



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO.39 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JKN.....ACCUSED

JUDGMENT

[1] The accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya. The particulars of the offence are that; on the 6th day of May 2013 in Imenti South District within Meru County, murdered DMK. The prosecution called 5 witnesses. Their evidence is recorded and shall be accordingly evaluated.

Defence

[2] After the close of the prosecution case, the accused made a sworn statement and stated that his wife is called RK. Their marriage was blessed with two children namely; VM and IM. I is now deceased but M is still alive. He said that he only heard that he had killed i. This he was told by the prison mate. He claimed that he was drunk at the time of arrest. He said that he does not know DM the child allegedly killed by him and that he was not his child.

[3] In cross-examination, he stated that his two children are born of his wife, PW1. He also stated that IM died at the age of five months. He did not however have a birth certificate or notification of birth or clinic card to show that his second born son was called IM. He admitted that he used to have quarrels with his wife. He also used to fight with his wife.

ANALYSIS AND DETERMINATION

[4] I should now carefully evaluate the evidence adduced to establish whether the prosecution proved their case beyond any reasonable doubt, to wit:

That the accused, of malice aforethought, caused the death of DMK by an unlawful act or omission.

Elements of offence of murder

[5] The accused person is facing a charge of murder. Section 203 of the Penal Code defines the offence of murder in the following terms:-

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

[6] Arising from the above definition are four elements of the offence that the prosecution must prove beyond reasonable doubt, to wit:

- 1. The fact of the death of the deceased***
- 2. The cause of such death***
- 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and***
- 4. Proof that the said unlawful act or omission was committed with malice aforethought.***

Of fact and cause of death

[7] **PW3, Dr. Michael Ongas** produced post-mortem report on the examination carried out on the body of DM. The apparent age of DM at the time of the examination was recorded as five months. The body was identified to be that of DM by RK and AN. After the examination the doctor formed the opinion that the deceased died of cardio-respiratory arrest secondary to massive haemoperitoneum following multiple abdominal stab wounds. Accordingly, the prosecution proved the fact and cause of death of the deceased. I move on to the next requirement.

Unlawful act or omission by accused

[8] Is there proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person? **PW1, RK**, the mother of the deceased told the court that on 5th May 2013, she woke up and went to church. She came back home and had lunch with her two children namely VM and DM, and her husband JK. When bed-time came, they went to sleep. M spent the night with his father and she slept with baby D. M woke her up at night and told her that his father was scratching him. She asked him to come and sleep with her. M obliged and they slept. She woke up the following morning at 7.00am and found the accused already dressed in mud-boots ready to go to pick tea. She asked him not to leave as she intended to go and borrow fire. She also asked M to take care of baby D. She left for the mother in law's home. The mother in law gave her a match box for lighting fire. On her way back, she collected some dry leaves to help her start fire in her house. Then suddenly, she heard M screaming and calling her to come and nurse D as he had been stabbed and was bleeding profusely. She threw down the dry leaves and ran. She asked K what was happening. K started chasing her with a panga and axe. She ran for her life towards the road.

[9] The mother of the accused came and the accused chased her away too. Another person called K came and asked the accused what the problem was. The accused lifted the axe and wanted to cut K. The father of the accused one AN and M also came to the scene. The two wrestled the accused and took away the panga and axe from him. PW1 also ran and called Gikunda, the brother to the accused and asked him to break down the door to the house where the children were. He broke down the door. She also took an axe and broke the window. She peeped through the window and saw her child lying dead on the bed.

[10] The other boy ran out of the house. PW1 held him and ran to the road. She reported the matter to AP Camp and the AP reported matter to Nkubu police station. The police came and took the body away. She stated that the accused was beaten by his brothers and he disappeared only to be arrested later the same day.

[11] It was her evidence that the accused did not have any problem with D except he was complaining that the children are troubling him for being ill often. He had even told her that he will kill himself by taking poison. PW1 beseeched the accused not to kill self because of children. There were no other family problems apart from what she has narrated.

[12] During cross-examination, PW1 stated that the deceased was her husband of over 3 years at the time of the incident. Her first born was born in 2009 while the second was born in 2011. She was not sure when the latter, the deceased, was born but he was aged about 5 ½ months at the time death. She was traumatized by what happened to her child. She admitted that the deceased was sickly except the treatment papers were at home. She confirmed that it was M who witnessed the killing. She described the layout of her matrimonial house and stated that their bedroom was the bigger one whilst the children bedroom was the smaller. But, they had two beds in their bedroom. It was when M fell ill also that they agreed that each one of them will be sleeping with one child.

