



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL CASE NO. 7 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NICKSON PETER SADERA.....ACCUSED**

**JUDGEMENT**

**Introduction**

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased, DMS, which is alleged to have taken place in Olposimoru village in Narok North on 04/05/2018.
2. The accused pleaded not guilty
3. The prosecution called six witnesses in support of the charge.
4. The accused testified on oath and did not call any witnesses in his defence.

**The case for the prosecution**

1. The prosecution called Gladys Sadera (Pw 4), who is the mother of the deceased and the wife of the accused. It was her evidence that they had been married for four years. She continued to testify as follows. They were blessed with three children of the marriage namely 1) IS 2) MS 3) and DM (the deceased). It was her evidence that on 4/5/2018 at 7.00 pm the accused arrived home drunk. He began shouting in anger that the deceased was not his blood child. He then began to beat her and the deceased using his Maasai walking stick. Pw 4 was holding the one-month old deceased in her arms. He hit the deceased in the head and at the back of the head. Pw 4 realized that her screams could not be heard outside the house. As a result, she struggled successfully with him to get out of the house. The accused followed her out of the house and held her throat. He then got hold of the sweater of the deceased. Pw 4 then let loose the deceased to him and she escaped.
2. Furthermore, the accused told the accused that the deceased was the child of Mzee Lormunyie, Mogaka and Mavina. She unsuccessfully tried to persuade him that the child did not belong to those three men.
3. After escaping to her sister in law's house, Pw 4 told her not to allow her children to come out of the house, since the accused had stripped her naked. Pw 4 asked for a sheet to cover herself.
4. Furthermore, in response to the question by her sister in law as to what was happening, Pw 4 told her that: "*it was our usual problems.*" Her sister in law asked Pw 4 as to the whereabouts of the deceased. Pw 4 told her that she had left the child with the accused. Pw 4, her sister in law and her mother in law (Julia Sadera) went to the house of the accused. Upon arrival at gate of the house of the accused, they realized that the accused was furious.
5. They then decided to go and call the brother of the accused namely IS. They arrived at the house of IS, who appeared scared to accompany them to the house of the accused. Their mother successfully persuaded him to accompany them. Upon arrival at the house of the accused, the accused became more furious. They entered the house and found the accused cooking ugali. The child was lying down crying in anger. The accused took a panga and ordered IS and M to lie down. He wanted to cut them. IS tried to talk him out not to cut the children. Following advice from her mother in law, Pw 4 escaped to the house of Stephen Sadera (Pw 5).
6. Furthermore, she arrived in the house of Stephen Sadera. Electricity was put on by the wife of Stephen Sadera. His wife and Pw 4 then sat down in the sitting room. Pw 4 told them that the accused had beaten her and that she had left the deceased child with the accused. The head

of the deceased was swollen. Pw 4 told Stephen Sadera that she had told her mother in law to take the deceased child to hospital.

7. Stephen Sadera then accompanied Pw 4 to Olposumori centre, where they met her mother in law (Jemima Sadera), Mary Sadera and Eric Sadera.

8. Stephen Sadera (Pw 5) asked her mother the condition of the deceased child. She told them that the deceased child had been given medicine. The doctor had told them to take the deceased child to Olonguruone hospital as its condition was serious. The deceased child was unable to be breast fed and was also unable to drink the cow milk, that was being given to the child by its grandmother. The grandmother had carried the cow milk.

9. Stephen Sadera suggested that it was better to take the child home, since they did not have enough money. After crossing the river, the grandmother to the child said that the deceased child was now becoming heavier. The grandmother covered the child with a towel, since it was cold and they then proceeded home. While en route the child's grandmother said that the body of the deceased child was now cold. Upon arrival at home, the grandmother lit fire and gave PW 4 cow milking jerry to rub on the body of the deceased child; which Pw 4 did. Pw 4 felt the child had grown colder. It was at that point in time that Pw 4 was told by her mother in law that the child had died on the way and that she feared to tell her. The mother in law told Pw 4 to take the child and leave her on the bed. They then left the house and began to mourn. The child died at 4.00 am in the morning.

