



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 15 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

ROMA MICHAEL FURAHA.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Ruttoh for Accused

Ms. Sombo for the State

JUDGMENT

The accused person **Roma Michael Furaha** was charged with the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code. The brief particulars alleged against him were that on 2.9.2018 at Kwa Ndomo area in Malindi Sub-County in Kilifi he unlawfully murdered **Lawrence Roma**.

When entering plea, accused denied any such wrong doing as stated in the charge sheet. In terms of Section 107(1), the prosecution summoned six (6) witnesses to prove the charge against the accused person.

PW1 Zawadi Charo, the girlfriend to the accused testified that prior to 2.9.2018 they had a relationship which resulted in her conceiving and one child herein referred as **LR** was born. In the course of their courtship, they lived separately and the minor (deceased) lived with the accused. However, on a date not indicated, the minor fell ill and PW1 agreed with the accused that he be taken to the hospital for medical checkup and treatment. On consideration of the request by the accused, PW1 stated in the morning of 2.9.2018 PW1 learnt from the neighbours that their child whom he left with accused has been poisoned and was admitted at Tawfiq hospital. At that stage, PW1 left for hospital where she found the minor in serious condition. She further came to know that the accused was also admitted at Malindi General Hospital. On an allegation that he had also ingested some poison.

In the course of time, the complainant testified that the deceased who was taken to the hospital for review, passed on apparently from the effect of poison.

In cross-examination by **Ms. Ruttoh** Learned counsel for the accused, (PW1) confirmed that due to the difference she had with the accused, she moved to go and move with her parents leaving the deceased with the accused. However, it was possible to have access to the child including spending sometime with him at her home.

The witness admitted that she did not know under which conditions the deceased lived with the deceased. She further testified and told the court that on this material day, the information came about due to the admission of the deceased at Tawfiq hospital.

PW2 Peninah Karisa the mother to the accused testified that she used to live with the deceased for about 2½ years while accused went about his daily chores or as motorcycle rider. On that fateful day, 2.9.18 PW2 testified that the accused picked the minor as usual from her house at about 2.00 p.m. It did not take long before PW2 was informed by another Boda Boda rider that the accused and the minor were in bad state likely to die from what he had observed.

When she followed to the house of the accused, it was confirmed that he was frail and a mucus substance came out of his mouth. The minor was calling for the accused. According to PW2, she fainted and found herself at the hospital. At a later Stage, the doctor's examination revealed that the accused and the minor had ingested poison.

In cross-examination by **Ms. Ruttoh**, the witness told the court that it was a routine custom for the accused to take the child and have him returned in the evening. The witness expected this to be the common trend, but unfortunately on this 21.9.2018, she received information

that there is something that has happened to both the accused and the deceased. What followed was an admission of the deceased at Tawfiq and the accused at Malindi Hospitals.

PW3 Dr. Swaleh's gave evidence that during the post mortem examination she formed the opinion that the deceased had suffered physical injuries as a result of poisoning. He described the cause of death as poisoning subject to further toxicology tests by the Government analyst (PW5). The postmortem report was admitted as exhibit 1.

PW4 Allan Chengo, testified as the clinical officer attached to Tawfiq hospital and on the 2.9.2018 he happened to be on duty when the deceased was admitted with a history of food poisoning. On examination PW3, told the court that the deceased showed some abnormalities of the abdomen and according to the discharge summary produced as exhibit 2. There was clear evidence of ingestion of poison.

PW5 Yahya Hamisi was the government analyst who carried out Toxicology examination of the human samples from deceased body comprising of the heart, lungs, liver, stomach, spleen and kidney.

On examination at the laboratory, it was confirmed that a maroon substance stated to contain pesticide chlorophyte for pesticide was present in the liver, stomach and kidney.

PW6 PC Percy Musyoka, the police officer who investigate the case in his testimony told the court that he received the report of murder, in which he took necessary steps of collecting the evidence. He also testified to have visited the scene, participated in the post mortem and recording statements from witnesses.

At the scene, he collected some samples which were later to be subjected to forensic analysis in conjunction with body parts taken from the deceased when the accused got discharged from the hospital he preferred charge of murder of killing his own child.

At the close of the prosecution case, the accused elected to give unsworn statement in which he denied the offence of killing the deceased.

Analysis and determination

In the instant case, Section 203 of the Penal Code defines murder to be when any person with malice afterthought causes death of another person by an unlawful act or omission.

