



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 23 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENARD OKUMU OLALO.....ACCUSED**

**JUDGMENT**

1. Benard Okumu Olalo is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 2<sup>nd</sup> day of September 2017, at Namunyuenda village, in Samia sub County of Busia County, murdered Whitney Sirale.
3. It was contended by the prosecution that the deceased was called by her grandmother to go and take gruel. When she was going, the accused slapped her and asked her how many times she was going to feed. When the mother of the child screamed, he took both mother and child to their bedroom and continued to beat them. Eventually the child succumbed and died.
4. In his defence, the accused, contended that he returned home and found his wife beating the deceased on allegations of going to eat from his mother's house, which she disapproved. He took the child from her. His wife poured dirty water on him and when he followed her into the house, he found their daughter lying down. His wife told him that she was hit by the door. He therefore denied any involvement in the offence.
5. The issues for determination are:
  - a) How did the deceased meet her death;
  - b) Whether the accused was involved in the death or not; and
  - c) Whether the offence of murder was proved against him.
6. There are two competing versions on how the deceased met her death. The prosecution has adduced evidence which attribute the death of the deceased to the willful beating by the accused.
7. Zuhura Highten Ringo (PW5) the mother of the child and the wife of the accused testified that at about 9 a.m. on 2<sup>nd</sup> September 2017, the mother of the accused called the deceased to go to her house to take gruel. When she started going, the accused slapped her and asked her how many times she was going to eat. The child fell on the chair inside the house. This witness screamed and the accused got hold of her and the child and took them to their bedroom. In the bedroom he beat them up to 2 p.m. She gave a graphical narration of how the accused beat the deceased until the child died.
8. The version by the accused was that after his wife, Zuhura Highten Ringo (PW5), had poured dirty water on him, she ran away into their house. He pursued her there and found her standing and Whitney, the deceased had fallen down. She told him that the deceased had been hit by the door as she was entering into the house.
9. During cross examination, the mother of the deceased was not confronted with this version of events, if indeed this is what had transpired. His contention is clearly an afterthought. Secondly, the medical evidence does not support the contention by the defence. This is what doctor Angira Stephen (PW3) testified about the injuries observed:
  - a) Cut wounds on the forehead;

- b) Bruise on the right parietal scalp;
- c) Cut wounds on the left thigh anteriorly in a streak fashion with the largest being 2 cm in greatest dimension;
- d) Subdural hematoma at the calvarium, extending to both right and left parietal regions;
- e) Large subdural hematoma more on the left brain extending to the occipital region.

The version of the accused does not account for the injuries sustained by the deceased.

10. My finding therefore is that the incident that led to the death of the deceased occurred in the manner testified to by the prosecution witnesses.
11. Though the accused wanted the court to believe that it was Zuhura Highten Ringo (PW5) who caused the death of the deceased, the evidence on record is to the effect that he was indeed the cause.
12. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

**The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).**

13. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

**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.**

14. The evidence of Zuhura Highten Ringo (PW5) is very detailed. It painted a very vivid account of the brutality the deceased received in the hands of the accused from about 9 a.m. to about 2 p.m. Section 206 (b) of the Penal Code was therefore satisfied.

15. The prosecution has therefore proved the offence of murder contrary to section 204 of the Penal Code. I accordingly find him guilty and convict him for the offence.

**DELIVERED and SIGNED at BUSIA this 8<sup>th</sup> day of October, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**