



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 76 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOHN OPONDO ODUOR.....ACCUSED

JUDGMENT

The charge

1. John Opondo Oduor, hereinafter called “the accused”, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The charge reads as follows:

JOHN OPONDO ODUOR: On the 5th day of August 2014 at Katwekera Village in Langata Area within Nairobi County murdered CLIFFORD ODUOR OPONDO.

2. The accused denied committing this offence. He is represented by Mr. L. Wahome, learned counsel.

Evidence

3. The accused is the father of Clifford Oduor Opondo, hereinafter called “the deceased”. On the night of 4th/5th August 2014 the deceased did not sleep at home. On 5th August 2014 when he returned home, his father the accused sought to know where he had spent the night. The deceased did not explain. The accused decided to discipline him. This “discipline” was beatings. The body of the deceased as seen in the photographs produced in evidence bear testimony to the severity of the beating the deceased received from the accused.

4. Rose Mueni, PW1, was a neighbour of the Opondos. In the morning of 5th August 2014 she overheard the accused asking the deceased where he had spent the night. She also heard sound of beating. Mueni told the court that the child (deceased) was crying loudly and she could hear this from her house and that she could also hear the deceased pleading with his father not to beat him. The evidence of Mueni confirms the evidence of the accused in his defence. The accused confirmed to the court that he had picked issue with the deceased his son for not spending the night at home and for failing to explain where he had been overnight. However, the accused told the court that he only “disciplined” his son.

5. At the time of this incident, Mueni worked at Kibera Shining Hope for Communities (Shining Hope) as an aid worker. Among other services Shining Hope offered was operating a medical clinic. She reported on duty that day at the Clinic at Shining Hope. At about 12.00 noon she saw the deceased lying on a bench at the Clinic. Mueni told the court that the deceased was with Maureen, his stepmother, waiting for treatment. The deceased could not walk and Mueni carried him to the examination room.

6. The deceased was taken to the Shining Hope by Elizabeth Odede, PW2, and Frederick Omondi, PW4, both working at the same clinic. Elizabeth testified that she learned of a child who had been beaten by his father from a certain woman who also led her to the home of that child. Elizabeth went to the home and confirmed that there was an injured child. She went to call Frederick. Both worked at Shining Hope at the time. Both visited the home, a 10 minute walk from Shining Hope. The time was about 11.30am.

7. Elizabeth and Frederick found the accused and Maureen at home. They introduced themselves and asked to see the injured child. They were shown the deceased lying on a bed on one side. He had no energy and was speaking in low tones. Frederick tried to hold him up but he could not walk. Frederick and Elizabeth asked the accused and Maureen to allow them to take the boy to the Clinic for examination. They were allowed. They asked one of the parents to join them and Maureen joined them.

8. Frederick told the court that he asked the boy what had happened and in low tones the boy told him that his father had injured him. Frederick said he could see injury marks on the legs, palms and hands. Elizabeth said he could see stripe marks on the boys back. Frederick carried him to the Clinic. Frederick left the boy at the waiting bay because of his serious condition and went to get a number for him. When

he returned to the waiting area, he found Rose carrying the deceased to the clinical officer for examination. Frederick left the boy being attended to in the presence of his mother.

9. The clinical officer attending to the boy is Diana Ayabei, PW6. Diana testified as follows in respect of the condition of the deceased:

“He was sick-looking. He could not walk or talk. He was in semi-comatose state. His eyes were pale and his clothes were bloodstained. He had lost a lot of blood. His eyes and fingers were white. He had a deep cut open wound on left side of the forehead and bruises all over the body. His vital signs were weak and his blood pressure un-recordable. I thought he had internal injuries because of loss of blood.”

10. Diana testified further that she resuscitated the boy by giving him glucose and fluids. She testified that as they were giving him resuscitation fluids the deceased started to gasp. They started vigorous cardiopulmonary resuscitation (CPR) procedure but after 30 minutes the boy died. Diana told the court that she confirmed that the deceased had died and prepared treatment notes. She also notified the police.

Submissions

11. At the close of the case for the prosecution, Mr. Wahome submitted that for this court to find the accused guilty of murder the prosecution must satisfy the court beyond reasonable doubt that the accused caused the death of the deceased and that he had malice aforethought when he committed that offence. He submitted that there were no eye witnesses when the alleged offence was committed and therefore the prosecution must rely on circumstantial evidence. Counsel submitted that the prosecution must meet certain parameters to persuade the court to find a conviction based on circumstantial evidence.