10. Chief Douglas Sadera (Pw 2) was informed who in turn rang a woman police officer. As a result, three police officers arrived including the OCS Olposimoru police post.

11. The body of the deceased was taken to Molo hospital mortuary by police officers.

12. A postmortem on the body of the deceased was performed on 28/5/2018. Thereafter the body was released to them for burial at Molo hospital cemetery, since it was said that the deceased child was not their child.

13. After the burial, the blood parents of Pw 4 returned to Baringo. They later came to the matrimonial home and bid farewell to the mother in law of Pw 4. Pw 4 left the following day with her personal belongings and her two children for Baringo.

14. It also was the evidence of Pw 4 that the fighting between her and the accused were frequent. An attempted reconciliation between the accused and Pw 4 by chief Jonathan Sadera did not bear any fruits.

15. The prosecution also called Assistant chief Douglas Olorun Sadera (Pw 2). Pw 2 supported the evidence of Pw 4. Pw 2 testified that the accused is his nephew. Additionally, Pw 2 saw an injury in the head of the Pw 4 in the morning at 4.00 am on 4/5/2018. The body of the deceased had been removed to the house of the mother in law to Pw 4. Pw 2 then called the OCS of Olposimoru police station, Wanjala. A vehicle arrived and took the body of the deceased child to Molo hospital mortuary. After this incident the accused escaped from home for six to seven months. He only returned when there were clashes between the Maasai and Kipsigis in Olposimoru. The clashes were caused by cattle rustling.

16. In addition to the foregoing witnesses the prosecution called Stephen Sadera (Pw 5). Pw 5 testified that the accused is his nephew. Pw 5 testified that on 4/5/2018, Pw 4 went to his house at 10.30 pm. When he wanted to go out, Pw 4 told him not to come out as she was naked. Pw 5 awoke his wife who had Pw 4 dressed and then allowed her to enter the house. Pw 5 has repeated what Pw 4 told him about the accused in that fateful night, which is needless to repeat.

17. In addition to the evidence of the foregoing civilian witnesses, the prosecution called three police officers namely PC Wycliffe Mwakha (Pw 1), Cpl Kitilit (Pw 3) and Cpl Moses Lutenyo (Pw 6).

18. Pw 1 went to the scene of crime on 4/5/2018 on the instructions of his boss. He saw the body of the deceased child, which was covered with a towel. The accused was not there as he had escaped. Later on 3/3/2018 he arrested the accused person at Olposumori centre.

19. Pw 3 testified that on 28/5/2018 he proceeded to Molo hospital mortuary, where he witnessed the postmortem examination of the body of the deceased.

20. Pw 6 took over the investigations from the original investigating police officer. After recording statements from the witnesses, he charged the accused with the murder of the deceased. It was also his evidence that the accused accused his wife of siring the deceased child outside wedlock.

21. The postmortem examination report was admitted in evidence as exhibit 2 by consent of both counsel. According to exhibit 2 the deceased was aged one month and two weeks. The examining doctor found as follows upon examining the body of the deceased. There was a swelling on the temporal parietal region of the head, which measured 10 cm. There was a linear fracture on the parietal and occipital bones with subdural hematoma.

22. The cause of death was due to severe head injury caused by a blunt object.

23. A mental assessment report of the accused was similarly admitted in evidence as exhibit 1 by consent of both counsel. According to the report the accused was mentally normal.

### **The submission of the prosecution**

24. The prosecution did not have a right to file their submissions in reply to the defence as the prosecution was not conducted by the Director of Public Prosecutions or his deputy. See section 310 as read with section 161 both of the Criminal Procedure Code (Cap 75) Laws of Kenya.

#### **The case for the defence.**

25. The accused testified on oath as the only defence witness. He testified that he had gone to Olenguruone with his friends. Upon arrival there, he drank alcohol whose brand name is Kenya cane. Thereafter, he changed and began to drink chang'aa.

26. He further testified that he was so drunk that he did not know how he arrived in his home. He only remembered becoming conscious in the morning of 5/3/2018. That is when he found himself in his home. His wife and children were not at home.

