REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 50 OF 2017

LESIIT,J.

REPUBLIC.....PROSECUTION

-versus-

SKO.....ACCUSED

JUDGMENT

1. The accused person SKO is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of offence are:

"That on the 31st October, 2017, in Embakasi East Sub-County, within Nairobi County, murdered DSA."

2. The prosecution called a total of eight (8) witnesses. The brief facts of the case are that the deceased was a daughter of PW2, who was an elder brother of PW1. PW1 was living with the accused as his wife and both had an issue from their union, one GGK. PW1 stated that in August, 2017, herself and her husband went to her paternal home so that the accused could pay her dowry. That is where they met PW2 father of D, the deceased in this case. PW2 had separated with his wife and mother of the deceased. After a family discussion, it was agreed that PW1 should take the deceased to live with her in Nairobi for a while as her parents sorted out their issues.

3. PW1, the accused and their daughter, G, took D to their home in Nairobi to live with her. They even enrolled her in Baby class in [particulars withheld] at Umoja Innercore. The deceased was 4 years old by then, while G was 3 years old. On 31st October, 2017, as was usual, the accused was left at home with the children, the deceased and G. PW1 went to do her casual work being a Saturday. When she returned home that afternoon at 4pm, PW1 found G outside the house alone. That is when the accused called her and summoned her to Mama Lucy Hospital saying that D was in a critical condition. On reaching the hospital the accused told her that the deceased had died at the hospital.

4. PW6 the doctor in charge at Mama Lucy Hospital testified that the deceased was dead by the time she was brought to the hospital on 31st October, 2017 at 3pm. He testified that he made a report to the Directorate Criminal Investigation about the matter on the same day.

5. A post mortem examination done on the body of the deceased on 3rd November, 2017, revealed that the deceased had suffered old bruises and abrasions all over the body, and severe head injuries which were fresh. As a result of his examination, PW7 stated that he formed the opinion that the cause of death was severe head injuries due to blunt force trauma. He stated that the significant findings of healing bruises and abrasions all over the body were consistent with assault. He noted that the recent injuries which caused death were concentrated on the head and the brain. The report was P. Exh 4.

6. PW7 produced a P3 form dated 6th November, 2017 by the consent of the parties. It was filled by Dr. Shako after she examined one, SKO, the accused in this case. The doctor wrote that after her examination of the accused, she was of the opinion that he was fit to stand trial.

7. The accused was placed on his defence and he gave a sworn defence. He said that he was married to his wife, PW1 and had two (2) children. He said he was a primary school teacher. He said that he used to live with his wife, their daughter, G, and DS, the child to his wife's brother. He said that on the fateful day, he was in the house with G and D and at around 2.30 p.m. while he was washing clothes in the bathroom which was outside, next to the house, his daughter G, went to him and told him that D had fallen on the ground from the seat where she was lying. He said that he eventually went to the house and

found the deceased on the floor which was made of cement, complaining of not feeling well. He said that she was bleeding from the mouth and crying with pain. He wiped her mouth and put her on the sofa set. He then called PW4, his Pastor, who went for him in his vehicle and took him and the deceased to hospital. She was declared dead at the Mama Lucy Hospital.

8. The Defence filed written submissions dated 6th December, 2018. In those submissions, the defence urged that there were issues that were not in dispute which were:

> **i. That D died on 31st October, 2017, after sustaining injuries.**
>
> **ii. The injuries were sustained while in the house of the accused and that the only other person at home at the material time apart from the accused was the three (3) year old daughter of the accused, GGK.**
>
> **iii. When D sustained the said injuries, the accused called his pastor to take the child to the hospital where she was pronounced dead on arrival.**

9. Mr. Wamwayi for the accused urged that on the fateful day, the deceased had woken up with a headache and had been having a congested chest. Counsel urged the court to find that it was instructive that the prosecution did not produce results of the sample tests done on the blood, urine, liver, stomach and kidney of the deceased.

10. The defence urged that the conduct of the accused was not consistent with a guilty mind as he immediately called his pastor and rushed the deceased to hospital soon after he found out the deceased had fallen to the floor. It was urged further that the child was enrolled in a school and was also taken to attend church together with their daughter G, which counsel urged confirmed that the accused loved the deceased.

