



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 17 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ZMO.....ACCUSED

RULING

1. ZMO (herein referred to as the accused) is charged with murder contrary to Section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 11th March, 2015 within Kakamega County, he murdered SOM (herein referred to as the deceased).

2. The prosecution case is that the deceased was at the time of death a baby aged one year. The baby was said to have been born as a result of an incestuous relationship between its mother called N and her uncle JO. The child was living with her grandparents, the accused and his wife, MW PW1.

3. That on the material day the accused returned home at 10 p.m. The child was at that time sleeping in his house. The accused milked the family cow. He and his wife PW1 tried to feed milk to the baby and realized that it was dead.

4. That on the following day the accused and two of his sons buried the body. Neighbours intervened. The body was exhumed. The matter was reported to the police. PC Muriuki PW7 of Mumias Police Station went to the home of the accused. He found the body of the baby in the house of the accused. He arrested the accused. The other two sons of the accused who were also suspects in the case went into hiding. The body was taken to St. Mary's Hospital, Mumias. A postmortem was conducted on the body. The doctor who conducted the post mortem found the body with fractures on C3 and C4 of the neck. The doctor formed an opinion that the cause of death was due to cervical spine injury secondary to blunt force. The accused was charged with the offence. During the hearing Dr. Hayambe PW6 produced the postmortem report as exhibit, PExh.1.

5. At the close of the prosecution case, the court is being called upon to rule on whether or not the prosecution has established a *prima facie* case against the accused. A *prima facie* case, it has been held means:-

“One on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence – see Ramanlal Trambaklal Bhatt –Vs- Republic (1957 EA 332).”

6. The only material witness in the case is the accused's wife PW1. Her evidence was that on the material day she was away from home from morning and returned home at 5 p.m. That she found the baby lying on a chair in her house. She did not check on the baby because she thought that it was sleeping. That her husband, the accused, returned home at 10 p.m. He milked the family cow. They went to feed the milk on the baby. They found it was dead. Other people went to the home. On the following day her husband buried the body. Members of the public then started to shout that the accused had killed the baby. The body was exhumed and taken back to their house.

7. Martin Otieka PW4 testified that he is a village elder. That on the material day he received a report that some people were burying a child at the home of the accused. He went there and found the accused and two of his sons, BO and T, burying the body of a baby. He and members of the public removed the body from the grave. The two sons of the accused escaped. Policemen went to the place. The accused was arrested.

8. The accused's wife PW1 gave contradictory evidence as to the time that she discovered that the child had died. She at first stated that it was 7 p.m. Then she said that she discovered it after 10 p.m. when they tried to feed it with milk.

9. In cross-examination she stated that she was sleeping with the baby. That the accused was sleeping in a separate room. That at 11 p.m. she discovered the child had died. She then went and woke up the accused and informed him.

10. The case against the accused was based on circumstantial evidence. In **Abanga Alias Onyango –Vs- Republic, Criminal Appeal No. 32 of 1990**, the court said that when a case is built on circumstantial evidence, the evidence must satisfy three tests:-

- (a) The circumstances from which an inference of guilty is sought to be drawn must cogently and firmly be established.**
- (b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.**
- (c) 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.**

11. The accused's wife PW1 was a suspect in the death of the child just like the accused. The accused's wife could not tell the court the exact time that she discovered that the baby had died. PC Muriuki PW7 stated that the other suspects were two of the accused's sons who assisted him to bury the body of the baby. PC Muriuki admitted that there was no witness who pointed at the accused as the person who killed the baby.

12. Upon evaluation of the evidence, I find no evidence that connects the accused with the death of the baby. The only crime established against the accused is burying the body of the baby without a permit.

13. The circumstantial evidence in this case did not irresistibly point at the accused as the person who committed the crime. There were other people, including his wife PW1, who had the opportunity of committing the offence.

14. In the foregoing the prosecution has not established a *prima facie* case against the accused. The accused has no case to answer and is acquitted of the charge vide Section 306 (1) of the Criminal Procedure Code.

Delivered, dated and signed in open court at Kakamega this 23rd day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for state

Miss Kadenyi holding brief for Kambwayo for accused

Accused - present

Court Assistant - George

14 days right of appeal.