27. He further testified that he loved all his children including the deceased; who he sired. In response to the evidence of his wife (Pw 4), the accused labelled her as a liar. He testified that her wife lied that he hit the deceased and that the deceased was sired by other men.

28. He finally testified that he was so drunk that he would not remember as to what happened that night and on how he arrived in his home.

#### **The submissions of the accused.**

29. Ms. Saika, counsel for the accused filed written submissions, in which she urged the court to acquit the accused as the prosecution had failed to prove the case against the accused beyond reasonable doubt.

30. Based on the evidence adduced in court, counsel submitted that malice aforethought in terms of section 206 of the Penal Code was not proved

31. Counsel cited section 13 (2) of the Penal Code, which reads as follows. *"Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-*

*a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*

*b. the person charged was by reason of intoxication insane, temporarily or otherwise at the time of such act or omission.*

32. *where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.*

33. *Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."*

34. Based on the foregoing statutory provisions, counsel submitted that those provisions afford the defence of intoxication in three situations.

35. First, where there is involuntary intoxication, a situation in which an accused is intoxicated without his consent either by the malicious or negligent act of another person.

36. Secondly, where an accused by reason of intoxication is insane temporarily or otherwise, a situation in which an accused does not know that it is wrong or does not know what he is doing. Counsel cited *Rex v Retief [1940-1943] EA 71*, in which the former Court of Appeal for Eastern Africa pronounced itself as follows in that regard.

*"The insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The law takes no note of the cause of insanity and, if actual insanity in fact supervenes as the result of alcohol excesses, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. It is immaterial whether the insanity so induced was permanent or temporary and if a man's intoxication were such as to induce insanity so that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity and the verdict should be as laid down in section 159 of the Criminal Procedure Code 'guilty of the act charged but insane when he did the act.'*

37. Furthermore, counsel submitted that the third situation contemplated by section 13 (4) arises where the accused by virtue of drunkenness is incapable of forming the specific intent, which is an element of the offence charged and has to be proved and if proved it negatives the *mens rea*. She cited *Said Karisa Kimunzu v Republic, criminal Case No. 266 of 2006 (Mombasa)* in support of that submission.

38. She has therefore submitted that by virtue of intoxication the *mens rea* in the accused was negative with the result that he is not guilty of murder and should be acquitted.

39. Furthermore, counsel submitted that there was no direct evidence that the accused caused the death of the deceased. The evidence relied upon is that of the wife of the accused, whose evidence was not corroborated. According to counsel the deceased might have been injured before the accused arrived at home. She cited *Sawe v Republic [2003] KLR 364*, in which the Court of Appeal held that for a conviction based on circumstantial evidence such evidence must only point to the accused as the perpetrator of the crime charged.

40. Furthermore, counsel submitted that there were many possibilities that the child might have fallen and hit a blunt object in the house before the arrival of the accused. The walking stick was also not produced as an exhibit.

41. Based on *Roba Galma Wario v Republic [2015] e-KLR*, counsel submitted that for a conviction to be sustained it must be proved that the death of the deceased was caused by the appellant and that he had malice aforethought. If malice aforethought is not proved, then the accused would only be guilty of manslaughter.

42. Counsel therefore urged the court to acquit the accused.

### **Issues for determination.**

43. I have considered the entire evidence and the applicable law. I have also considered the submissions of the defence. As result, I find that the following are the issues for determination. 1) Whether the accused caused the death of the deceased. 2) Whether the evidence discloses murder or manslaughter. 3) what are the appropriate orders to be made?

### **Issue 1**

44. I find as cogent and credible the evidence of Gladys Sadera (Pw 4) that the accused came home drunk on 4/3/2018. He then began shouting that the deceased was not his blood child. He then began to beat her and the deceased using his Maasai walking stick. Pw 4 was holding the one-month old deceased in her arms. He hit the deceased in the head and at the back of the head. Pw 4 screamed and successfully struggled to get out of the house and escaped and reported the matter to her sister in law.