11. Counsel submitted that the case rests entirely on circumstantial evidence, and urged that the issues for determination was whether the accused inflicted the injuries on the deceased and whether he had malice aforethought.

12. Mr. Wamwayi cited the case of **Republic vs Tubere s/o Ochen (1945)12 EACA 63** which was cited with approval in the case of **Republic vs Stephen Sila Wambua Matheka, Kajiado HCCR Case No. 10 of 2015**. The **Tubere case**, supra was not supplied. I am therefore unable to know for what proposition it was cited. In the **Matheka case**, supra the learned judge cited **Tubere case**, supra and observed that the court in the cited case held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

13. Mr. Wamwayi submitted that the prosecution did not establish beyond reasonable doubt that the circumstances in this case point irresistibly to the guilt of the accused and relied on the case of **Republic vs Michael Muriuki Munyori, Nyeri HCCR Case No. 71 of 2010,** which cited with approval the case of **Sawe vs Republic 2003 Klr 364** where the Court of Appeal observed:

> ***"In order to justify a conviction 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."***

14. Mr. Otieno prosecuted this case on behalf of the Prosecution. He filed written submissions dated 28th November, 2018. Learned Prosecution Counsel urged the court to reject the accused defence that the child fell from the sofa set and find him guilty for the offence of murder for inflicting injuries upon the deceased subject. Learned Prosecution Counsel urged that the prosecution had made out a *prima facie* case against the accused person on three (3) issues which are **whether there was death; whether death was occasioned by unlawful act or omission on the part of the accused; and, whether the act was actuated by malice aforethought.**

15. On the first issue, Mr. Otieno urged that there was proof of death and that the deceased death was not due to natural causes and neither was it accidental. Counsel urged that the post mortem report by PW7, Dr. Muturi concluded that the deceased died as a result of severe head injury due to blunt force trauma. The Prosecution urged that the report was corroborated by in the evidence of PW2, LO, father to the deceased in this case, who identified the body of the deceased at the hospital and also saw the injuries that were spread all over her body.

16. The Prosecution submitted that it was the accused person who caused the fatal injuries on the deceased and that the chronology of events that led to this conclusion was the evidence of PW1. PW1, he urged said that she left the deceased and their daughter, G, under the care of the accused and as such, the accused assumed the role of a guardian who had the responsibility to protect the deceased subject from both internal and external harm and also protect her from any danger or self-inflicted injury/harm on herself.

17. Mr. Otieno submitted that PW6, Dr. Musa Mohamed of Mama Lucy Hospital, testified that the deceased was already dead by the time she was taken to the hospital. That fact was established through P. exh.1 which was produced in court. In addition, it was the Prosecution's contention that the deceased death was not consistent with a fall as confirmed by the evidence of PW7, whose examination of the deceased body revealed that it had significant bruises and abrasions which were consistent with assault. Counsel urged that PW7 also noted the presence of old and fresh/recent injuries; and noted that the recent injuries were concentrated on the head. Counsel urged that the pathologist testified that the amount of bleeding on the brain was quite massive and according to him, even if the child fell from a height as alleged by the accused person, the injury or injuries

caused would only have been on one side of the deceased head, and not on multiple areas of the head as was the case.

18. The Learned Prosecution Counsel submitted that the accused himself admitted in his defence, that he had beaten the child two (2) weeks prior to the incident and even though he estimated the height of the sofa set from which the child fell to be 1.5 ft, that cannot rebut the fact that the child was tortured as evidenced from the post mortem report P.exh. 4, which, he urged was an overwhelming proof that the cause of death was consistent with assault.

19. Mr. Otieno submitted that the cause of death was therefore unlawful and thus constituted murder and urged that this was consistent with the legal principle enunciated in the case of **Republic vs Gusambizi (1948) EACA 65**, that all homicides are presumed unlawful unless excused by law. The prosecution also relied on a similar case of **HCCRC No. 108 of Republic vs Eunice Wambui Njeri,** where the court found the accused person guilty for the offence of murder for the unlawful act on the part of the accused person and her failure to give due care to the deceased subject who was under her care.