The essential elements of the offence as stated in the case of **Republic –vs- Mohamed Koran 2014 eKLR** constitute the following:

- (1) The death of another human being*
- (2) That the death was unlawful*
- (3) That in causing death the accused had malice aforethought.*
- (4) That the accused person was positively identified as the offender to the crime.*

I have reviewed the evidence of the six witnesses; it is perfectly clear that there was no eye-witness to the commission of the offence. My view of the matter is that the prosecution case is purely on circumstantial evidence.

The Law

On application of circumstantial evidence, it is well settled in our criminal jurisprudence in a plethora of cases to mention just but a few to illustrate the principles:

The Law on application of circumstantial evidence is well settled in our criminal jurisprudence. In the case of **Musili Tulo v R {2014} eKLR** the Court of Appeal had this to say on circumstantial evidence:

“It follow that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements: -

- (i). The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
- (ii). Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
- (iii). The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*

Those principles were set out in the case of GMI v Republic {2013} eKLR which echoes the locus classicus case of R v Kipkering Arap Koske & Another, 16 EACA 135 In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke v R {1958} EA 715 citing

with approval *Teper v R* {1952} AL 480, thus:

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

From the foregoing, it would be plausible to discuss each element of the offence in the sense of the legal and evidential burden that is required of the prosecution to point out and present sufficient evidence to raise the existence of the facts in issue against the accused.

The prosecution primarily carries the initial evidence burden of the indictment to prove the elements of the offence in the charge sheet underpinned under the doctrine of the right on presumption of innocence of an accused person as envisaged in Article 50 2(a) of the Constitution. The Law also in exceptional circumstances stipulates that once the prosecution has discharged the burden of proof, the evidential burden may shift to the accused to shed light on some material or elements in the charge as to the existence of truthfulness of the facts in issue as alleged by the prosecution.

The standard of proof of beyond reasonable doubt which would play a vital role in the adjudication of this case is discernible from the principles in the case of **Woolmington v DPP** {1935} A. C. and **Miller v Minister for Pensions** {1942} 2 ALL ER. The context of the principle in these two cases is that in human affairs what can be achieved at best is legal certainty as opposed to full certainty as in mathematics or logic. Therefore, as **Lord Denning** puts in the case of **Miller (supra)** what is required is not proof beyond the iota of doubt but establishing the facts in issue firmly with help of direct or circumstantial evidence.

That is what in **Woolmington (supra)**, **Lord Sankey L. C** succinctly stated inter alia as follows:

“If at any period of trial, it was permissible for the judge to rule that the prosecution had established its case, and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case, and not the jury, which is not the Common Law. It would be an entirely different case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner, which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence..... Throughout the web of the English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt No matter what the charge matter what the or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

This formulation would be the anchor in resolving the two theorems set out between the prosecution and the defence. An abiding conviction for the offence of murder as the one facing the accused is considered when the above cited elements have been proved beyond reasonable doubt as can be seen shortly herein. All elements must be proved beyond reasonable doubt to sustain a conviction.

(a). The death of the deceased Lawrence Roma

In **R v Cheya & Another** {1973} EA 300:

“Proof of death of another human being is at the heart which stands for the offence of murder.” (See also **Rex v Sirasi Bachumira** {1936} 3 EACA 40)

The death in murder charges is distinguishable from other deaths because of its unlawfulness and does not fall within the available defences, self-defence, or defence of another or property or accidentally.

According to the evidence of **PW1**, the mother to the deceased on 2.9.2018 upon request by the accused, he took the deceased to his homestead to assist in having him examined by the doctor. This was necessitated because the deceased had been taken ill while in custody of (PW1).

She went to Tawfiq where the deceased was admitted but unknown to her the following morning the deceased succumbed to death. The evidence by **Dr. Fadiye** who performed a post mortem examination on the deceased confirmed that the alleged death on high probability was due to poisoning. The accused person did not dispute that his son Lawrence is dead. There is therefore sufficient proof of death beyond reasonable doubt.

(b). The death being unlawful act of omission

Unlawfulness is the requirement which excludes any act done with justification. In **S v Thebus** {2003} SA 505 the court observed:

“Common minimum requirements of Common Law crimes are proof of unlawful conduct, criminal capacity and fault, of all which must be present at the time, the crime is committed.”

The unlawful conduct being tested here is one best described as conduct controlled by the accused's will. It is that physical manifestations of the accused's state of mind which is under scrutiny. Did the accused do what the reasonable person would do in the circumstances. (**Thus Gardner and Lansdown Criminal Law and Procedure 6th Edition Vol 1 P. 87:**)

“Two psychological factors render a person responsible for his voluntary acts: firstly, the free choice, decision and voluntary action of which he is capable, and secondly, his capacity to distinguish between right and wrong, good and evil.”

