



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: OUGO J

CRIMINAL CASE (MURDER) NO. 35 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

EMO.....ACCUSED

JUDGMENT

1. By an information dated the 12th September 2018 **EMO** 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, on the 4th day of August 2018 at [particulars withheld] location in Kisii south Sub-County within Kisii County murdered **HM**.
2. The accused pleaded not guilty. The prosecution called seven (7) witnesses.
3. **IKC** (Pw1) testified that on a date in the month of July on a date she could not recall she escorted V the mother of the deceased to the accused's house in [particulars withheld] area. According to her the accused was the husband of V. She left V at the accused's house. Later V called her and told her that the accused had taken the baby away.
4. **VKO** (Pw2) testified that she delivered baby H on 22nd July 2018. The accused is the father of the child. On the 29th of July 2018 she went to look for the accused person. She found the accused and told him that they should look after their child. She spent the night. The next day the accused woke up her up at 5.00am and asked her for the baby and told her that he was going to take the baby home and return for her the next day. He told her that he did not have the fare for both of them. The accused left with the baby. At 7.00am she rang the accused and asked her to return the baby. He responded by telling her that she was forcing him to marry her. They exchanged various texts and then he switched off his phone. He put on the phone and again she asked him to return the baby. He told her that the baby was in a children's home. She decided to go and report the matter to the police at Rioma. She was with Isabella and Irene. The accused was arrested thereafter. The accused led them to where the baby was but they did not find the baby there. Thereafter she saw the baby in the mortuary.
5. **Peter Maroko Micheka** (Pw3) testified on the 30/7/2018 he was at work at Kegogi market. He went to the accused's place and found Irene, Isabella and a lady holding a baby. He was told that the accused was the father of the child. The accused denied that the baby was his.
6. **No. xxxx Sergeant Eric Ngetich** (Pw4) testified that on the 11/8/2018 he was on duty when he received a report of kidnapping from V Pw2. The report was that her boyfriend the accused had kidnapped their son HN. During his investigations he tracked the accused on the 30th August 2018 and arrested him. The accused told them that the baby had died. They searched for the baby. They found the baby's notification card and a mother's handbook in the house of the accused. He learnt from the assistant chief that a body of a baby had been recovered. He found a record of the recovery of the child's body in the OB no. 24 of 4/8/2018. They went to the mortuary with Corporal Charles Koech who recovered the body. On the 5th September 2018 they charged the accused with kidnapping. On the 7th September 2018 V identified the body and a post mortem was done. The child died on the 4th of August 2018. Thereafter the accused was charged with murder.
7. **No. xxxx Senior Sgt Charles Kipkoech** (Pw5) testified that on the 4th August 2018 whilst on patrol he received a call from Chief Eric Morara that a body of an infant had been abandoned beside the road at Bomakobi. He went to the scene and found the body of an infant boy wrapped in a plastic bag. They took the body to the mortuary. On the 6th of August 2018 he identified the body to officers from Rioma police station.
8. **Doctor Brian Ayaro** (Pw6) testified that he conducted a post mortem on the remains of HK on the 7th September 2018. The body was of a new born wrapped in numerous clothing. The body demonstrated moderate decomposition and skin was coming off. Some key findings included fractures of the head region with some bleeding under the skin of the scalp. There was multiple fractures of the bones of the head. According to him the cause of death was head injury due to blunt force trauma. The other possible cause was limited by decomposition of soft tissue. He took some specimen for DNA being a piece of the rib, the blood and root of the hair.

9. **Polycap Lutta Kweyu** (Pw7) testified that on the 10th September 2018 he received the following samples; hair sample from HK, a piece of rib muscle from H, blood sample from H, blood sample from VK and blood sample from EM. He was to determine the genetic relationships in the submitted samples. His analysis revealed that there are 99.99+% chances that EM was the biological father of the deceased infant HK and VK was the biological mother of H.

10. The accused gave a sworn statement. His defence was as follows; he did not murder HK. On the 27th July 2018 he was staying at Kegogi and at about 7 going to 8.00pm some wazees came to his place with V. V said the child was his. They left him with the child despite him telling them that he did not know what to do with the child. V left too. V did not return. He did not feed the child on anything. The child was crying. V had put off the phone. On the 30th July he decided to go home to Suneka. He boarded a vehicle to Kisii town he was with the child and a bag of clothes. The child was not in good health. He boarded a boda to get to their home. On reaching Riamasagari the motor bike fell on the ground as it tried to avoid an oncoming Nissan vehicle. He still had the child. They fell together. He was in shock. He got injured on the right leg. He gotten on the motor bike. The child was not in good condition. He wanted to go and explain to his parents. He decided to leave the child on the roadside. The child was still breathing. He did not find his mother at home. He went back to check on the child and found the child missing. He did not tell his parents. Later he was arrested. The child was just about 3 days old.