20. Mr. Otieno, learned Prosecution counsel submitted that the extent of grievous bodily harm caused on the deceased body by the accused clearly falls within section **206(b)** of the **Penal Code** and that it shows that the accused intended to cause bodily harm or death to the deceased and that his claims that he used slippers to discipline her is itself incompatible with the severe injuries caused as recorded in the post mortem report. Counsel urged that the report further shows that the injuries were inflicted at different times proving malice aforethought. Further, that it was immaterial that the accused took the deceased to hospital as that was only to conceal her death.

21. I have considered the evidence adduced in this case by both the prosecution and the defence, and have also considered the submissions filed by both the prosecution and the defence. Having considered the same, I find that there are issues which are not in dispute.

i. It is not in dispute that the accused and PW1 took the deceased, D, the deceased daughter of PW2, from him in Bondo to stay with them in Nairobi.

ii. It is not in dispute that the deceased died on the 31st October, 2017, and was received dead at Mama Lucy Hospital where the accused and PW4 took her.

iii. It is not in dispute that the deceased sustained injuries at the accused house while at home with the accused and his daughter G.

22. Having settled the issues not in dispute, the following are the issues I find to be in dispute.

i. Whether the deceased death was occasioned by unlawful act or omission on the part of the accused.

ii. Whether the prosecution has established that at the time he committed the act or omission the accused was actuated by malice aforethought.

iii. Whether the prosecution has proved a motive for the attack.

iv. Whether the accused defence can stand.

23. I will begin with the definition of murder under **section 203** of the **Penal Code.** In order to sustain a conviction for the offence charged, the prosecution must prove beyond reasonable doubt the following ingredients of the offence:

i. That the deceased died.

ii. That the cause of the deceased death was an unlawful act or omission by the accused.

iii. That at the time the unlawful act or omission was committed by the accused he was motivated by malice aforethought.

24. What constitutes malice aforethought is set out under section 206 of the Penal Code as follows:

"206 (a) An intention to cause the death of another.

(b) An intention to cause grievous harm to another.

(c) Knowledge that the act of omission causing death will probably cause death or grievous harm to some person, whether that person is the one killed or not, accompanied by indifference whether death or grievous harm occurs or not or by a wish that it may not be caused.

(d) An intent to commit a felony;

(e) Intention to facilitate the escape from custody of a person who has committed a felony."

25. **On the first issue of whether the deceased death was occasioned by unlawful act or omission on the part of the accused**. In the case of **Nzuki vs Rep 1993 KLR 171,** the learned judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

> **"1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.**
>
> **2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions:**
>
> > **(a) To cause death;**
> >
> > **(b) Cause grievous bodily harm; and**
> >
> > **(c) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits these acts deliberately.**
>
> **3. Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.**
>
> **4. …**
>
> **5. ....**"

26. The burden of proof is upon the prosecution to prove the case against the accused beyond any reasonable doubt and the accused bears no responsibility to prove his innocence. Having said that, when a person kills another unlawfully with an intention to kill or cause grievous harm, the objective element of the crime, that is, ***actus reus***, in other terms also known as the ***"guilty act"*** needs to be proved beyond reasonable doubt and this, in combination with ***mens rea***, in other terms also known as ***"guilty mind or malice aforethought"***, constitutes criminal liability. As a general rule, someone who acted without ***mens rea*** or ***mental fault*** is not liable in criminal law, thus the Latin phrase ***"actus reus non facit reum nisi mens sit rea"***, ***"the act is not culpable unless the mind is guilty"***. There must be both ***actus reus*** and ***mens rea*** for a defendant to be guilty of a crime.

