



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 7 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

DWK.....ACCUSED

J U D G M E N T

The accused **DWK** was charged with offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. That on the night of 27th day of February, 2017 at [particulars withheld] village in Bumula Sub County within Bungoma County murdered **ESK**.

On 27th February, 2017 **PW 1 JK** the mother of accused was at her house when deceased **ESK** a child aged 4½ years and **JK**, came to her house. They were all children of the accused and grand-children of the witness. They were in good health. They then went back to their house. The next day at 6 a.m. accused came and informed her that deceased was dead. She went to accused's house and found deceased in the accused's house dead. Accused's wife told her that deceased had suffered from vomiting and diarrhea.

PW 2 BW received information that his niece **S** child had died. He went there and found **Silvia** and the accused. **Silvia** told him that accused had gone out with the child at night and brought him back. When she tried to wake up the child she found the child was dead. He observed the child and found the neck was loose and had injuries on the buttocks. Police were informed who came to the scene and took away the body.

PW 5 No. 236053 I P Simon Mwangi attached to Bumula Police Station received a report of sudden death and visited the scene. On arrival he found the lifeless body of a child aged about 5 years lying in a house of its grandmother. He observed and saw that he had bruises around the neck. He also observed injuries on the buttocks. He asked the mother of the child who informed him that accused who is the father had taken the child out to answer a call of nature and while outside the child started crying. Upon this information he arrested accused; on the basis that he was the last person in contact with the deceased.

PW 6 No. 56896 Sgt Richard Langat upon receipt of the information of death went to scene. On arrival he found the body of the child in the grandmother house. He observed the body and saw it had injuries on neck and buttocks. The mother of deceased informed them that accused had taken the boy out and he came back pulling him and placed him on his bed. He arranged for photographs of the scene be taken. Later he caused accused to be charged with present offence.

PW 8 VNW the mother of the deceased testified that on material day she was with accused and their children, the deceased and **KA**. The child asked accused to take him outside for a call of nature. Accused took him out. She then heard the deceased crying. She saw accused dragging deceased into the house and placed him on a mattress. The next day she observed the child and saw the neck was broken. The accused then called his mother **Pw 1** who took the child to her house. She testified that when accused took the child outside the deceased was fine and she heard him crying.

PW 7 DR. Harun Obongi performed a post –mortem examination on body of deceased. He found there were multiple bruises on frontal lobe, neck had fracture of cervical spine. On opening the body he found there was total collapse of left lung, fracture of cervical spine, compression of neck veins and total obstruction of upper airways. The examination of neck showed pressure, probably by a rope. He formed opinion that the cause of death was due to strangulation.

The accused gave sworn evidence in his defence. He testified that deceased was his son. On 22nd February, 2011 he worked upto 7 p.m. he went and drunk bussa and reached his home at 9.00 p.m. He entered the house and went to sleep. The next day he woke up and saw deceased lying down. The mother tried to wake him up but found he was dead. He then informed his mother. Police were called and he was arrested. He denied taking the child out to urinate or that he had any injuries.

The accused is charged with the offence of Murder Contrary to Section 203 as read with section 204 of the Penal Code which provides: -

203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person convicted of murder shall be sentenced to death.

From the provisions, the elements of the offence of murder which the prosecution will seek to prove are: -

- a) The fact and cause of death.
- b) The unlawful act or omission causing death
- c) The existence of malice aforethought and
- d) That it is accused who executed the unlawful act or omission that caused the death

In **Republic Vs Andrew Omwenga (2009) eKLR** the court stated:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- (a) the death of the deceased and the cause of that death;***
- (b) that the accused committed the unlawful act which caused the death of the deceased and***
- (c) that the Accused had the malice aforethought.***

It is the duty of the prosecution to lead evidence to prove all the ingredients of the offence beyond reasonable doubt. This burden does not shift at all times except in statutory exceptions. This is the principle established in Section 107 and 109 of the Evidence Act Cap 80 which provide: -**“Section 107.**

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 109 States: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In **Woolmington Vs DDP 1935 AC 462** Lord Sanckey stated: -

“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 subject to... the defense of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge 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.”

