



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 26 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

WALTER OKARO NYAWARA.....ACCUSED

JUDGMENT

1. Walter Okaro Nyawara is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 25th day of October, 2015, at Rimu village, Lower Kayambo location in Ndhiwa District of Homa Bay County, murdered Clydon Omondi Okaro and Onix Juma Okaro.
3. The prosecution case was that the accused was left at home with his now deceased children. He poisoned and locked them in the house. He sent the key of the house to his wife. She got alarmed and when she went home, she found one child already dead and the other one died in hospital while receiving treatment.
4. Walter Okaro Nyawara, the accused contended that on the material day he was away from home when the incident occurred.
5. The issues for determination are:
 - a) Whether the accused was the one who caused the deaths of his children; and
 - b) Whether the offence of murder has been proved against him.
6. Beatrice Atieno (PW3) was the mother of the deceased children who are the subject of this case. In her evidence is that she married the accused while she had three children namely; Clydon, Onix and Val. Prior to the incident leading to the children's deaths, the accused had burnt all her clothes and those of their children. She however did not testify as to why the accused did so.
7. On 25th October, 2015 she woke up at about 6 a.m. and went to her place of work. While there, a school girl called Evelyne took to her, her house key. She told her that the accused had given her the key to take to her. She got alarmed for she had left the children at home.
8. When she returned home, she found a crowd standing outside her house. Upon opening her house, she found Onix dead on the ground. Clydon was crying and rolling on the floor. She rushed him to Ndhiwa hospital where he died while undergoing treatment.
9. At all this time the accused was nowhere. He did not attend the funeral of the children.
10. Valentine Claire (PW2) was aged 8 years at the time she testified in court. Her evidence was that the accused sent her to purchase *mandazi*. She left with Val. When they returned, they found the house locked from outside with a padlock. She heard Clydon crying from within. She did not see the accused.
11. When Osuri Kevin examined the body of Onix Juma Okara, he formed an opinion that he died due to poisoning. His opinion was that Clydon Omondi died due to strangulation with substance ingestion.
12. The accused in his defence pleaded an alibi. In the case of **Kiarie vs. Republic [1984] KLR** where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

I am aware that throughout the burden remains on the prosecution. I will therefore endeavour to find whether the prosecution discharged this burden.

13. There was no eye witness to the murder. The evidence against the accused is circumstantial. Circumstantial evidence was restated in the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

The Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354**, held as follows:

- 1. 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 hypotheses than that of his guilt.**
- 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
- 3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

14. The evidence of Beatrice Atieno (PW3) and that of Valentine Claire (PW2) place the accused at the place where and at the time the two children died. Though the prosecution failed to call Evelyne, the school girl who took the keys to the mother of the deceased children, I am satisfied that the defence of the accused has been displaced by the evidence on record.

15. The evidence on record is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

16. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (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.**

17. The killing of the two children was carefully planned by the accused. He ensured that there were no eye witnesses by sending the other children present to "buy" *mandazi*. I therefore find that prosecution has proved malice aforethought and consequently I find the accused guilty of the offence of murder and accordingly convict him.

DELIVERED AND SIGNED AT HOMA BAY THIS 5TH DAY OF OCTOBER, 2021

KIARIE WAWERU KIARIE

JUDGE