



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO.20 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

EMMANUEL WEKESA MAKOKHA.....ACCUSED

J U D G M E N T

1. The accused herein Emmanuel Makokha is faced with the offence of murder contrary to section 203 as read with 204 of the Penal Code.

2. It is alleged that between the 29th of May, 2012 and 22nd of June 2012, in Bungoma County together with another they murdered a child BJS.

3. According to the evidence of the prosecution witnesses the accused lived with Joan Cherono as a wife. Joan Cherono was the mother of the deceased who was aged 5 years. The accused did not like the fact that Joan had a child. On her part Joan did not care for the child and assaulted her often prompting PW3 Linet Mukhuyi a neighbour to stay with the child.

4. Cherono had been arrested 2 days prior to the disappearance of the deceased on 29th of May 2012 for assaulting the deceased. PW3 had left the deceased and her daughter PW2 at home. And on returning home to prepare lunch she found the deceased had disappeared. She reported to the chief and the police. Four days later the deceased body was found covered in a sack inside a well belonging to PW7.

Cherono is said to have returned home the day the child disappeared and did not care much nor look for the lost child. The accused was nowhere.

According to PW3 Cherono suspected the accused and when she said this PW5 her boss asked her to report to the police.

5. Apart from Cherono's suspicion the witnesses who appear to implicate the accused are PW4, PW6 and 7. In his evidence PW4 stated that on his way from Ndal market on 29.5.2012 at 6pm he met the accused carrying the deceased on his motorbike. He knew the child and its mother Cherono. And since Cherono lived with the accused, it was his view that accused was like a parent to the deceased so he did not question him.

6. On his part PW6 recorded a statement from PW3 on 29.5.2012 at about 5.45 that the deceased had gotten lost. And on 2.6.2012 he received a report from PW7 that as he drew water from the well it came out red which was unusual. As the investigating officer he went to the scene and found that a sack had been removed from the well half covering the decomposed body of the deceased. He also learnt that the

accused lived with Cherono but was not happy that she had a child. Further learnt that the accused had been seen with the child from PW4 on the day she disappeared.

7. PW7 Lilian Wafula Wanyonyi who had employed Cherono learnt from PW3 that Cherono had assaulted the deceased and neighbours being tired of Cherono's behavior had reported her to the police. Later she learnt of the child's disappearance. The accused on meeting the witness wondered why no one had asked him about the killer, prompting the witness to ask him to take any information he had to the police and gave him his fare to the station.

8. PW5 was a medical doctor Patrick Misite who in his evidence confirmed that at the time of doing a post mortem on the body of the deceased child aged about 5 years the body had largely decomposed. The body had a linear fracture 6cm on the left parietal bone. He formed the opinion that the cause of death was the head injury.

9. The court at the close of the prosecution case found that the accused had a case to answer and placed the accused on his defence. The accused chose to give an unsworn statement. He confirmed that he lived with Cherono and that on 28.5.2012 he learnt of Cherono's arrest. Further that on 30.5.2012 he learnt from PW4 that the child was lost. It was his testimony that on the fateful day he was at an A.P. Camp working and did not carry the deceased on his bike as alleged. That he had no pending issues or quarrel with Cherono. He confirmed that the deceased lived with PW3 in her home.

10. Having considered the evidence of the prosecution and the defence, submissions and authorities cited, this being a murder case the court must of necessity consider the relevant ingredients of the offence of murder bearing in mind that the burden of proving the charge against the accused squarely falls on the prosecution.

11. Murder is defined in section 203 of the Penal Code as the causing, by a person or persons with malice aforethought the death of another by an unlawful act or omission. There are 3 elements essential in determining whether murder has been proved firstly, there must be proof of death of the victim, secondly proof that the accused committed the act. Thirdly whether the accused had malice aforethought. PW5 in his testimony established that the deceased died of head injury caused by a sharp object. Both prosecution and defence did confirm that BJS died.

12. There was no direct evidence proving that the deceased death was caused by the accused. The prosecution have purely relied on circumstantial evidence. Which has been said to be the best Evidence in **Tumuheire V U(1967)E.A.C.A at 328** Sir Udo Udoma (CJ) stated

“it should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence is in a criminal case, often the best evidence in establishing the commission of a crime by a person as in the present”.

In ***Abanga alias Onyango Vs Republic CRA No.32 of 1990(ur)*** The court of Appeal stated of the test to be applied when relying on circumstantial evidence.

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (ii) those circumstances should be of a definite tendency seemingly pointing towards guilt of the accused (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all probability the crime was committed by the accused and no one else”

13. In this instant the neighbours loved the deceased. PW3 stayed with her despite both Cherono and the accused staying in the next room for what PW3 says was wont of care. PW7 and other neighbours got Cherono arrested two days prior to the deceased disappearance due to Cherono's frequent assault. On the deceased in his testimony the accused says he was unhappy with Cherono's behavior, of assaulting the

child. Although PW4 is the only one who saw the accused carrying the child on his bike on the material day, Cherono had intimated to PW7 that she suspected the accused and she indeed escorted him to the police station. Secondly the accused on being questioned by PW7 where he had been since the child disappeared he did not give an account save that no one had asked him about the killer. Thirdly the testimony of the accused gives him away he does not give an account of where he was on the 29th of May save that he had gone to see Cherono at the police station. The accused stayed next to Linet who had been searching for the child, as one close to the child he does not say what efforts he put in place to have the child found. This I find partly strange. He met Eric on 30.5.2012 who told him the child was lost on 31.5.2012 when Cherono told him again. He does not say what he did. If indeed he cared for the child as one who lived with the child's mother and had gotten the child a school as he alleged why is it that he was not bothered about her whereabouts. Did Cherono know something when she suspected him?. In my view the evidence of PW4 and the information gathered by PW5 that the accused disliked the fact that Cherono had a child and his non-action and attitude after the disappearance of the child; and removing Cherono from the scene as she was incarcerated then the only other person who would have taken away the life of B is the accused as, she got on his way, she got his woman arrested and incarcerated. In my view malice aforethought can be deduced from the foregoing. Further in my considered view the 3 necessary tests of circumstantial evidence apply in this case and all evidence pierced together leave no other conclusion other than the crime was committed by none else but the accused.

I therefore accordingly convict him of the offence of murder as charged.

Dated at Bungoma this **2nd day of March, 2017**

ALI-ARONI

JUDGE