1) The fact and cause of death

This can be proved by evidence of post-mortem examination report by medical practitioner. PW 7 Haron Ombungi performed the post-mortem examination of the deceased. His findings were that externally the deceased had multiple bruises on frontal lobe and neck and there was fracture of cervical spine. His internal findings were compressed neck and veins, leading to total obstruction of upper airways, there was mild haemothorax on right lung and total collapse of the lung. He also found there was fracture of cervical spine. He formed opinion that cause of death was due to Pulmonary arrest secondary to strangulation. The fact and cause of death is, therefore, established by the evidence of **Dr. Harun Ombongi Pw 7.**

2. The unlawful act or omission

PW 1 JK the grandmother of the deceased and mother of accused testified that when the deceased left her house on 27th February, 2017 at 2 p.m. he was fine. **PW 2 BW** who responding to information of death of deceased went and observed the child and saw injuries on the buttock and the neck was loose. **PW 3 Zacharia Simiyu** also visited the scene and on observing the deceased saw that the neck was loose and head rotating. **PW 5 IP Simon Mwangi** who also visited the scene and observed the body saw bruises around the neck and it was flexible. He also observed injuries on the buttocks. **PW 6 Sgt Richard Langat** also confirmed that on observing the body of the deceased, he saw bruises on the neck and buttocks. **PW 8 VN** the mother of the deceased that when she went to check on deceased, she found him dead with neck broken.

All these witnesses testified that they saw that the deceased had injuries on the buttocks and the neck was loose others describing it as broken. In the normal course of things injuries leading to a broken neck do not just happen. They can be as a result of unlawful act or self-infliction. In this case it is not likely that a child aged 4½ years would cause such injuries to himself. The injuries were, therefore, as a result of a deliberate act of another person.

3. If malice aforethought been established?

Malice afterthought on guilty intention can be discovered from the actions of the accused. Section 206 provides that malice aforethought means: -

“(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 *R Vs Tubere S/O Ochen 1945 12 EACA 63* to discern malice aforethought the court considered the following elements: -

- 1) Nature of weapon used
- 2) The manner in which it was used
- 3) The part of the body targeted.
- 4) The nature of the injuries inflicted either a single stab wound or multiple injuries.
- 5) Conduct of the accused before, during and after the incident.”

In this case, the target of the assailant was the neck where he exerted pressure which the Doctor said would be probably a rope. Any pressure on the neck is aimed to starve the victim of oxygen which in this case led to total obstruction of the airways leading to total lung collapses, which was the cause of death. The execution of that act was meant to and did cause the death of the deceased. I, therefore, find that malice aforethought has been proved.

4. Were the injuries inflicted by the accused? This reviews the identification of an accused as the perpetrator of the offence. Positive identification of the offender is important for two reasons. First, it is to the person to whom guilt is assigned and secondly, to punish the person for the offences. Identification of an accused can be by direct evidence of the eyewitnesses who will testify that they saw the accused commit the offence. The prosecution can also prove identification of the accused by circumstantial evidence. This is evidence proving events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue.

In this case none of the witnesses testified that they saw the accused strangle the deceased. The prosecution, therefore sought to rely on circumstantial evidence.

For this court to base a conviction on circumstantial evidence, the prosecution must prove the following element as stated in *Abanga Alia Onyango Vs Republic Criminal Appeal No. 32 of 1990*: -

“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests (1)

i) The circumstances from which an inference of guilt is sought to be done must be cogently and firmly established.

ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of 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 accused and no one else.

In *Deepok Sarna Vs Republic* the court of Appeal stated that: -

“In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on one hand inference of facts to be drawn from them on the other. In regard to proof of primary facts the court has to judge the evidence and decide whether that

evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused should be considered.