27. The Irish Court of Criminal Appeal in the case of **People vs Douglas [1985] 1L-R.M 25** stated as follows with regard to ***"mens rea/malice aforethought"***:

> ***"Evidence of the fact that a reasonable man would have foreseen that the natural and probable consequences of the acts of an accused was to cause death and evidence of the fact that the accused was reckless as to whether his acts would cause death or not is evidence from which an inference of intent to cause death may or should be drawn, but the court must consider whether either or both of these facts do establish beyond a reasonable doubt an actual intention to cause death."***

28. In **Stanton vs the Queen [2003] 77 ALJR 1151** the Australian Court of Appeal discussed how intention may be inferred from the actions of the accused and stated thus:

> ***"In the circumstances of the present case, bearing in mind the nature of the weapon involved, and the range from which it was discharged, if the appellant intended to shoot the victim, then his intent was obviously to kill, rather than merely to cause grievous bodily harm. Furthermore, although defence counsel at trial put an argument to the effect that the shooting was accidental, in the sense that it was not a willed act, the argument had nothing to commend it. The appellant's best hope was that the jury might regard the case as one of manslaughter based upon the view that he was menacing his wife with a loaded shot gun but did not actually intend to shoot her."***

29. The Australian Court of Appeal continued to state that:

> ***"There was abundant evidence on which a jury could infer an intent to kill. It appeared that the appellant had endeavoured to conceal his arrival at the house. He hired a car for the occasion, and parked it in a location where it could not be seen from the house. He walked up to the house unannounced, apparently surprising his wife before she had a chance to flee. He had equipped himself with a shotgun and ammunition. The evidence was that the shotgun would only discharge when placed in a fully cocked position, which involved exerting approximately three kilograms of pressure. The shotgun was discharged on a level parallel to the floor, and at a very close range to the victim. There was forensic evidence to the effect that the victim had her left forearm in front of her chest in a protective gesture at the time she sustained the fatal wounds. After the appellant shot the victim, he picked up the spent cartridge shell, placed it in his pocket, and walked out of the premises. He did not attempt to assist the victim although she did not die immediately."***

30. The duty has been squarely placed upon the courts to determine malice aforethought by the evidence given in court. In

Kenya, our superior courts have also grappled with the same issue. In **Republic vs Daniel Anyango Omoyo [2015] eKLR**, the High Court, in dealing with the circumstances which constitute malice aforethought under **section 206** of the **Penal Code** held that:

> ***"It is to be noted that once the prosecution proves one or a combination of the above circumstances (under section 206 of the Penal Code), malice aforethought, will be deemed to have been established and in such a situation, there would be no escape route for the accused person."***

31. In **Republic vs Mazabia hin Mkumi [1941] 8 EACA 85**, the appellant killed his friend by shooting him with an arrow at close range. There was no evidence of motive, provocation or insanity. The court upheld the charge of murder.

32. In the case of **Karaki & 3 Others vs Republic [1991] KLR 622**, the Court of Appeal held, inter alia that malice aforethought can be deemed to exist from the nature of injuries caused on the deceased and the weapons used.

33. In another case of **Republic vs Tubere S/O Ochen [1945] 12 EACA 63**, which was cited and relied upon by the defence, the Court of Appeal of Eastern Africa stated as follows:

> ***"That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used and the part of the body injured and the conduct of the accused before, during and after the attack."***

34. The defence cited the case of **Ogelo vs Republic [2004] 2 KLR**, where the Appellant in the case chased the deceased and another person, caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wound. The court held that by dint of **section 206 (1)** of the **Penal Code**, an intention to cause death or grievous harm (malice aforethought) was deemed to have been established by the prosecution evidence presented.

35. The other case the defence relied upon with regard to conduct was the case of **Nzuki vs Republic [1993] KLR 191** in which the ingredients of murder were set out as;

> **1) The death of the deceased.**
>
> **2) That the death of the deceased was as a result of unlawful act or omission.**
>
> **3) That the person who killed the deceased did so with malice aforethought.**
>
> **4) That the person accused before court either directly or indirectly participated in murdering the deceased.**

36. The death of the deceased is not in dispute and both the prosecution and the defence are in agreement with the fact that the deceased died. What caused the injuries sustained by the deceased and which led to her death, is the bone of contention. There was no eye witness account of how the injuries on the deceased were caused. Indeed, the investigating officer of this case did not recover any weapon that may have been used to cause the injuries the deceased suffered from. The only evidence we have is that of the pathologist to the effect that the injuries were caused by a blunt force.