Towards this element, the Law stipulates the pieces of evidence which point in the direction that the unlawful act which caused the death of the deceased was dangerous and foreseeable that considerable injury would inevitably result in occasioning of death or to do grievous harm. See **DPP v Newbury and another {1976} 2 ALL ER 365** the prosecution relied on the discharge summary exhibit 2 of the deceased from Tawfiq hospital dated 3.9.2018 which show that he had been admitted with a history of having ingested poison as to the forensic evidence based on the report of the analyst exhibit 4.

The quality of the findings was from the tests run on the deceased body parts to wit heart, lung, liver, stomach, spleen, kidney and more importantly plastic container containing maroon substance.

The analyst found out that there was a match between the maroon substance which contained chlorophyte pesticide and the toxins identified in the stomach, liver and kidney of the deceased.

There are therefore no inconsistencies on the prima facie post mortem report examination and what was noticed by the analyst upon carrying one toxicology examination.

The evidence when taken together with the other strands of evidence by PW1, PW2, PW3 and PW6 leads to proof beyond reasonable doubt that the deceased death was due to an unlawful act of poisoning.

(c). Malice aforethought

A case of murder is majorly build on malice aforethought. On this matter a number of facts are considered to establish malice aforethought as defined under Section 206 of the Penal Code. The provisions undeniably are prejudicial with specific circumstances which in broad measure which gives a framework to deduce intention of the defence.

At the enactment of the code the term malice aforethought flows from the following set of 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.

The impact taken of the Section is aided by looking at the substantial approach on the abundance of case Law that supports the ingredient of malice aforethought. **Samwel Mosirigwa v R CR Appeal No. 59 of 1997, Ogeto v R {2004} 2KLR, R v Tubere S/o Ochen {1945} 12 EACA 63, Ernest Asami Bwire Abang alias Onyango v R CR Appeal No. 32 of 1990** a close examination of the evidence by **PW3 Dr. Fadiya** who conducted the postmortem, **PW4 – Allan Chengo, the clinical officer** at Tawfiq hospital and the Government analyst, **PW5 – Yaya Hamisi** further, **PW6 – PC Percy Musyoka** gave evidence that a container collected at the scene containing maroon substance was subjected to forensic analysis by PW5.

As indicated in the testimony of PW5, there was a match between the maroon substances and residue of pesticides contents found in the internal organs of the deceased. The acts which caused the death of the deceased bear a reasonable relationship to the poison recovered from the accused house.

The presence of malice aforethought can be construed from the time (PW1) dropped the deceased at the accused house. It can be observed from the evidence of PW1 and PW2 it did not take long before the deceased got admitted at Tawfiq hospital with a history of ingestion of poison.

The offence must have taken place in the house of the deceased. This view is supported by the fact that the accused was also admitted at the scene with the deceased for reason that he had ingested poison.

Thus, in reference to the offence, the accused must have intended to kill or cause grievous harm to the deceased and with full knowledge of the dangerous act and its consequences, the only means was to kill himself through the same poison.

The administering of the physical poison upon the deceased is consonant with the concept in **R v Mowatt {1968} 1 QB 421** where **Lord Diplock** stated that:

“the word maliciously in the commission of a crime does implore upon the part of the person who unlawfully inflicts the wound or other grievous bodily harm an awareness that his act may have the consequences of causing some physical harm to some other person. It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described. It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character might result.”

This was also explained in the case of **R v Belfon {1976} 1 WLR 74** the court held that:

“mere foresight or recklessness that harm was likely to result are sufficient for the element unlawfully and maliciously inflict/cause for the basic intent to cause death or grievous harm.”

I have examined the evidence by the prosecution witnesses PW1 and PW2 where a conclusion can specifically drawn that the accused picked the deceased from their home as sometimes happens with a view to return him back at the cause of business.

Whilst this was expected to happen, PW1 and PW2 received contrary information that both of them have been taken ill. PW1 and PW2 further confirmed that on making a visit to Tawfiq and Malindi Hospital the basis of their sickness was similar, ingestion of poison.

At this point it became necessary to involve the police where PW6 did asset that following the death of the deceased he visited the accused home and was able to recover a container with maroon substances. The material which later became a subject of forensic analysis as confirmed by PW5 was a pesticide dangerous to human life when ingested. The analyst report corroborated the testimonies of PW4 who first saw the deceased and PW3 evidence on the post mortem report and positive findings on examination.

