



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 9 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

EVANS OSIYA OMIKULE.....ACCUSED

JUDGMENT

1. **Evans Osiya Omukule** 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 23rd day of November 2013, at **Kamunyiyele** village in **Teso North** sub County of **Busia** County, jointly with another not before court murdered **Franklin Omukule Osiya**.
3. The prosecution case was that the deceased had stolen some neighbour's chicken and was arrested. When the neighbour decided to forgive him, he was released to his father, the accused. After the release, the accused and his brother beat him to death. The two then made arrangements for his body to be dumped into river Malakisi. The body was recovered and the accused was charged with the offence.
4. **Evans Osiya Omukule**, the accused, in his defence denied any involvement in the murder. He contended that after the child was released to him, he (the deceased) went to his (accused's) brother's house. His brother later informed him that the child had escaped. He was found after he had drowned.
5. The issues for determination are:
 - a) Whether the deceased died of drowning; or
 - b) Whether the deceased died as a result of beating;
 - c) Whether the accused participated in the fatal beating of the deceased; and
 - d) Whether the offence of murder was proved against him.
6. The circumstances of this case are very depressing. Apparently, the accused had lost the control of the deceased who was his son. The evidence on record is silent as to whether the accused re-married after the mother of the deceased died. This came from his brother Sammy Otaga (PW2). We however learnt from the evidence of Juliana Osiya (PW5) that the deceased was staying in the home of his paternal uncle Stephen, now deceased.
7. From the evidence on record we also establish that the deceased had truanted from school and later ran away from home until after his arrest over the chickens' theft that eventually led to his death. This was in the evidence of his grandmother Juliana Osiya (PW5).
8. On the material day, Zakayo Ekwenye Okatula (PW6) arrested the deceased after he had stolen his chickens. Since he recognized him, he sent for his father. The matter was reported to the police but he decided to forgive the boy who was handed over to his father (the accused) and his deceased brother.
9. The events after the release of the deceased to the accused and his brother are the ones that the prosecution and the defence do not agree on. According to the prosecution, the deceased was killed before his body was thrown into Malakisi River. The defence on the other hand contends that the deceased ran away from home and was found after he had drowned.

10. Doctor Chemonges performed the post mortem on the body of the deceased. The report was produced in court on her behalf by Doctor Harun Ombongi (PW12). These were the positive findings on the body of the deceased:

- a) Broken ribs on the right and the left side;
- b) Fracture at the base of the skull; and
- c) Externally rotated left thigh (dislocated left hip joint).

The opinion of the doctor was that the cause of death was cardiorespiratory arrest secondary to severe head and chest trauma as a result of severe blunt force (trauma).

11. The medical evidence therefore, ruled out drowning as the cause of death as contended by the accused. I therefore make a finding that the deceased was beaten to death.

12. Reuben Osuru Osiya (PW1) testified that when he asked the accused about the deceased, he became very arrogant to him. Sammy Otaga (PW2) and who is a brother to the accused, testified that he saw the accused and Stephen beating the child. Before he was ordered to go and attend to other business, he had seen the child bleed from the nose and the ears. He contended that he assisted Stephen to take the body of the child to river Malakisi. He conceded that in his statement to the police he had lied that it was the accused who went with him to throw the body of the deceased.

13. This witness was an accomplice after the fact. The correct approach of dealing with an accomplice witness was laid down in the case of **Republic vs. Ndara % Kariuki & 6 others (1945) 12 EACA 84, at Page 86** as follows:

A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief.

This witness conceded to have lied in some aspects in his statement to the police. He is not therefore a credible witness.

14. The evidence that the deceased was released to the accused and his subsequent conduct when asked about him by Reuben Osuru Osiya (PW1), leave no doubts in my mind that the accused participated in the fatal beating of the deceased.

15. 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 grievousbodily 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).

16. 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.

In the instant case, the accused was disciplining the deceased. However, it is clear that this went overboard. Malice aforethought was not therefore proved.

17. The prosecution has however proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit the accused of the charge of murder. I however find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED and SIGNED at BUSIA this 21st day of January, 2020

KIARIE WAWERU KIARIE

JUDGE