37. What this means is that the court needs to determine whether or not both ***actus reus*** and ***mens rea*** which I have already described herein above, have been established.

38. The evidence of the events that took place on the 31st October, 2017 was that the accused was the only adult at the scene, except his daughter who was 3 years old at the time. The deceased was four years old. The accused said that while he was washing clothes in the bathroom which was outside the house, his daughter G, went to him and told him that D had fallen on the ground from the seat where she was lying. He said that he told his daughter to lift D back to the seat. The accused said that he thought that it was their usual game even though he knew that D was sick. G returned back and told him that D had fallen down again. He eventually went to the house and found the deceased on the floor, which was made of cement. He said that the deceased was complaining of not feeling well. He said that she was bleeding from the mouth and crying of pain. The accused said that he wiped her mouth and put her on the sofa set. He then called PW4, his Pastor, who went for him in his vehicle and took him and the deceased to hospital. The deceased was pronounced dead at the Mama Lucy Hospital.

39. PW1 said that she received a call from her husband asking her to proceed to Mama Lucy Hospital because the deceased was critically sick. She proceeded there to find the accused and PW4 who told her that the deceased had died. PW4 on his part said that that afternoon he received a call from the accused to proceed to his home and pick him and the deceased as she required urgent treatment. PW4 stated that when he went to accused home, the accused carried the child to the vehicle and he sped to the hospital. At the hospital they were told that the child was already dead.

40. The defence has urged the court to find that the accused conduct of calling PW4 to rush the deceased to hospital was consistent with the conduct of a person with an innocent mind and with no ill motive.

41. PW1 testified to an incident two weeks before the instant one. She stated that on 21st October, 2017, after she had returned home from work, she found that the deceased had been beaten on the buttocks and thighs and had cane marks. PW1 testified that she massaged her with warm water, after which the deceased told her that it was the accused who had beaten her. Further,

PW4, the Pastor, testified that on 22nd October, 2017, PW1 called him after the church service and requested him to go to their house as she had a small problem. He said that upon reaching there, PW1 explained to him how she had found injuries on the child the previous day and upon asking her husband (the accused) about the same, he denied having caused the injury.

42. It was PW4's testimony that the accused eventually admitted to having beaten the child but claimed that he did so lightly. PW4 said that he counseled PW1 and the accused on how to take care of children and to only inflict light punishment in case of a mistake but not hurt them. The evidence of PW1 and PW4 is in conflict with the accused defence in court during cross examination that it was not true that the pastor and his wife confronted him about disciplining the deceased. However, during re-examination, he admitted having been cautioned by his pastor about injuring the child.

43. The accused, in his defence admitted that he beat the deceased two weeks prior to the material time. However, he claimed that he only beat the child's thighs with slippers, and that that could not have caused injuries to her buttocks or abdomen or back. I find it hard to believe that the accused beat the child lightly with slippers as claimed. PW1 testified that she saw cane like marks on the child's buttocks and thighs and further, that the injuries were swollen and she had to massage them with warm water. Those could not have been caused by light discipline or with the use of slippers as the accused claimed. The evidence of PW1 is clear that the accused had used a cane to beat the deceased. Furthermore, even though he said he only beat the deceased on her thighs, there were injuries found on the buttocks, back and abdomen of the deceased during post mortem, which according to the record in the post mortem report, were healing, meaning they were not fresh.

44. I am aware that the incident of which PW1 and PW4 talked about where the deceased had severe cane marks on her thighs and buttocks was two weeks before the material day. The incident has relevance to the case as it shows that the accused had severely beaten the deceased before the instant incident as to cause concern not only to his wife, PW1, but also his Pastor, PW4.

45. It also shows a pattern, that the action of punishing or disciplining the child was administered on the same child, both severely and severally by the accused before the incident in issue. The findings of PW7 the pathologist at post mortem puts this into perspective. He found that the deceased had several injuries of varying ages which he classified as fresh, recent and old injuries. I find that the evidence of the facts of the earlier beatings of the deceased are relevant facts and are admissible under **section 6** of the **Evidence Act.** They form part of the *res gestae* under that section of the **Evidence Act.** This repeated action on the accused part proves a deliberate act intended to inflict pain on the child. And for the reason he was even warned against it by his Pastor but he still chose to repeat is proof he was intentional.