[13] She continued to answer questions and reiterated what he had stated in examination in chief about 6th May 2013. She only added the following: (1) that she found the accused smoking a cigarette at the corridor; (2) M and K was uncle to the accused and neighbour respectively; (3) that she saw her child's intestines were out and tried to pick him but he was already dead. She was categorical that M was screaming and so he attracted the attention of those she has stated and they came. She also denied vehemently the suggestion by defence legal counsel that she told the accused that D was not his child. She, however, confirmed that she had gone back to her maternal home two times following quarrels on use of money.

[14] In re-examination, she confirmed that when she left to borrow fire she left her two children in the house.

[15] **PW2, ALIAS MWANIKI KANAMPIU**, told the court that on 6th day of May 2013, he had come from work at Kathera Primary School where he was a watchman. While he was seated outside his house he saw a person chasing another and threw some object at him. He went closer to find out what was happening and found the accused and his father N fighting over an axe. N took the axe from the accused. He immediately heard shouts from a lady saying 'mtoto amekufa'. A crowd then gathered at the scene He called the sub chief on phone and told him something was wrong. The sub-chief came but the accused had already taken off. He told the sub chief that the accused ran away. N had also called the chief and he sent his askaris to the scene. The police took the body of the child away. N, mother of the deceased and PW2 boarded the police vehicle to Nkubu Police station. He said that he is the brother of N, the father of the accused. In cross-examination he stated that he has been having eye problems for a long time now.

[16] **PW4, VM**, a minor aged 9 years testified after a voir dire examination and the court was satisfied he was of sufficient intelligence and understood the duty of telling the truth, that in 2013 his father killed his young brother- he used to call him T. He insisted that he saw his father kill the child. He was holding a knife and an axe. He stabbed him in the stomach. He ran away to his mother whom she met on the way from her grandmother. His father is the accused and pointed at him in the dock.

[17] In cross-examination, PW4 said that he had not been told of what to tell the court. His mother only enquired from him whether he can remember what had happened and he replied in the affirmative. He narrated once again what had happened.

[18] **PW5, IP. FRANKLINE MWAI**, o/c crime at Nkubu Police Station stated that this file was handed over to him when the IO was transferred. He assumed role of IO to date. The original IO is Joel Muthama but was on sick leave. According to the investigations, the IO received a call on 6th May 2013 at about 8.30 hrs from number [0723.....]that someone had murdered his baby of 5 months by stabbing. CI. Nderitu, PC. Ogoti, and PC. Gitonga went to the scene of crime and found a timber house where the body of the deceased was lying on its back with multiple stab wounds in the stomach. Investigations established that the accused was in the house with his two children at the time

of the incident. His wife had gone to her mother in law to get match box. On her way back she heard screams for help from VM. She ran back only to find the child bleeding profusely and her efforts to bandage him were in vain. The accused, on being asked by his wife why he had killed the child he became violent, took a panga and threatened her with harm. She ran for her life to the mother in law. The mother in law accompanied her back to his son's house and both were met with violence by the accused. The commotion attracted a crowd of people. PW1 also sought help from Gikunda, her brother in law. His father also saw the commotion and recorded statement about what he had seen. He narrated what witnesses stated. He also stated that the accused told him that his wife had told him that the deceased was not his son, and out of anger he stabbed the child. He stated also that witnesses stated that he had been complaining that he has used a huge amount of money on the treatment of the child. The killer weapon was not however recovered despite thorough search: it was said to have been thrown into the river by the accused.

[19] PW5 was not able to produce photographs taken at the scene as the original IO is the one who would explain their whereabouts. In cross-examination he refuted claims by defence counsel that he carefully selected witnesses to implicate the accused and that is why he did not record statement from the brother of the deceased. He said that investigations led them to the decision of charging the accused.

[20] The evidence of the Minor, PW4 was that he saw his father, the accused, stab the deceased. He is the only eye witness to the crime. Although his evidence was consistent but caution is necessary and I should find whether there is other corroborating evidence.

[21] PW2, is the mother of the deceased. Her evidence was that, on the material day, she left the accused with the two children in the house when she went to get a match box from her mother in law. Again, she stated that she heard screams and cries for help from PW4. She gave a vivid account as to what happened that day. Her evidence places the accused and the two children, on the material day, in the house where the deceased was killed. PW4 stated that the accused stabbed his brother, T (his nick name). PW2 gave a graphic account that the deceased's body was lying on its back with intestines out. **PW3, Dr. Michael Ongas** stated that the post-mortem report on the body of DM showed that he died of cardio-respiratory arrest secondary to massive haemoperitoneum following multiple abdominal stab wounds. The medical evidence corroborates the evidence by PW2 and PW4.

