



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 66 OF 2014

REPUBLIC PROSECUTOR

-VERSUS-

1. E O A

2. C A J.....ACCUSED

JUDGMENT

1. The Accused persons herein, **E O A** and **C A J** were arraigned before this Court on 22/09/2014 and faced an information of murder. The particulars of the offence are as follows;-

“On unknown date in August 2014 at [Particulars withheld] village in Nyakondo Location, Nyatike District within Migori County in the Republic of Kenya murdered Z J J.

2. The Accused persons denied committing the offence and the case was set for hearing. The prosecution availed five witnesses who testified in support of the charge. They were **M O N (PW1)** who was the grandfather to the deceased herein **Z J J** and the father to the deceased's father one **J M O. PW2** was **JIM OKOTH KAWA** who was the Assistant Chief of Ibencho Sub-Location within Nyatike District. **D A** who testified as **PW3** was a brother to PW1. The Doctor who conducted the post mortem examination one **Dr. VIVIAN CHEBOIWO** testified as **PW4** whereas the Investigating Officer **No. 79589 Cpl. JAMES NZIOKA** testified as **PW5**. The first four witnesses testified before **Hon. Majanja, J.** who was transferred from the station before the conclusion of this case. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya, I proceeded with the hearing of the case from where it had reached without the recall of any witness.

3. The prosecution's case was that in the morning of 23/08/2014 some people from [particulars withheld] village which village falls within the area of operation of PW2 went to PW2's office and informed him that there was a body of a child which had drowned in the Upper Tito Dam which dam was also in the said Ibencho village. PW2 in the company of his three elders went to the dam and so truly found the said body lying at the shore of the dam. PW2 carefully observed the body and estimated its age to be around 10 months old. He also noted that the body was swollen and had clothes on but it had begun to decompose and that it was smelling. He reported the incident to Muhuru Police Post and the body was later on collected by the police and taken to the Migori District Mortuary for preservation and post mortem examination.

4. PW2 the began investigating the matter and learnt that one of her subjects, **C A J** the second accused person in this case, had been seen (by a fisherman whose name was not disclosed and who did not testify) in the night of 18/08/2014 leaving the second accused person's home in Ibencho location with her husband **E O A** the first accused person herein together with one of the children of the second accused

person and that since then they had not returned home. PW2 knew both accused persons as they were his subjects and he was aware that the first accused person had inherited the second accused person and the two lived together with the children the second accused person had with her deceased husband. The two lived at the home of the second accused person's deceased husband; the homestead of PW1 and PW3. PW2 began tracing the whereabouts of the accused persons and managed to arrest them at Sisinga in Sori on 30/08/2014. He handed them over to the police.

5. PW3 confirmed that the child who had been dead found at the dam was the son of PW1's son one **J M O**. The child was known as **E J J** and also as **J J J** (hereinafter referred to as '**the deceased**') and that prior to his death the deceased used to live with the accused persons at their homestead. PW3 so confirmed the death of the deceased at the Migori District Hospital Mortuary where he went upon learning that the deceased had died. PW3 also witnessed the deceased's post mortem examination at the Migori District Hospital Mortuary on 09/09/2014. Prior to the autopsy, it was PW3 who identified the deceased's body by the mark on his left side of the thigh. PW3 had last seen the accused persons together with the deceased on 16/08/2014 at the family shamba where he had also gone to work on.

6. It was PW1 who explained that his son who had married the second accused person died in 2012 and the second accused person then briefly moved out of the home to Tanzania and that by then the second accused person was pregnant. That the second accused person gave birth to the deceased while in Tanzania and thereafter returned to Kenya with the deceased. The second accused person then continued to live in the PW1's homestead and was later, secretly though, "inherited" by the first accused person whereof they both continued living together in his homestead together with the other children of PW1's son. PW1 confirmed knowing the deceased as J J J and that the accused persons and the deceased left his homestead on 17/08/2014 and did not return.

7. PW1 later learnt that the accused persons had been arrested and that they did not have the deceased. He saw the deceased's body when it was being buried in his homestead and noted that the body had decomposed and was smelling.

8. PW4 conducted the post mortem examination on the body of the deceased at the Migori District Hospital Mortuary on 09/09/2014. The body had decomposed and the skin was peeling off. It was likewise smelling. Apart from the partial decomposition, PW4 did not find anything abnormal with the body but due to the state of decomposition PW4 could not ascertain the possible cause of death of the deceased. PW4 however took samples for DNA testing and handed them to PW5 on request. She filled in the Post Mortem Form, signed and stamped it. She produced the Form as an exhibit.

9. PW5 who conducted the investigations in the case visited the scene and drew both a rough and fair sketch plans of the scene. He produced the same in evidence. He also recorded statements from various witnesses and on concluding the investigations, he decided to prefer the charge against the accused persons. Although PW5 admitted that there was no direct evidence of the accused persons having caused the death of the deceased he so charged them as they were the custodians of the deceased and that they never reported any loss of the child prior to their arrest. Further they had disappeared from PW1's home.

10. The samples did not however yield any positive results on whether the second accused person was the biological mother of the deceased but PW5 recorded statements from witnesses in such confirmation.

