating officer was directed by the OCS to visit a scene where a child had died. He went to the scene. On arrival he found the accused and the child lying on the bed dead. He interrogated accused who informed him he had left the deceased with the mother and when he came back found the mother away. There was a smell of a cattle dip insecticide. The deceased was fully dressed with shorts on. They took the body to mortuary where post mortem was conducted. He recorded statements including of the mother of deceased but who has not been traced to testify. According to his investigation's the accused used to stay with S the mother of deceased, and the deceased, and accused was the last person seen with deceased alive.

The accused on being placed on his defence testified that he was married to S and together had a son **BKK** who at time of death was aged 3 years. On 13.12.2017 he left home at 6.am to go to Kabonyo forest to buy maize. He left the deceased with S the wife. He later came home and found the house locked. He opened and on entering found the deceased lying under the bed. He observed him and saw he was dead. He informed his father **EM** who reported to police. He was arrested and later his wife S came to the police station. He was later charged with present offence. He denied that there was any pesticide in the house or that he killed the deceased.

For an accused to be found guilty of the offence of murder contrary to section 203 of Penal Code the prosecution must prove beyond reasonable doubt the following ingredient of the offence

- a. The fact and cause of death.
- b. The unlawful act or omission that caused the death.

c. The existence of malice aforethought.

d. It is accused who committed the unlawful act or omission that caused the death.

**PW8 Dr. Edward Wafula Simiyu** who performed the post mortem on body of deceased found no injuries on the body. Upon opening and on examination he saw his liver was greenish in colour and formed opinion that cause of death was due to poisoning.

**PW11 Emmy Akhevi Otieno** a Government analyst who analyzed the liver sample found that a Propoxa, a pesticide was detected in the liver and gastric sample properties. The poison that caused the death was a pesticide poison called Propoxa. The cause of death was therefore established as being due to poisoning. How did the poison get into the body of the deceased?

**PW2 Robert Matui Ndiema** who is a neighbor of the accused testified that on 13.12.2017 he saw accused and with the deceased at 8 .a.m. When he came back at 4.p.m. he was informed that the deceased had died. **PW4 EM** the father of accused testified that the accused told him that the deceased had slept and he found him dead. **PW6 ECM** the mother of accused only received information on the death of deceased from accused. She went to accused's house and saw the body of deceased which had no visible injuries or vomit.

The accused's defence is that on the material day he left the deceased with his wife S and went to the forest. When he came back he found the door locked and upon opening found the deceased lying down under the bed and was dead. Both he and his wife S were arrested as suspects on the death of deceased. S was later released and accused charged with the present offence.

The prosecution called 11 witnesses. None of them was an eye witnesses to the killing by poisoning. Of the 11 witnesses S the wife of the accused and mother of deceased was not called as a witness by the prosecution. Accused alleged that he left the child in the custody of S when he went to the forest. S therefore was a crucial witness in this case against the accused.

In a criminal trial, the prosecution is required to avail to court all the evidence to enable the court to make an informed decision. The prosecution is not required to call a particular number of witnesses as an issue can be proved by evidence of one witness. Section 143 of the Evidence Act Provides.

**143. No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact.**

The prosecution therefore is not under obligation to call any number of witnesses but should only call such witnesses as are sufficient to prove the charge beyond reasonable doubt.

Where there is a crucial witness whose evidence is essential in proving the charge, the prosecution must call him, to tender such evidence. Where the prosecution, deliberately or by negligence fail to call such witness, the court may make an inference that the witness who was not called, had he been called, his evidence would have been adverse to the prosecution case.

In **Bukenya & Others –vs- Uganda 1972. E.A 549 the Court of Appeal of East Africa** in respect of the issue stated.

**i. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

**ii. The court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.**

**iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witness would have tendered to be adverse to the prosecution.**

The court before making such inference in respect of the prosecution not calling a crucial witness must be satisfied that:

**1. The evidence of the witness was crucial in the just determination of the case.**

**2. The witness was available who would have given the relevant evidence.**

**3. The prosecution could reasonably have been expected to call that witness to give evidence.**

**4. The prosecution failed to call the witness.**

**5. The prosecution provided no satisfactory explanation to the failure to call the witness.**

In this case there was no eye witness to how the deceased child ingested the pesticide poison. The prosecution was therefore relying on circumstantial evidence in particular that it is accused who was last seen with the deceased alive. The accused contention in his evidence is that he left the deceased with S his wife. This is the witness who was not called by the prosecution to at least testify how she left the deceased on that material day or whether she left the deceased with accused. This was crucial evidence for the prosecution. I therefore find her failure to give evidence leaves a gap in the prosecution case on how the deceased died, or who killed him.

After considering all the evidence I find that the prosecution has failed to prove the charge of murder against the accused. I therefore find the

accused **KKM** not guilty of the offence of murder contrary Section 203 of Penal Code and acquit him under Section 215 Criminal Procedure Code. Accused **KKM** be set at liberty unless otherwise lawfully detained.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22<sup>ND</sup> DAY SEPTEMBER, 2021.**

**S.N RIECHI**

**JUDGE**