There was therefore strong circumstantial evidence adequately implicating the accused with the murder of the deceased. Given the age of the deceased, it was only the accused who could have procured the poison, make a concoction of it, have it administered upon the deceased. The accused unlawful act does not fall within any of the criminal defences known in Law to justify the crime.

Based upon the material on record, a prima facie case exist that the accused was the last person to be with the deceased before he met his death. As stated by PW1 and PW2 there is direct evidence to support the complicity of the murder by the accused step by step until the admission at Tawfiq and subsequent death.

On the reconstruction of the scene, he was the last person to be with the deceased. Both of them were taken from the scene being the house of the accused.

PW6, recovered the pesticides at the instance of investigations. The residue substance formed its entry into the internal organs of the deceased. (See the forensic testimony by PW5).

The accused conduct before, during and post commission of the offence all point to the direction malice aforethought and motive both combined.

As there can be no doubt that (PW1) and the accused once enjoying girl/boyfriend relationship terminated it with (PW1) surrendering the deceased to the care of the accused. There rests squarely circumstantial evidence on motive given the fact that this was a child of very tender years left under the care of a man, who may have been least prepared for such responsibility.

A reference can be made to her mother’s testimony (PW2) to the effect that the accused lived in his own house and at all material times did stay with the deceased in that same house.

However, by virtue of motor cycle rider duties, he used to drop the deceased at the house of his mother (PW2) and make him picked after work in the evening.

The total effect of the evidence shows that this time round the accused went with the deceased so that he could assist in having him see a doctor. In absence of any other defence, the time difference between the point of the deceased being dropped and when he fell sick gives rise to one reasonable hypothesis that the accused sought the deceased in order to administer the poison.

The parameters or requirements of Section 111 of the Evidence Act comes into play for the accused to bring his case within any exceptions to prove any facts especially within his knowledge. Moreover, all circumstances are consistent with only one hypothesis that of guilt of the accused in so far as the death of the deceased is concerned.

The accused is therefore taken to have willfully, deliberately and with intent did inflict serious harm by use of pesticides and must have done so with full knowledge of the inherent risk to life of the deceased.

The potentially lethal poison considered conclusively has only one outcome to do grievous harm likely to endanger life or intent to kill the deceased. This objective for purposes of the accused intention was achieved in occasioning the death of the deceased. On this basis the unlawful act was otherwise accompanied with malice aforethought.

In my view, the evidence by the prosecution has all the hallmarks of a premeditated malice aforethought by the accused to effect the death of the deceased.

Accordingly, this court is entirely satisfied that the accused is guilty of the offence contrary to Section 203 of the Penal Code from which to

draw an inference to support the conviction for the offence.

Sentence

In assessing an appropriate sentence, the court has taken into consideration the totality of mitigating factors and sought to weigh them *vis-a-vis* the aggravating factors at the same time seeking to strike a balance on the nature of the offence, murder with malice aforethought and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done.

Society requires protection from dangerous criminals and in fact the society looks up to the court to do justice not condone crime in a manner which would intrigue society into losing confidence in the whole justice delivery system. In passing sentence then, the pre-sentence time of incarceration will be taken as part of punishment already served and suffered. In passing sentence the court will not lose sight of the pre-trial and during trial, incarceration period.

The Accused's moral blameworthiness in this matter is of a high degree. His decision to terminate his child's life was purely selfish. He acted after careful planning and there was an element of premeditation. His conduct was utterly cruel as he took the life of his child by poisoning. The offence is inexcusable, and the court must impose a sentence that should blend leniency and mercy with a just and proper sentence.

In mitigation, the accused is a young person of about 24 years and he was 22 years at the time of commission of the offence. He is a family man blessed with children from two successive marriages. He also claimed to have a poor medical history. He had spent one year and about 5 months in pre-trial custody. He is also a first offender with no previous criminal record. Although the accused is a youthful offender and youthfulness can to some extent denote blameworthiness, in the present case the court should not place undue weight on this factor.

The deceased was a child and his young life had been unnecessarily lost and the court had the duty to protect the sanctity of human life. The lost human life can never be replaced. In any event no amount of compensation can bring back lost life.

It was brutal murder of an innocent person and the accused has not shown any remorse. As I have mentioned above, the accused's moral blameworthiness is very high. The circumstances in which the crime was committed and the nature of the crime far outweigh the mitigatory features advanced by the accused. The appropriate sentence that reflects society's disapproval of his actions but takes into account his mitigation is one of 30 years imprisonment.

It is so ordered.

14 days right of appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF APRIL 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Gekanana holding brief for Ruttoh for the accused person
2. Accused person