



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 23 OF 2014

REPUBLICPROSECUTOR

VERSUS

PHILIP WANDERA.....ACCUSED

JUDGMENT

1. **Philip Wandera** is charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offences are that on 19th day of August 2014, at **Muramia** village, **Kisoko** sublocation of **Busia** County, murdered **Nobert Okoth** and **Silvarous Wandera**.
3. The prosecution contended that the accused differed with his wife after he had discovered love messages in her phone. He therefore killed their two children.
4. In his defence the accused conceded that there was a disagreement with his wife over the love messages he discovered in her phone. After their disagreement she went away with the children. He denied to have been involved in the offences.
5. The issues for determination are:
 - a) Where did the children of the accused spent the night after the disagreement;
 - b) Whether both children are alive or not;
 - c) If any one of them is dead, how he met his death;
 - d) Whether the prosecution has proved its case against the accused to the required standards.
6. The genesis of this case is the effect of modern technology where a spouse can cheat on the other even where they are residing together. The accused and his wife had returned home from Nairobi where they stay. The accused borrowed his wife's phone to send some money. When he was deleting the m-Pesa messages of the transactions he had made, he stumbled on some love messages between his wife and another man. A quarrel ensued and both of them went to the house of Agnes Odhiambo (PW1). She managed to pacify the couple but the accused declined to go back to his house with his wife. These are undisputed facts by both the defence and the prosecution.
7. According to the evidence of Agnes Odhiambo (PW1), when the accused was categorical that he was not going back to his house with his wife, she requested her to spent the night in her house which she agreed. The accused therefore went alone. Dennis followed the accused and he (accused) told him that he was going to take the children to spent the night in their grandmother's house. This evidence is inadmissible hearsay. Dennis was not called to testify.
8. The version of the accused is that after he had disagreed with his wife, he went and informed Agnes Odhiambo (PW1) what had transpired. His wife left with the children. There was no independent evidence to show where these children spent the night on the material night.
9. Agnes Odhiambo (PW1) in her testimony said that at about 11 p.m. the accused called her on the phone and informed her that he had completed his mission with the children and the only one remaining was his. He went on to inform her where they would get his pair of trousers, wallet and two phones along Suo river. The inference to be drawn from this evidence is that the accused had killed his children and was about to commit suicide.

10. From the evidence of this witness we are aware that Silvarous Wandera (Silvanus) is alive. In any case no post mortem report in his respect was produced. The question that crosses one's mind is what prompted the investigating officer and the office of the Director of Public Prosecutions to charge the accused with an offence of murder in respect of a person who was alive. According to the evidence of Agnes Odhiambo (PW1), Silvarous Wandera (Silvanus) was taken home the following day by a neighbour. If this is not a case of malicious prosecution then this is recklessness of the highest order. I accordingly acquit the accused in count two.

11. If we assume that the evidence of Agnes Odhiambo (PW1) is true on what the accused is alleged to have told her, we appreciate if he talked to her at 11 p.m. then he did not tell her the truth. One of the children was alive and he did not commit suicide. The investigating officer ought to have probed these allegations further. The onus of proving every allegation which the prosecution intends the court to rely on is on the prosecution. The court cannot be left to speculate. I would have expected evidence from the service provider of the network allegedly used by the accused to call Agnes Odhiambo (PW1). This was however not forthcoming from the prosecution.

12. The evidence of Dr. Dickson Muchana (PW2) was that Norbert Okoth died of asphyxia secondary to drowning. Other than the cause of the death there was no evidence that connected the accused to the offence other than what the prosecution expected the court to speculate.

13. The prosecution failed to call some material witnesses and it would appear deliberately. Even after the court had issued witness summons no witnesses were availed and there was no evidence that there was service of the same or an attempt to do so. Instead the court was treated to an exhibition infantile prosecutorial antique. When the court declined to allow an adjournment, the prosecution counsel sat in a huff and purported to leave the case to the court. I need not say any more but this is rudeness not expected from a learned counsel.

14. From the foregoing analysis of the evidence on record, I find that the prosecution has failed to prove its case against the accused in count one as well. I acquit him on both counts and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 6th day of May, 2019

KIARIE WAWERU KIARIE

JUDGE