45. Furthermore, I find as credible the evidence of Stephen Sadera (Pw 5), who testified as follows. Pw 5 testified that on 4/5/2018 Pw 4 went to his house at 10.30 pm. When he wanted to go out, Pw 4 told him not to come out as she was naked. Pw 5 awoke his wife who had Pw 4 dressed and then allowed her to enter the house. Pw 5 has repeated what Pw 4 told him about the accused in that fateful night.

46. I find as cogent and credible the report of the postmortem (exhibit 2) that the cause of death was due to severe head injury caused by a blunt object. This evidence supports the evidence of the wife of the accused that the accused used a Maasai walking stick to assault the deceased in the head and at the back of the head.

47. The submission of counsel that the deceased child might have fallen and hit a blunt object amounts to speculation which is not allowed in law; see *Oketch Okale & others v. R. (1965) E.A. 555*. I also find that this is a case of direct evidence and therefore the principles governing circumstantial evidence are inapplicable. I further find that the issue of insanity arising out of drunkenness does not arise in this case.

48. I find as incredible the evidence of the accused that he was so drunk that he did not know what happened after returning from Olenguruone centre to his house. I saw the accused testify and he struck me as an intelligent but an untruthful witness. The accused took refuge in drunkenness to tell lies to the court. He accused the wife of infidelity and told her that the deceased was not his blood child. He suspected Mzee Lormunye, Mogaka and Mavina as the biological fathers of the deceased child.

49. In the light of the foregoing prosecution and defence evidence, I find as a fact that it was the accused who caused the death of his deceased daughter.

### **Issue 2**

50. I find from the evidence of the wife of the accused that whenever the accused was drunk, he used to quarrel and fight with her. Reconciliation between her and the accused by chief Jonathan Sadera was not successful.

51. I find as credible and cogent the following evidence of Pw 4. She had left the deceased child with the accused. I also find that Pw 4, her sister in law and her mother in law (Julia Sadera) went to the house of the accused. Upon arrival at gate of the house of the accused, they realized that the accused was furious.

52. I further find as credible the following evidence of Pw 4. Her mother in law successfully persuaded her son, IS to accompany them to the house of the accused. Upon arrival at the house of the accused, the accused became more furious. They entered the house and found the accused cooking ugali. The child was lying down crying in anger. The accused took a panga and ordered IS and M to lie down. He wanted to cut them. IS tried to talk him out not to cut the children. Following advice from her mother in law, Pw 4 escaped to the house of Stephen Sadera (Pw 5).

53. It is clear from the foregoing evidence that the accused was drunk. The issue is whether the drunkenness negated the *mens rea*, that is an essential element in a charge of murder. In other words, the question that arises is whether the prosecution have proved *mens rea* on the part of the accused. I find that there is credible evidence that whenever the accused was drunk, he used to quarrel and fight with his wife. This quarrelling and fighting occurred frequently. The accused struck the deceased child while in the arms of her mother. As a result, the deceased sustained injuries in the head that led to her death.

54. When the mother returned to the scene of crime, they found the child lying down crying in anger. As at that time the accused took a panga to cut his other two children, but was talked out from doing so. The prosecution is required to prove malice aforethought in terms of section 206 of the Penal Code. I find as persuasive the decision of the court in *Roba Galina Wario v. Republic (2015) eKLR*, in respect of proof of malice aforethought, in which the court pronounced itself as follows: “for the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice

*aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”*

55. The prosecution has not proved that the accused caused the death of the deceased intentionally; since quarrelling and fighting between the accused and the mother of the deceased (PW 4) was frequent. It is possible that the accused caused the death of the deceased during one of those frequent quarrelling and fighting between the accused and PW 4. In the circumstances, I find that the prosecution has not proved *mens rea* in terms of section 206 of the Penal Code. It therefore follows that the evidence disclosed in manslaughter and not murder.

### **Issue 3**

56. In the premises, I hereby find the accused guilty of manslaughter and is hereby convicted accordingly in terms of section 202 as read with section 205 of the Penal Code.

Judgment signed, dated and delivered at Narok this 20<sup>th</sup> day of July, 2020 through video link in the presence of Mr. Karanja for the Republic and Ms. Saika for the accused.

**J. M. BWONWONG’A.**

**J U D G E**

**20/07/2020**