



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 59 OF 2014**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**JLA..... ACCUSED**

**J U D G M E N T**

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the penal code**. The particulars of the offence was that on the **5<sup>th</sup> day of December 2014 within Trans Nzoia County murdered JMO**. The accused denied the offence. The prosecution called several witnesses to prove its case whose evidence can be summarised as follows.

**PW1 Richard Obino Murisho** testified that he was in his house at around 10.00 pm on 4<sup>th</sup> December, 2014 when he was called by Benard and others and told that the accused had been assaulting his child from 4.00 pm. They went to his house and found the child's hands tied on the back and the accused together with his wife were sitted. There was a tin lamp which was a source of light. He accused the child of stealing money from his wife who was his step mother. Efforts to have him stop were fruitless and he became violent. The following day he met the accused going to buy "rob" and he told him that the child was doing well. That night they went to report the incident at Geta police post. He later heard that the child had died. He said that he was distantly related to the accused.

2. **PW2 Bernard Gesura Biraui** is in charge of "Nyumba kumi". He said that he knew the accused as well as his family. He was called on 4<sup>th</sup> December, 2014 at 10.00 pm and told that the accused was beating the deceased. He went with the rest and found the child assaulted and sitting on saw dust. His hands had been tied on the back. The accused was using a wooden bar. They then decided to report the matter at Geta police post. He heard the following day that the child had died.

3. **PW3 RMA** is the accused estranged wife and the mother to the deceased. She stays in Molo and was called after the fact. She witnessed the postmortem.

4. **PW4 Dr. Faustin Shitote** from Kitale County hospital carried out postmortem exercise and established the cause of death as severe internal bleeding on the head and chest secondary to trauma with blunt object.

5. **PW5 CPL Evans Barasa** from Geta police post arrested the accused after being tipped by the Assistant Chief. The accused was arrested at Kachibora road in his probox. The witness knew the accused who was his friend. He escorted him to Cherengany police station.

6. **PW6 ZNM** is an in law to the accused. She said that when she heard noise from the accused place at night (10.00pm) she went to get Benard Gesura. They went with him to Geta police post.

7. When placed on his defence, the accused gave unsworn defence and stated that he was a businessman with 3 wives. He said that he had withdrawn kshs 100,000/= and that Kshs 10,000/= was stolen from his pocket. He said that he called PW1, PW2 and PW4 and carried out a search and found Kshs 3000/= from the deceased. On 5/12/2014 he was going to his business when he was arrested and accused of escaping after the deceased was found dead. He said that key witnesses including the Assistant Chief were not called. He generally denied the offence.

**Analysis and Determination**

8. The court has perused the proceedings herein as well as the exhibits and the submissions by the prosecution. Apparently there were no submissions by the defence counsel.

9. The relationship between the deceased and the accused was that of father and son. The deceased was a son from the accused other marriage. They had separated with his mother apparently. He was staying with his step mother.

10. On the fateful night PW1, PW2 and PW4 came to the scene. They have described vividly what they saw. The deceased was naked with only a green underwear. His hands were tied from the back. The accused and his wife were sitted. The deceased was sitted on the saw dust. The accused had a wooden bar (mbao) which he used to assault the deceased.

11. When the witnesses attempted to stop him he became violent. They then decided to report the matter at the local Geta police post.

12. The following day it was pronounced that the child had died. The postmortem report clearly showed that the injuries sustained by the deceased were consistent with use of a blunt object. The weapon was however not produced.

13. Can it be said that the child sustained injuries elsewhere? The accused line of evidence does not offer any assistance to his defence. Although there was no dispute that he was related to some of the witnesses, I do not think that there was any malice on the part of the said witnesses. He was actually found on the act. He was found assaulting the child.

14. The said assault was based on the reason that he had stolen money from his step mother who was equally a “passive” participant in the assault. I do not see any malice on the part of the prosecution witnesses especially those who after failing to stop the beating went to report at the police post. There was no other reason why they went to report that night.

15. The deceased death was as a consequence of the accused action of disciplining the deceased. In my view the same was excess in the circumstances. He ought to have known the consequences of his actions, namely that it could fatally injure the deceased.

16. Without considering other merited evidence on record, I am satisfied that the accused in an attempt to discipline the deceased for allegedly stealing from his step mother acted excessively. The discipline if any was not commensurate.

17. In a nutshell the prosecution has established beyond any shadow of doubt that the accused fatally wounded the deceased. His unsworn defence was of no probative value.

18. He is hereby found guilty under the provisions of Section 203 of the Penal Code.

**Delivered, signed and dated at Kitale this 11<sup>th</sup> day of February, 2019.**

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**H.K. CHEMITEI**

**JUDGE**

**11/2/19**

**In the presence:-**

**Mr Omoria for the State**

**Mr. Nyamu holding brief for Mr Ndarwa for Accused.**

**Accused - present**

**Court Assistant – Kirong**

**Judgment read in open court.**