



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL CASE NO. 3 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SMM.....ACCUSED**

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

1. **SMM** is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence are that on the **20<sup>th</sup> day of January, 2010** at **[particulars withheld] Village, Kaliluni Sub-Location, Migwani Location in Migwani District** within **Eastern Province**, murdered **SM** (Deceased).

2. Facts of the case are that on the **19<sup>th</sup> January, 2010** the Deceased was unwell. The following day, the **20<sup>th</sup> January, 2010** her father, the Accused picked her up from the bed on which she was sleeping and held her tightly on his chest. PW1 **WKM**, her mother, fearing for her daughter's life attempted to take her away from him but he threw her on the ground. She picked her up and rushed her to hospital where she was pronounced dead. In the meantime, the Accused fled from the scene but was pursued and arrested later on.

3. Upon being put on his defence, the Accused stated that the Child was unwell on the material date. That prior to his wife leaving for work, she requested him to hold the child so as to collect medicine. When he held the child she was motionless. His wife on seeing the child who was pale allegedly said that the injection that was administered to the child was overwhelming. She screamed and ran out. People went to his home and refused to listen to the explanation that he gave. He was arrested. Later he was treated at **Mathari Hospital**.

4. Issues to be determined are:

- (i) Whether death occurred.
- (ii) Whether it was a direct consequence of an unlawful act or omission perpetrated by the Accused.
- (iii) Whether it was committed with malice aforethought.

5. A postmortem was conducted on the body of the Deceased which revealed the cause of death as cardiopulmonary arrest secondary to subarachnoid haemorrhage that was marked on the parietal side. A blood vessel burst in the brain that was attributed to the fall. A certificate of death was duly issued which was proof of death.

6. PW1 stated that she wanted to take the child from the Accused on noticing that she could be injured but he protested and held her with both hands. As she tried persuading him, he suddenly threw the baby on the ground. The Accused attributed the death of the Deceased to some medicine that she was given in hospital but his brother, PW3 **NMM** who heard noise and went to check on what was happening found the Accused holding the child. He witnessed as PW1 wanted to take the child but the Accused declined to give her. All over a sudden he saw the Accused release the child who fell on the ground. He observed the Accused who was violent, pacing up and down.

7. The action of the Accused of throwing the child on the ground did not conform to what was expected of a parent or any individual. The act was hence unlawful.

8. The question to be addressed is therefore, whether he acted with malice aforethought. **Section 206** of the **Penal Code** defines malice aforethought thus:

***“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.”*

9. PW1 testified that the Accused was a person of unsound mind. But she also stated that he used to babysit the children. On the fateful morning, she tried to take the child away from him but he said it was too early. He proposed to take the child to her while at work but she noticed that his mental status was not good then.

10. **Section 11** of the **Penal Code** provides thus:

*“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”*

The Accused was charged in Court because it was presumed that he was sane at the time of the act. The presumption is however rebuttable. **Section 12** of the **Penal Code** provides thus:

*“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”*

11. Other than PW1, evidence adduced by PW3 was that his brother was a person of unsound mind.

12. **Section 9(1)** of the **Penal Code** provides thus:

*“Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.”*

13. Prior to answering charges, the Accused was examined by a Psychiatrist on the **14<sup>th</sup> February, 2010**. He was found fit to plead but the Doctor opined that he required to be accorded comprehensive medical re-evaluation. Since the report was vague, the Court directed him to be taken to **Mathari Hospital** for examination. A report dated **27<sup>th</sup> May, 2011** by **Dr. Mercy Karanja**, a Consultant Psychiatrist at **Mathari Hospital** was to the effect that he could not plead as he suffered from schizophrenia. Consequently, he was committed to **Mathari Hospital** for treatment on the **5<sup>th</sup> January, 2011**. Thereafter he was examined on the **15<sup>th</sup> November, 2012** by a Psychiatrist who found him not suffering from mental illness. He opined that the Accused was fit to follow Court proceedings and advise his counsel accordingly.

14. Prosecution witnesses suggested that the Accused may have not been sane at the time of the act. But, on being put on his defence the Accused denied having perpetrated the act that caused the death of the Deceased. He attributed it to the medicine that the child was taking. He testified that he was assaulted while in prison and taken to hospital as he was unwell.

15. The arresting officer alluded to the conduct of the Accused at the point of being arrested. He stated that the Accused pretended to have fainted. The Accused having not pleaded the defence of insanity this Court cannot assume that he was insane at the point of throwing the child on the ground. It was demonstrated that although he used to have a mental challenge he would have lucid moments as he would be entrusted with duties of minding his children.

16. But on the fateful date, his wife insisted on taking the baby from him because she feared he would throw down the child. He picked the baby from the bed while she was sleeping. After the act he kept on pacing up and down. From evidence adduced by the Prosecution, it is apparent that the Accused was not sane at the point of committing the offence. His conduct could not have been of a loving and caring father who used to mind his children.

17. From the foregoing, I find that evidence adduced justify a conviction hence pursuant to **Section 167(1)(b)** of the **Criminal Procedure Code** the Accused ought to be detained during the President's Pleasure.

18. In the case of **A.O.O. and 6 Others vs. Attorney General & Another (2017) eKLR Mativo, J** dealt with the issue of detention at the President's Pleasure. He cited the case of **SVT COE 1B (1966) (1) SCAR 290** where the Court observed thus:

*“It must, I think be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do. The hope which might flicker in the mind and the heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left invaded.”*

19. The issue of passing an indefinite sentence has been found to be unconstitutional. Looking at the emerging jurisprudence, incarceration that is undetermined is viewed to be unconstitutional. From the foregoing, I do find the Accused guilty, convict him accordingly and call upon the State and the defence to address the Court pursuant to **Section 329** of the **Criminal Procedure Code**.

20. It is so ordered.

**Dated, Signed and Delivered at Kitui this 9th day of January, 2020.**

**L. N. MUTENDE**

**JUDGE**