12. Mr. Wahome cited the case of *Joan Jebichii Sawe v. Republic [2003] eKLR* to buttress his submissions. He submitted that on the issue of death the circumstantial evidence tendered in court by the pathologist and the cross examination reveals that the doctor did not make extensive and full examination of the body of the deceased in order to make exclusive conclusion as to what may have caused the death; that the doctor did not test the other organs of the body for toxicology; that the witnesses did not testify how the wound on the scalp of the deceased could have caused the death and that the witnesses contradicted themselves some saying the boy was unconscious while others were saying he was not; some witnesses saying that the deceased was bleeding while others said this was not the case.

13. Mr. Wahome submitted that the weaknesses in the evidence by the witnesses for the prosecution has left gaps in the case and that the circumstantial evidence does not decidedly point to the accused as the one who caused the death of the deceased and therefore it fails to satisfy the principles of circumstantial evidence.

14. It was further submitted that there is no evidence to show that the accused intended to kill the deceased or cause him grievous harm. Mr. Wahome urged this court to make a finding that the prosecution has failed to prove murder against the accused and acquit the accused.

15. The prosecution counsel submitted that the evidence tendered by the prosecution places the accused at the scene and the accused admits the same and told the court that he was disciplining the minor. Counsel submitted that the post mortem shows that the deceased died due to severe head injury due to repeated force trauma and that he suffered multiple extensive wounds all over his body and had dislocated his shoulder. Counsel submitted that the prosecution has proved all the ingredients of murder beyond reasonable doubt.

Analysis & Determination

16. The legal duty placed on the prosecution to prove a criminal offence beyond reasonable doubt does not shift to the accused. In this case, keeping the required standard of proof in mind, the prosecution must prove that the accused, John Opondo Oduor, caused the death of the deceased Clifford Oduor Opondo by an unlawful act or omission and that in so acting or omitting to act, the accused had malice aforethought as defined under Section 206 of the Penal Code.

17. That Clifford died is not in doubt. His body was examined by Dr. Charles K. Muturi on 19th August 2014 and the findings of that examination recorded in a Post Mortem Form produced in court as Ex. 4. The doctor also testified in court to the death of the deceased. The doctor found the following:

(i) Multiple extensive bruises on both upper and lower limbs.

(ii) Dislocated right shoulder.

(iii) Laceration on the left forehead measuring 2 x 1 cm.

(iv) Multiple scalp bruises.

(v) Multiple brain contusions.

(vi) Right subdural (parietal) haematoma measuring 4 x 3 cm.

18. After the examination, the doctor formed the opinion that the cause of death of the deceased was severe head injury due to repeated blunt force trauma.

19. In his oral evidence, Dr. Muturi testified on cross-examination that the deceased was wearing a white T-shirt that was blood stained. The

doctor told the court that he found defensive injuries and that the injuries were fresh. He further told the court that bleeding in the brain would cause pressure in the brain leading to a coma and eventual death. He stated that injuries to the brain caused death of the deceased.

20. The defence was advancing a theory that Shining Hope Clinic through its staff, specifically Diana Ayabei, may have caused the death of the deceased due to negligence or by introducing fluids in the deceased body during resuscitation. This theory was not directly advanced but through cross examination when Diana was taken to task on the role she played in attending to the deceased.

21. Dr. Muturi told the court that he was not given the information that the deceased was treated at the clinic before he died. He stated that he was told that the deceased was taken to a local clinic but was pronounced dead on arrival. He said he was not aware that the deceased had been given some medication before he died and therefore he could not say whether that medication could have accelerated his death.

22. I have considered the evidence surrounding the circumstances leading to the death of the deceased. On the issue of contradicting evidence, I have noted that Mueni told the court that the deceased was not bleeding when she saw him. She also said he was not able to talk although he was conscious. Elizabeth said that the deceased was not talking though conscious. She also said she did not see blood on him. She said she did not talk to him. Frederick said that the boy had no energy to talk but he talked to him in low tones and told him that his father had injured him. He too said that the deceased was not bleeding although he body was bruised and swollen. PC Bernard Kiplagat Serem, PW5, took photographs of the body of the deceased at Shining Hope. He noted injuries on the head, hands and back of the deceased. He said he did not observe blood oozing from the wound.

23. The evidence of these four witnesses seem to contradict that of Diana Ayabei who told the court that the clothes the deceased was wearing were blood-stained and that the deceased had lost a lot of blood. It will remain as an opinion by Diana that the deceased had lost a lot of blood. There is no such evidence. Her evidence that the deceased had blood stained clothes is also exaggerated. My observation of the photographs produced in court shows light stains of blood on the T-shirt. This could be what Dr. Muturi said he noticed. But these stains cannot be said to be heavy. I have not seen any evidence on heavy loss of blood. Although Diana said that the deceased had lost a lot of blood, this was not noticed by the pathologist. In his findings, Dr. Muturi does not mention loss of blood in respect to the body of the deceased. The major findings were on the head where injuries to the brain are said to have caused the death of the deceased.