11. At the close of the defence case Mr Mainga for the accused relied on the submissions filed at the close of the prosecution case. Mr Otieno for the prosecution submitted as follows; that the case against the accused person has been proved beyond reasonable doubt. That 3 witnesses testified and placed the accused as the last person seen with the deceased before the deceased was found dead and the cause of death was a head injury. That Pw1 testified to the conduct of the accused person when he had the deceased in his possession. That the accused's defence weighed against the prosecution case was an afterthought and that it confirmed that the accused had killed the deceased. Mr. Mainga submitted that no of the witnesses who testified gave evidence that the accused had intentions to kill the deceased and that going by the doctor's evidence the cause of death could have been due the fell and the tender age. That the prosecution failed to prove mens rea and actus rea. That the circumstantial evidence by the six witnesses do not paint a picture of a man that had the intention to cause death or grievous harm on the deceased. That the weapon used was not produced. The defence relied on the following cases; **R vs Tubere s/o Ochen (1945) 12 EACA** where the Court of Appeal of Eastern Africa outlined what to consider when determining whether there was malice aforethought has been proved. The case of **Simon Musoke vs R (1958) EA 715** where it was held that: "**It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other circumstances which could weaken or destroy the inference**"

Analysis and Determination

12. For the prosecution to secure a conviction they must prove that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought (see **Anthony Ndegwa Ngari v Republic [2014] eKLR**).

13. The fact and cause of death are not in dispute. Pw6 testified that the cause of death was a head injury (traumatic brain injury) due to blunt force trauma. Pw1 identified the deceased at the mortuary and Pw5 recovered the baby's body.

14. The next issue is whether the accused unlawfully caused the death of the deceased. The prosecution's case is that the accused was the last person seen with the deceased. Pw2 testified that he gave the baby to the accused and he went out with the baby. The accused person admitted in his defence that he was with the baby. None of the witnesses saw the accused commit the unlawful act that caused the death of the deceased. What I need to consider is the circumstantial evidence adduced by the prosecution.

15. In **Abanga alias Onyango v Republic CA CR. Appeal NO. 32 of 1990 (UR)**, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows: It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- 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.*

16. In **Sawe -V- Rep [2003] KLR 364** the Court of Appeal held:

"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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused".

17. The evidence of Pw2 who was the accused's girlfriend and the mother of the deceased is that she handed over the baby to the accused. I am aware that the law is clear that the burden of proof always rests on the prosecution to prove the case against the accused beyond any reasonable doubt. No duty or burden is imposed on the accused to prove his innocence but there are instances when the law places a duty on the accused to explain certain facts particularly those within his own knowledge. **Section 111(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)** which casts the burden of proof on the accused provides as follows:-

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

18. Pw2 gave the baby to the accused whilst alive. The accused had the duty to explain what happened to the baby or how the baby died. Pw2 gave the child to the accused on the 30th July 2018. The baby's body was recovered on the 4th August 2018. The accused's defence that it was Pw2 left the baby with him in a helpless state is an afterthought. No such question was put to Pw2. Pw2 stated very clearly that the accused asked her to give him the baby and that he would return for her as he did not have fare. The baby's body was recovered on the 4th August 2018 by Pw5 wrapped in a plastic paper bag. This confirms that by the time the deceased was found he was no longer alive. The accused's defence that the baby fell when he had an accident on a motor bike and that he left the baby by the roadside alive is an afterthought. He did not find the baby because the baby's body had been picked by the police. He was the last person with the baby and I find that he must have caused the head injury that caused the deceased's death and wrapped the body in a paper.

19. On the of malice afterthought, the conduct of the accused when Pw2 went to his place tells it all. He was not happy that Pw2 had gone to look for him. He took the baby from Pw2 the next day and threatened to kill the baby. When asked by Pw2 the whereabouts of the baby he said the baby was in a children's home. Pw2 evidence was clear and consistent and I believe her. She explained the efforts she made to get her baby back. From this evidence and the condition the deceased as found wrapped in a plastic bag I find that the accused who was the last person with the deceased and he had the intentions to cause grievous harm to the baby. In the case of **Libambula v Republic [2003] KLR 683**, the Court of appeal stated as follows:

“We may pose, what is the relevance of motive here” Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See Section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”

Weighing the defence against the prosecution case I find that the circumstances point to the guilt of the accused. The prosecution has proved their case beyond reasonable doubt. I therefore find the accused **EMO** guilty of the murder of the **HN** and I therefore convict him accordingly.

Dated, signed and delivered at KISII this 20th Day of May 2020

R.E.OUGO

JUDGE

In the presence of;

Accused Present.

Mr. Mainga For the Accused Person

Mr. Otieno Senior State Counsel Office of the ODDP

Ms. Rael Court Assistant