[22] PW3, although he stated during cross-examination that he has had eye problems for a long time, there is nothing to show that he is blind or that he did not see what he claimed he saw on the material day. He is the uncle to the deceased and a neighbour. He knows the accused well. He narrated how he saw the accused and his father wrestling. He went closer and established that N was trying to take away an axe from the accused; and he was successful in doing so. He also stated that he heard a lady screaming "mtoto amakufa". This made him understand what was happening. This old man seemed truthful. His evidence that he saw the accused and his father wrestling is believable. All these witnesses placed the accused at the scene at the time the child was murdered. They also prove that the accused stabbed the deceased as a result of which he died.

[23] The investigations as was stated by PW5 put together all these pieces of evidence and pointed to the guilt of the accused.

[24] Before I conclude on this issue, the accused claimed that he was drunk on the day he was arrested. He stated that he was merely told by inmates that he had killed his child but he could not remember doing such a thing. I do think the accused is setting up a defence of insanity by reason of intoxication. I understand his plea to be merely that by reason of intoxication he was incapable of forming the specific intention required to constitute the offence charged. In this case therefore, the onus of proving his guilt squarely lies on the prosecution. Nonetheless, I do not find anything to show that the accused was drunk on the material day. He merely made generalized statement to that effect without a shred of any meaningful detail. He also attempted to introduce confusion in this case in claiming that he does not know DM. He gave a false name of IM to be the name of his five months' child who he says he was accused of killing. He admitted that the said child died but he did not explain how the child died. He did not even produce anything to show his second child with PW1 was called IM. The evidence by PW1, PW3, PW4 and PW5 show that the child who died and was the son of the accused and PW1 and his name was DM. It was his body that was examined and to which the post-mortem report herein relates. The body was properly identified by her mother and he was approximately 5 months. This claim by the accused was merely intended to create confusion in the hope that a doubt may arise and be resolved in his favour. The claim is hollow and does not hold sway. I reject it.

[25] Accordingly, I find that the deceased met his death as a result of unlawful act by the accused. I now ask: did he kill the deceased with malice aforethought?

Malice aforethought

[26] Having found that it was the accused caused the death of the deceased; the next question for determination is whether he had the necessary malice aforethought to commit the offence of murder. It bears repeating that, the accused claimed that he was drunk on the day he was arrested. He stated that he was merely told by inmates that he had killed his child but he could not remember doing such a thing. I do think the accused is setting up a defence of insanity by reason of intoxication. I understand his plea to be merely that by reason of intoxication he was incapable of forming the specific intention required to constitute the offence charged. In this case therefore, the onus of proving malice aforethought squarely lies on the prosecution. The circumstances which constitute malice aforethought are set out under Section 206 of the Penal Code as follows:

"206. 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.”*

[27] In **DANIEL MUTHEE vs. REP. CA NO. 218 OF 2005 (UR)**, the Court of Appeal while considering what constitutes malice aforethought, stated thus;

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

[28] The same reasoning was adopted by the Court of Appeal in the case of *Joseph Mwongera Rukaria v Republic [2013] eKLR* where the court stated;

“We are cognizant of the statement by the learned Justices of Appeal made in the Daniel Muthee case. In the instant case, when the appellant cut the deceased at the back side of the neck, he must have known that the act of cutting the deceased on the neck would cause death or grievous harm”

[29] In the instant case, the evidence shows that the accused stabbed the child who was only five months old several times on the stomach. The doctor PW3 explained the cause of death in simple language to be bleeding from the gut due to multiple stab wounds. To inflict such brutal and severe stabs on such a small baby portend intention to cause grievous bodily harm or death of the deceased. Accordingly, I find that the accused intended to kill and killed the deceased. In passing I should state that facts of this case makes me wonder when humans gained the intuitive practice of the jungle where big cats especially lions would kill cabs of the previous pride patriarch. That notwithstanding, I find that the prosecution proved malice aforethought within the meaning of Section 206 (a) of the Penal Code CAP 63 of the Laws of Kenya and that the accused person had the requisite malice aforethought in the commission of this offence. I therefore find the accused, JKN, guilty of the murder of DM and convict him accordingly under Section 322 of the Criminal Procedure Code CAP 75 of the Laws of Kenya. Right of appeal explained.

Dated, signed and delivered in open court at Meru this

11th day of December 2018

F. GIKONYO

JUDGE

IN PRESENCE OF

M/S Nelima for accused – holding brief for Muriuki

Accused – present

Namiti for state

F. GIKONYO

JUDGE