11. The prosecution then closed its case and by a ruling of this Court, the accused persons were placed on their defences. They both opted to give unsworn testimonies. The first accused person denied any involvement in the death of the deceased and stated that he knew nothing about the case and that he was only arrested while at his home and taken to the police where he was later on taken to Court and the charge read to him. The second accused person also denied the offence as well as any knowledge of who Z J J was. She said that she was arrested one morning she had gone to buy some fish and taken to the police and later on she was charged. Both accused persons closed their cases without calling any witnesses.

12. At the close of the defence cases both Counsels for the accused persons and the State did not tender

any final submissions and the matter was set for this judgment.

13. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the accused persons are guilty of the offence of murder.

14. The offence facing the accused persons is an information of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will now consider the above issues as follows: -

(a) Proof of the fact and cause of death of the deceased:

15. As to whether the deceased indeed died, the prosecution availed PW1, PW2, PW3, PW4 and PW5 in such proof. All those witnesses saw the lifeless body of the deceased whereas PW1 and PW3 witnessed its burial. PW1 and PW3 confirmed that it was one **E J J** and also known as **J J J** who died and that the young child lived in their homestead together with the accused persons. PW3 went further to identify the deceased's body despite its state of decomposition. He confirmed that it was the deceased from a mark which the deceased had on his left side of the thigh.

16. But the second accused person denied any knowledge of the deceased despite the prosecution alleging that she was the mother of the deceased. On this issue I have considered the evidence of PW1, PW2 and PW3 on one hand and that of the second accused person on the other hand and I find that the evidence of PW1, PW2 and PW3 is credible and indeed believable. PW1 and PW3 lived in the same homestead with the accused persons and knew all along that the deceased was a child to the second accused person and PW1's son the late **J M O**. That is the more reason as to why PW1's family conducted all the funeral arrangements and buried the deceased. Further this Court was not informed of any claim on the deceased's body by anyone else apart from the PW1's family since the death.

17. The Court therefore finds as a fact that indeed the deceased herein **E J J** also known as **J J J** died.

18. I will now consider the aspect of the cause of the death of the deceased. PW4 was the only medical personell who testified in this case. Upon conducting the examiantion on the deceased's body PW4 could not ascertain the possible cause of its death. PW4 attribute that to the state of decomposition of the body.

19. I have carefully perused the Psot Mortem Report produced in evidence. The report confirms that except for the partial decomposition on the head, face and the upper limbs, the rest of the deceased's body had no abnormalities. The body was able to be opened up during the examination and all internal systems were examined. In particular PW4 did not notice any abnormality in the deceased's respiratory system. It therefore means that despite the body having been recovered from the Upper Tito Dam, the deceased had not drowned as there was no evidence of drowning or any intereferance with the respiratory system.

20. As a result of the state of the body PW4 did not recommend any further tests and/or examinations but only removed samples for the DNA testing as requested by PW5. However the said samples could not generate any specimens for the DNA testing and the matter ended there.

21. This Court is aware that even in the absence of medical evidence still the deceased's cause of death

can be presumed. That however is in very exceptional circumstances. A case at hand is **Wahih & Another =vs= Uganda (1968) EA 278** where the then Court of Appeal of Eastern Africa in dismissing an appeal against a conviction based on the presumption of the cause of death in the absence of medical evidence presented itself thus:-

“Mr. Kakooza's first submission was that the learned Judge had not given sufficient weight to the medical evidence and he argued that the appellant should not have been convicted in the absence of medical evidence as to the cause of death. It may be added that, for the same reason Mr. Deobhakta who appeared for the Republic' was not disposed to support the conviction. Of course, such evidence is always desirable and usually essential, but there are exceptions. There have, for example, been general cases in East Africa where persons have been convicted of murder, although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violence that it could not but have caused immediate death. On the other hand, where there is medical evidence and it does not exclude the possibility of death from natural causes, the task of the prosecution is very much harder and only in exceptional circumstances could a conviction for murder be sustained. We think this is such an exceptional case. The condition in which this body was found buried, with the elastic rightly round the neck and the hands tied behind the back, with the other evidence in the case, points irresistibly to a unlawful killing. We think any other supposition would be quite unreal.”

22. The decision in **Republic =vs= Michael Mucheru Gatu (2002) eKLR** also followed the above binding decision.

23. In our case the deceased's body did not reveal any signs or possible evidence that would irresistibly point to an unlawful killing. PW4 noted throughout the Post Mortem Report that there were no fractures, no injuries (whether caused by sharp or blunt objects) or any abnormality on and in the body. Even the digestive system with all its organs appeared normal thereby possibly ruling out chances of poisoning. The possibility that the deceased may have died from natural causes cannot therefore be completely ruled out.

24. I am hence afraid that the circumstances leading to the death of the deceased in this case cannot be said to be exceptional and in the absence of the proof of the cause of death, it hence remains uncertain as to what really caused the deceased's death. As the deceased's cause of death was not ascertained, the second limb of the first ingredient of the offence of murder fails.

25. Having found that the cause of death was not proved, there would be no purpose to be served in attending to the other ingredients of the offence of murder.

26. Consequently, the prosecution has failed to prove its case as required in law and the accused persons herein **ERNEST ONYANGO AJUALA** and **C A J** are hereby not found guilty of the murder of **Z J J**. They are hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 24th day of January 2017.

A. C. MRIMA

JUDGE