46. I find that the prosecution has shown that the accused was at home with the deceased and his daughter when the deceased was injured. The prosecution has established the fact that the incident of 31st was not an isolated incident but was a part of a series of similar ones where the deceased suffered beatings at the hands of the accused person leading to the ones which caused death. The repeated beatings of the deceased, and the severe blunt trauma to the head to which the deceased succume

47. **As to the motive**, there was no direct link of a motive. However, PW4 did mention that before D's issue, the accused had reported his wife to him for denying his brother (accused brother) permission to live with them. PW4 said that at the time, he had to talk to both of them and counsel them after which the issue was resolved. That was in 2015, two years earlier. I find the lapse of time long and therefore remote that the behavior of PW1 towards accused brother could have been the reason the accused treated the deceased the way he did. No motive has been proved for this attack. It is however not necessary to prove motive in this case.

48. The defence stated that the accused conduct of calling PW4 to rush the deceased to hospital after he found out that the deceased had fallen, is not consistent with guilt. The defence contends that the accused loved the child since they had enrolled the child to school and used to take her with them to church. Conduct has to be considered holistically. The entire acts of the accused must be considered together in order to form a holistic view of the facts in order to reach a conclusive finding.

49. The defence raised issue with failure by the prosecution to avail the results of analysis of samples taken by the pathologist, which samples were of blood, urine, liver, stomach and kidney and a vaginal swab. Regarding the samples, PW7 the pathologist testified that he took the samples from the deceased in order to assist investigators establish whether any medication had been administered to the deceased and also establish whether the deceased had been defiled.

50. The Investigating Officer did not refer to the samples, neither did he mention having taken any samples for analysis. I find that even if the samples were analyzed and results given thereof, they could not change the finding on the cause of death of the deceased. The results of the post mortem on the cause of death was conclusive. The only results awaited could only add to the findings made in the sense of showing whether any medication had been administered on the deceased and whether she had been defiled.

51. Much as the defence submitted that it was instructive that the prosecution did not produce the results of the analysis of samples taken, I find that the failure to avail the results of analyses if any had no effect on the pathologists finding on the cause of cause of death of the deceased.

52. Regarding the defence submission that this case is based on circumstantial evidence and that the prosecution did not establish beyond reasonable doubt that the circumstances in this case point irresistibly to the guilt of the accused. The defence relied on the case of **Republic vs Michael Muriuki Munyori, HCCR Case No. 71 of 2010 at Nyeri at page 2 and 3** which cited with approval the case of **Sawe vs Republic 2003 Klr 364** where the Court of Appeal observed:

> **"In order to justify a conviction 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."

53. It is true that there was no eye witness of the attack on the deceased. The prosecution is relying on circumstantial evidence. The leading authorities that lay the principles to guide the courts when the evidence relied upon by the prosecution is circumstantial in nature include: **Republic vs Kipkering Arap Koske & Another 16 EACA 135, Simon Musoke vs Republic [1958] EA 715, Abanga alias Onyango vs Republic Cr. Appeal No. 32 of 1990 UR.**

54. In reference to the above authorities, in order to rely on circumstantial evidence the facts relied upon must satisfy the following tests:

" 1). ***The circumstances from which an inference of guilt is sought to be drawn, must cogently and firmly established.***

2) ***Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.***

3) ***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."***

55. In the present case, the prosecution relies on the fact that the accused was at home alone with the deceased and his child of 3 years when the injury causing death was inflicted. The prosecution relies on the doctor's finding that the injuries found on the deceased were in three categories: fresh, recent and old wounds. The injuries causing death were found concentrated on the head on the frontal, left parietal and back of the head. The prosecution relies on the doctor's findings that the injuries causing death were the recent injuries, were massive and severe causing bleeding over the skull and brain.

