



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO.21 OF 2017 (MURDER)

REPUBLIC.....PROSECUTION

-VERSUS-

JMA.....ACCUSED

JUDGMENT

1. JMA hereinafter referred to as 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 are that, on the 5th day of October 2017 within Kisii County the accused person murdered YN.

2. The accused pleaded not guilty. The prosecution called 7 witnesses.

3. Pw1 Alfred Ongabi Nyarando a village elder testified that on 5/10/2017 he was at my farm plucking tea when the accused's wife L asked him to accompany her to home so that she could ask the accused, his mother and father to give her child so that she could go back to her parent's home. Whilst at his home after a short while he heard screams emanating from the accused's home which is not very far from his home. He went to the said home and found a child of about 3-4 years dead next to the road. At the scene he found the accused's wife (L) his mother and father. L was crying saying her child had been strangled. There was a lot of confusion with many people wailing. Nobody could tell him exactly what had transpired. He called the assistant chief. The body of the child had a black mark around the neck. It appeared the child had been strangled. He did not see the accused at the scene.

4. Pw2 Cleon Otuoma Oyange AP No.228790 testified that on 5/10/2017, whilst at the report office Nyamache a county council vehicle came with 2 officers – Casper and Samuel. They came with a man called JAM, the accused. They handed the accused over to him and told him they found the accused running along the road, later when he interrogated the accused, the accused told him that he was playing with a child and he hit the child and he suspected the child had died and that is why he was running away escaping from being lynched.

5. Pw3 LOM testified that the deceased YN is her child and was 3 years old. The accused person used to be my husband. On the 4/6/2017 she returned to her matrimonial home after having left due to a quarrel with the accused. She spent the night there. On the 5th the next day she decided to return to her home. Her mother in law requested her to accompany her to her home so that her parents could see the child. Whilst on the way the accused followed them and grabbed the child from her back. She began to scream and people came. The child was crying badly. She pleaded with her mother in law to help the child. Her mother in law told the people who had come that the child was playing with the father. The accused had entered her mother in-law's house. She decided to go and inform the village elder who sent her to the accused's uncle. She did not get him she decided to go to their home. On the way her father in law called her and asked her to return and get the child. She did so. She found her mother in law at the door. The accused was inside the house. The accused was inside the house. The accused on seeing her said "you have said I strangled your child come get your child". She asked him for the child. His mother told her to leave the child to wake up. She felt pain and she began screaming and asked how the child had slept. His father told her mother in law to get into the house and to bring out the child. When the child was brought out the child's feet were white. I asked what was wrong with the child. The accused's mother told me the child had fever and that made the legs to turn whitish. She checked the child. The child had been strangled with a wire on the neck. The child had already died. The accused was not there when people arrived. Later she was called to identify the child's body before postmortem.

6. Pw4 Casper Gegare Makori testified that on the 5/10/2017 he heard people screaming towards the river. He stopped a person, the accused who was running towards them. They asked him what was wrong and he told them he had killed a child. He decided to take him to the police station.

7. Pw5 No.78257 P.C. Charles Kitur currently attached to Scenes of Crime Gucha produced photographs of the scene he took at Igare sub-location. At the scene they found the body of the deceased YN. She had bruises, on the neck. He produced the said photographs as exhibits 1 (a) & (b) and Report is Exhibit No.2

8. Pw6 was Doctor Dennis Otworu Onsombi. He produced the post mortem report of the deceased done on the 14/10/2017. The cause of death was asphyxia secondary to manual ligature strangulation. He noted a ligature mark on the neck.

9. Pw7 No.67838 CPI Paul Okumu testified on how he received the report and how he arrested the accused. He also visited the murder scene arrested the accused's father but later released him after investigations. The accused was met running away before his arrest.

10. The accused gave an unsworn statement in his defence. He stated that he did not murder the child. His wife is L and the deceased was their baby. He forgot his phone on the table. He raised a cane and found he had hit the child accidentally. He did not plan to kill her it was not intentional.

11. The prosecution relied on the evidence on record. Mr. Omwega for the accused submitted that the evidence adduced shows that the accused did not intend to cause grievous harm to his daughter and that there was a serious omission on the part of the prosecution when they charged the accused with the offence of murder yet there was no medical report from the doctor to certify that the accused was mentally fit to stand trial for the offence of murder which he is charged with. That the accused is not guilty and he should be acquitted.

12. The accused was presented in court before Justice Okwany on the 21/11/ 2017. Justice Okwany ordered that he be remanded in police custody for mental assessment. The accused was informed that he was not required to take plea. Plea was taken on the 29/11/2017, the charge was read to the accused in *Ekegusii* and he responded that he was not guilty. Mr. Omwega applied for bond the application was granted. There was no mention that the accused mental status had been assessed. Mr. Omwega has submitted that there was no doctor's report to show that the accused was fit to stand trial. Section 11 of the Penal Code provides that, ***every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.*** Mental assessment of an accused person is a procedure done in murder trials to assess the mental capacity of an accused before the trial. What happened in this matter was a procedural technicality which Counsel for the accused did not raise at the beginning of the trial or during the trial. The fact that a report on his mental status was not produced before trial in my view does not prejudice the accused's case. I heard the case after Justice Okwany and there was no indication that the accused was of unsound mind or not fit to stand trial. He was of sound mind all through the trial and did not display behaviour of a person of unsound mind. I will now consider whether the prosecution has proved their case as required in law.

13. The accused is charged with the offence of murder. Section 203 defines the offence of murder and requires proof of the following if the offence of murder is to be established, malice aforethought on the part of the accused, death of the deceased, the cause of the death and an unlawful act or omission on the part of the accused resulting in the death of the deceased.

Section 206 defines Malice aforethought as follows;

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 first issue I will consider is the cause of death of the deceased. The post mortem report indicates that the cause of death was asphyxia secondary to manual ligature strangulation. The doctor noted a ligature mark on the neck. The deceased was strangled and died.

15. The next issue is whether the accused caused the death of the deceased. Pw1 narrated how the accused took the child from her and went with child back to their homestead. When she was called back by her father in-law she found the child dead. This happened the same day after the accused took away the child. The accused does not deny being with the child on the material day. His defense was that her death was accidentally. That he raised a cane and found that it hit the child accidentally. The post mortem indicated otherwise that the child died due asphyxia secondary to manual ligature strangulation. The doctor stated that there was a ligature mark on the neck of the deceased. In the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** the court 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. His defense that he hit the child accidentally is not true. Strangling a person is an act done intentionally. The neck of the deceased had a ligature mark, the accused strangled the child, in my view this was intentional. I find that the prosecution has proved a case of murder against the accused. The case is proved beyond reasonable doubt. The accused person is guilty of the offence of murder contrary to section 203 and he is convicted accordingly.

Dated signed and delivered this 1st day of February 2019.

R.E. OUGO

JUDGE

In the presence of;

Accused

Present

Mr. Okenye h/b Mr. Omwega For the Accused

Mr. Otieno For the State/Prosecution

Rael Court clerk