24. My finding on the contradictions found in the evidence of the witnesses as shown above is that these contradictions are minor. It is the evidence of Diana against that of the other witnesses who are the majority that the deceased had lost a lot of blood. As I have stated Diana exaggerated on that issue. These contradictions do not affect the evidence that the accused assaulted the deceased causing him fatal injuries. They are, in my view, negligible. As I have stated, I have noted that the T-shirt the deceased was wearing was thinly stained with blood.

25. It is true that Diana and her team administered fluids to resuscitate the deceased. She told the court that these were glucose and other fluids. She did not mention any medication given to the deceased. Taking this evidence into account, this court could have harboured some doubts if the pathologist did not make a clear finding as to the cause of death of the deceased or if he had not arrived at a conclusive finding as to what had caused that death. The pathologist explained the cause of death of the deceased as severe head injury due to repeated blunt force trauma. In my considered view, this finding is in agreement with the evidence that the deceased was hit repeatedly.

26. I have observed the photographs. The body bears marks all over. These include the open wound on the face and injuries on the hands which the doctor termed as defensive wounds. The serious wounds were found in the head and include multiple brain contusions and bleeds measuring 4 by 3 cm. I have no doubt that the beating the deceased received from the accused caused injuries on his body including the fatal head injuries. I do not agree with the defence in submitting that the doctor did not carry out extensive examination of the body. It is my view that he examined the body as required and recorded his findings.

27. I commend Mr. Wahome for articulating the applicable principles in circumstantial evidence. However, in this case, I wish to differ with him where he stated that the case for the prosecution is based purely on circumstantial evidence. This is not true. There is direct evidence by Mueni who testified to what she heard from her neighbours' home. She lived near the Opondos and on that morning she heard sounds of beating and crying of the deceased who was pleading with his father, the accused, to stop beating him. Indeed Mueni confirmed seeing the same boy later that day around mid-day at their clinic in Shining Hope and helped to carry him to the examination room.

28. It is my finding that the accused assaulted his son the deceased and occasioned him fatal injuries that led to his death. He was unhappy with his son for spending the night outside the home. In a feat of anger he beat him severely. He was disciplining him or so he believed but this got out of hand. The injuries on the body of the deceased attest to that fact. This is an unlawful act. That was not all. He failed to take his son to hospital after he assaulted him perhaps for fear of repercussions. Had he rushed him to hospital, perhaps this death would not have occurred. It took about five to six hours from the time the boy was assaulted to the time he was rescued and taken to the clinic for medical attention.

29. In regard to Shining Hope Clinic, it is my view that it was not well equipped to handle a serious case as this one. I believe their intentions in their attempt to save a life were noble. But they seem not to have appreciated the magnitude of what they were faced with. They were handling a case in which the deceased had been injured in the morning and all this time no medical attention had been given to him. I find no evidence that Diana and her team mates were negligent in handling the deceased and in any case the case before me is to determine whether the accused committed the offence he is charged with.

30. Having considered the evidence of Mueni, Elizabeth and Frederick and the defence of the accused that he "disciplined" his son, and having considered the entire defence in which the accused confirms the evidence of the prosecution safe for stating that he was disciplining his son, it is my finding that the prosecution has proved beyond reasonable doubt that the deceased died and that his death resulted from head injuries inflicted by the accused. It is my view that in so "disciplining" his son, the accused went overboard and occasioned fatal wounds on him.

31. I now turn to the element of malice aforethought. Given the circumstances of this case, it is my view that the intention of the accused was not to kill his son. His mistake was to let anger get the better of him. It is my view that he knew the magnitude of his beating, hence his

failure to take the deceased to hospital. This was cruel on his part as a parent. Whatever discipline he had planned for his son for sleeping outside the home ought to have been applied with restraint. He was the mature person in this case and ought to have toned down his emotions.

32. In view of my findings above, I conclude this determination by stating that the prosecution has proved beyond reasonable doubt that the deceased died due to unlawful actions of the deceased. However the prosecution has failed to prove to the required standard the element of malice aforethought on the part of the accused and therefore the offence of murder has not been proved to the required standard. I however find that the offence that has been proved beyond reasonable doubt is manslaughter contrary to section 202 as read with section 205 of the Penal Code.

33. Consequently, I hereby acquit the accused for the offence of murder and find him guilty of manslaughter and convict him of the same. Orders shall issue accordingly.

Dated, signed and delivered this 13th day of June 2019.

S. N. Mutuku

Judge