56. The defence argued that the said recent injuries were caused by a fall. The question was put to PW7, the pathologist who said it was not possible for reason the injuries were spread over a wide are of the head, that is the front, side and back. The doctor testified that if the injury was caused by a fall, the injury could have affected only one side of the head and could not could have involved the kind of injuries found on the deceased.

57. The defence had a statutory burden to give an explanation of how the injuries suffered by the deceased were caused for two reasons. First for the reason, which the accused admits the deceased was left whole and well in is company and the next time she was seen again she was dead. The accused having been with her when she suffered the fatal injuries should explain how they were inflicted. Secondly, the law under **sections 111(1)** and **119** of the **Evidence Act** places a rebuttal presumption, and therefore a duty to give an explanation to rebut it, upon the accused for having knowledge of facts concerning the deceased death which are in the accused own interest to explain.

58. **Section 111(1)** of the **Evidence Act** provides:

"**111.**

Burden on accused in certain cases

(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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

59. Section 119 of the same Act provides thus:

"**119.**

Presumption of likely facts

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

60. In the instant case the accused was with the deceased. She had several injuries of varying ages but fresh ones to the head. The fresh ones caused death. They were inflicted on the material day the deceased was injured while with the accused as the only adult in the house. In the circumstances it behooves the accused to give an explanation of how those injuries were inflicted. The accused gives an explanation that the injuries were caused by a fall. The doctor has discounted that on the basis of the fact the injuries were widespread on many parts of the head and could not have been caused by a fall. He said that the injuries were caused by a blunt force trauma.

61. The post mortem report showed that the cause of death was blunt force trauma to the head which injuries were fresh and were not consistent with a fall. It was further explained by PW7 that even if the deceased had a convulsion which could trigger bleeding in the brain and the tongue bite, it could not have been to the extent that it was, given that the size of the haematoma was 10x7x1cm, which was basically the size of the collection of blood, about 100mls. The amount of bleeding on the brain, according to the doctor, was quite significant and he said that if indeed the deceased fell, the injuries caused could have been on one side of the head, but as it was, the internal injuries were extensive and were concentrated on the head and brain and these were what caused the death of the deceased.

62. Other significant findings were bruises and abrasions which were healing and therefore not fresh and were consistent with assault. The combination of the injuries found on the deceased body clearly shows that she was assaulted both severely and severally. The accused urged that it was an act of punishing or disciplining the deceased.

63. I find that the injuries on the deceased were caused by a deliberate act intended to inflict pain on the child. The accused admits he was even warned against by his Pastor to be gentle in his discipline of the deceased prior to the incident.

64. The fact the accused still chose to repeat severe punishment or discipline of the deceased child of four years shows he was not disciplining the child. His actions were meant to inflict injury and pain to the child, and from the injuries found on the deceased, it was over a period of time.

65. Given the nature and extent of the injuries found on the deceased and the part of the body where the injuries were found, I find that the same are indicative of malice aforethought.

66. I have examined and analysed the evidence adduced by both sides as far as the injuries are concerned. I find that the doctor's finding is reasonable. The injuries could not have been caused by a fall. There is only one explanation of how they were caused, which is blunt force trauma. The weapon used was never recovered. It is however clear, and the facts points irresistibly to that, that it is the accused who caused the injuries that led to the deceased death, and no one else. His defence is a blatant lie, in all the circumstances of the case. Accordingly, I reject the accused defence.

67. I find that the evidence given by the prosecution satisfactorily and firmly establishes the facts upon which the inference of guilt is sought to be drawn from. I am satisfied that the inculpatory facts given and explained by various witnesses especially by PW1, PW4, PW6 and PW7, point unerringly towards the guilt of the accused. I am also satisfied that the facts and circumstances taken cumulatively forms 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 no one else.

68. In conclusion, I am satisfied that the prosecution has proved all the ingredients of murder as required by law and as such, proven their case beyond reasonable doubt against the accused person.

69. I find that the prosecution has proved as against the accused, the charge of murder contrary to **section 203** of the **Penal Code** beyond any reasonable doubt. I accordingly reject his defence, find him guilty as charged under section **322** of the **Criminal Procedure Code** and convict him accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2019.

LESIIT, J.

JUDGE