In dealing with this aspect of the problems the doctrine of benefit of doubt applies. Although there should not be any missing link in the case yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from proved facts. In drawing these inferences the court must have regard to the common cause of nature events and to human conduct and their relations to the fact of the particular case. The court, thereafter has to consider the effect of proved facts. In deciding the sufficiency of circumstantial evidence, for that purpose of conviction, the court has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt.”

The prosecution sought to prove that the deceased was of good health and fine on that day; through the evidence of the mother of the deceased (PW 8) and the mother of accused (PW 1). The mother of the deceased PW 8 testified that the accused came and took the child out who wanted to urinate. She then heard the child screaming while outside with the accused. She then saw the accused bring back the child and lay it on the mattress. She also testified that she was unable to move as she had been fractured on her leg as a result of accused's assault previously. The next day she found the deceased was dead. All the witnesses who came and observed the deceased were in agreement that the deceased had injuries on buttocks and the neck was loose.

The accused in his defence testified that on the material day he came home drunk and slept. The next day he woke up and saw deceased was lying down. He asked the wife (PW 7) to wake him up who on going to do so found he was dead. He went to inform his mother (PW 1).

“In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on one hand and inference of facts to be drawn from them in the other. In regard to proof of primary facts the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused should be considered.

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The prosecution, therefore, having adduced the evidence and sought to prove that accused was the last person seen with the deceased and that the deceased was found dead. The prosecutor sought to rely on doctrine of last seen alive. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is expected to provide any explanation as to what happened. Before doing so, the court must ask the following questions: -

i) Are the facts of this case compatible with the innocence of the accused?

ii) Are the facts capable of explanation upon other reasonable hypothesis than the guilt of appearance?

In the Indian case of **Deepack Sauna Vs State of Delhi** the court in developing the doctrine of last seen stated: -

“In the case of murder where there is no explanation for the death or disappearance of the deceased and the accused was the last person to be seen in the company of the deceased, the circumstantial evidence can be used to link the accused with the death of the deceased and prove the charges against the accused beyond reasonable doubt. There is no burden on the accused to prove his innocence and explain the death of the deceased but the burden remains on the prosecution to lead sufficient evidence to establish prima facie case against the defendant to require an explanation for the disappearance of the deceased and absence of a reasonable explanation can support the inference of guilt.”

The Nigerian Case **Achie Vs State (1993)** In Nigerian case of **Ismeni Vs State (2011)** **Kuktan JSC** said of the doctrine.

“In a case of culpable homicide as in the present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before the death was responsible for his death and the accused is expected to provide an explanation of what happened.”

In the absence of any explanation by the defendant as to how the deceased met his death, the court can allow an inference that the defendant killed the deceased.”

In **R Vs ECK**, Lessit J in analysis of the doctrine of the last seen with deceased alive stated: -

“Regarding the doctrine of the last seen with the deceased. I will quote from the Nigeria: Court case of Moses Jua Vs the state (2007) (PELR – CA/11 42/2006.

The court while considering the last seen doctrine held: -

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.”

In this case, the evidence of **PW 7 VN** the wife of the accused and mother of the deceased is that the accused took the boy out to urinate. While outside, she heard the boy crying. When she asked what the problem was the accused told her to keep quiet. He then brought the boy and laid him on the mattress. The next day when she woke up, she found the deceased dead and having sustained the stated injuries. These are the injuries which were the cause of death. There is, therefore, evidence that the deceased was in good health; and accused took him out; the deceased was heard crying. The accused brought him into the house and placed him on the mattress and then when he was checked on the next morning he was found dead. The accused was, therefore the last person seen with the deceased alive.

Accused in his defence states he was drunk when he came home, slept and did not know how deceased died. This cannot be true. There is evidence that he went out with the deceased, beat up the deceased, who cried and then he brought him back into the house and laid him on a mattress where he was found dead from injuries inflicted. The injuries would not have inflicted by any other person other than the accused.

After considering all the evidence, I am satisfied its case against the accused **DWK** has been proved beyond reasonable doubt. I find accused guilty of the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Dated, signed and delivered at Bungoma this 7th day of May, 2020.

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S N RIECHI

JUDGE