



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 18 OF 2014

REPUBLICPROSECUTOR

VERSUS

DANIEL EKWENY ALIAS

MOSES JUMA SIMATWAACCUSED

JUDGMENT

The accused was charged with the offence of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the **8th day of March 2014 at Kayos Farm within Trans Nzoia County unlawfully Murdered G K K**.

The accused denied the offence prompting the prosecution to call evidence from the various witnesses whose evidence can be summarised as hereunder;

PW1 Violet Chesia Naibei the accused wife and the mother to the deceased testified that the accused came home that night and had began quarreling the child. He then send him to get paraffin from the grandmother but the deceased refused. He then took a stick to hit him but the child ran away but unfortunately hit himself on a stone and he fell down. He then followed the child but shortly he called her to witness what had happened. She said that he had given the child the money during the day but instead he bought sugarcane instead of paraffin. On further examination in chief, she denied that the deceased assaulted the child and neither did she saw him falling on a stone. She said that the injury was on the forehead. Her screams attracted people who rushed to the scene but the child died while first aid was being administered to him.

PW2 Diana Chepkemoi Cherotich was in her house at the material time when she heard noise from the accused home. She rushed there and found the child lying down and there were other people too including PW1 and the accused. PW1 was saying that the accused had killed the child because of Kshs 10. She said that she did not see any injuries on the deceased body.

PW3 Stephen Boiyo was also in his house when he heard the screams from the deceased home. When he rushed there he found many people at the scene as well as the deceased body which was next to his grandmother's door. All efforts to save the child's life were fruitless. He participated in the postmortem exercise together with the accused's brother.

PW4 Josline Jerotich Kirui is a sister in law to the deceased. She also while taking supper heard screams from the accused home in particular from PW1. She went to the scene and found the deceased lying down and still breathing through with difficulty. PW1 was screaming and talking about Kshs 10 and that it was the accused who had assaulted the deceased. The police then came and took the body to

the mortuary.

PW5 Protus K. Ndiema was a Police Reservist (KPR) who testified that he was at his bar when he heard screams emanating from the accused home. He called the rest of his Kenya Police Reservist colleagues and went to the scene but found that the child had died. He then called the police from Endebess who came and took the body. The accused was arrested after 4 days.

PW6 PC Simon Kirui carried out the investigations and rerecorded statements from the witnesses. He testified that he was sent to the scene by the OCS and found the child already dead. They took the body to the district hospital mortuary. He also attended the postmortem exercise which was undertaken by Dr. Odhiambo. He did produce the postmortem report. He said also that the accused surrendered himself to the chief of Kolongolo area.

When put on his defence the accused in his unsworn testimony stated that he gave the child money to buy paraffin but he tripped and fell down. PW1 then went and saw him and started screaming. He called for a motorbike to take him to hospital but he died. He testified that he was called to record statement by the area chief but was later locked in and charged.

Analysis and Determination

I have read the written submissions by the defence counsel which essentially argued that the prosecution did not establish their case beyond reasonable doubt and that there was no *mens rea* against the accused. The state did not file any written submissions despite being granted opportunity by the court.

I have perused the witness evidence on record and it is true that the only probable eye witness to the incident is PW1 who is the accused wife and the mother to the deceased. The rest of the witnesses responded after hearing the screams from PW1. None of them saw what transpired.

The evidence by PW1 appears to me contradictory. On the one hand she states that the deceased tripped and landed his head on a stone while running away from the accused. On the other hand she states that the accused assaulted the child using a stick after buying sugarcane instead of buying paraffin as was instructed. The second version of the events in my view seems probable. It is trite law that a spouse need not give incriminating evidence against each other. It must also be noted that PW1 did not witness the child tripping and hitting a stone on his forehead.

In this case it appears that earlier in the day the deceased had been given money to buy paraffin but he did not. This is buttressed by PW1 testimony that when the accused arrived home that evening he quarreled with the deceased. He then sent him to get paraffin from the grandmother.

The theory of the child having hit a stone as he tripped seemed to have been well crafted by the accused and PW1. There was however no physical evidence. The rest of the witnesses did not see any injuries on the child.

The postmortem report prepared by Dr. Odhiambo however concludes the cause of death to be cardiac arrest secondary to severe internal bleeding from the ruptured abdominal aorta. An examination of the body revealed bruises in the left upper back abdomen of about 2 cm in length.

The above report produced as exhibit 1 does not in any way indicate any head injury on the forehead as proposed by the accused and his wife (PW1). This in my view was a way of cover up. I find that the accused assaulted the deceased on the back using the stick mentioned by PW1 and the only saviour was her grandmother's place. This finding is buttressed by the fact that the child was found at his grandmother's door, where he had been sent to get paraffin.

My above findings however do not show that there was any *mens rea* on the part of the accused as required under Section 206 of the Penal Code. I find that despite having assaulted the child there was no premeditated plan by the accused. I however find that the wife (PW1) concealed a lot from the police.

In the premises I shall acquit the accused from the charge of Murder and Substitute it with the offence of **Manslaughter under the provisions of Section 202 of the Penal Code Cap 75 laws of Kenya**

Orders Accordingly.

Delivered this 21st day of February 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Bororio for accused

Kirong – Court Assistant