



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 4 OF 2015

REPUBLIC PROSECUTOR

-VERSUS-

TOBIAS OSUMBA OPAT.....ACCUSED

JUDGMENT

1. The Accused person herein, **TOBIAS OSUMBA OPAT** was arraigned before this Court on 13/02/2015 and faced an information of murder of one **J S L** (hereinafter referred to as '**the deceased**'). The particulars of the offence were as follows:-

“On the 11th day of January 2015 in Migori County within the Republic of Kenya murdered J S L”

2. The Accused person denied committing the offence and the case was set for hearing. The prosecution availed seven witnesses who testified in support of the information. They were a minor aged 15 years old and a sister to the deceased herein one **F A J** who testified as **PW1**, **S J O** who was the father to the deceased and who testified as **PW2**, **N K R** who was **PW3**, a retired teacher and who had lived with the deceased during her childhood before the deceased found her father **PW2**, the maternal grandmother to the deceased one **C M K** testified as **PW4**, **DR. VICTOR AWINDA OMOLLO** testified as **PW5** and produced a Post Mortem Report which had been prepared by his colleague a Dr. Ndege who had proceeded on further studies, a motor cycle rider who had taken the deceased to hospital immediately before the deceased died one **JACK AWITI OSEWE** testified as **PW6** and **No. 83904 PC DERRICK MOSHI** attached to Migori Police Station and who was the Investigating Officer testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except otherwise stated.

3. The prosecution's case was very fairly straight forward. It was contended that the deceased had just found **PW2** as her biological father and had agreed that the deceased would live with **PW2** at the **PW2**'s home at Nyakenda area within Migori town of the Migori County so as to be able to attend school with ease. The deceased however had to briefly return to and collect her Certificate of Birth from her mother at Lolgorian and likewise collect her Results Slip from her previous school.

4. **PW2** allowed the deceased to go back to her mother but cautioned her not to delay. That was on 08/01/2015. The deceased left but did not return until on 12/01/2015 **PW2** called her to enquire what was happening. The deceased promised **PW2** that she was on her way back and that she would arrive on the following day. That did not however happen as **PW2** was called in the morning of 13//01/2015 and informed of the death of the deceased at the Migori County Referral Hospital.

5. **PW1** had accompanied the deceased to the accused person on 08/01/2015 where the deceased asked the

accused person to procure an abortion on the deceased but the accused person refused. PW1 then escorted the deceased to a house of one of the friends of the deceased in Apida area as she returned home and proceeded to school. On 13/01/2015 PW1 was called by a male friend of the deceased and asked to take the deceased to hospital as she was unwell. PW1 obliged. PW6 confirmed that he was the motor cycle rider who took the deceased and another lady from Kawata area in Migori town to the Migori County Referral Hospital on 13/01/2015 on request of a male customer whom he could not remember.

6. PW2 was accompanied by PW3 to the Migori Police Station and later to the Migori County Referral Hospital Mortuary where they viewed the body of the deceased. PW3 had lived with the deceased since her childhood as the father of the deceased was then unknown. PW4 identified the body of the deceased before the post mortem examination was conducted by a Dr. Ndege and a Post Mortem Report filled which report was produced by PW5. The cause of death was opined as an attempted abortion. PW5 agreed with that opinion in view of the state of the uterus of the deceased.

7. PW7 conducted investigations in the matter. On 13/01/2015 while on duty at the Crime Office he was asked by the then In-Charge of the Crime Section to book on enquiries one juvenile **F A** to Migori town. PW7 in the company of his fellow officer were led to a shop at Dip Area within Migori town where the accused person was arrested on allegations that he had committed an abortion on the deceased. PW7 booked the accused person into police cells at the Migori Police Station and attended the post mortem examination on the body of the deceased at the Migori County Referral Hospital Mortuary. Upon concluding the investigations PW7 preferred the current information against the accused person.

8. By a ruling of this Court, the accused person was placed on his defence. He opted to give an unsworn testimony without calling any witness. The accused person denied any involvement in the alleged abortion exercise and stated that he indeed lacked any medical knowledge to enable him conduct such an exercise. He wondered why such a charge had been placed on him.

9. At the close of the defence case Counsel for the accused person submitted briefly that the offence of murder was not proved and that there was completely no evidence linking the accused person with the commission of the offence. He prayed that the information be dropped. The State relied on the evidence on record.

10. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the accused person is guilty of the information of murder.

11. 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:

12. As to whether the deceased indeed died, the prosecution availed PW1, PW2, PW3, PW4, PW5 and PW7 in such proof. All those witnesses saw the lifeless body of the deceased. I hence find as a fact that indeed the deceased herein died.

13. On the cause of the death of the deceased, PW5 produced a Post Mortem Report which was prepared by a **Dr. Ndege**. upon conducting the examination. The said report gave the probable cause of death of the deceased to have been intra-uterine bleeding that resulted from a partial placenta abortion following an attempted abortion. Since there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

(b)Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused:

14. I will now turn to the second ingredient as to ascertain whether the death of the deceased was caused by the accused person. There is no doubt that the deceased died out of an unsuccessful abortion. Apart from PW1 who stated that she accompanied the deceased to the accused person where the deceased requested the accused person to procure an abortion on her and the accused person refused, there is no any other witness who mentioned the accused person. I say so because what PW7 alleged on the accused person, that he was the one who procured the abortion, was heresy at its most.

15. It is on record that the alleged boyfriend to the deceased escaped from Migori town before PW7 could interrogate him. As a result, PW7 admitted that his investigations were incomplete. PW7 as well did not search either the shop or the house of the accused person in a bid to find any possible evidence. Likewise there is no evidence on who the accused person is and what he does for a living save what the accused person stated in his defence. PW7 simply arrested the accused person and after the post mortem examination and recording of statements from witnesses, charged the accused person.

16. In view of the nature and the legal requirements of the information before Court, it was imperative that more serious investigations ought to have been conducted. PW7 ought to have endeavored to find a link between the death of the deceased and the accused person. Going by the evidence as tendered before this Court, the investigations fell short of that legal requirement. There is hence no evidence that the accused person was in any way involved in the death of the deceased. The second ingredient is answered in the negative

17. Having therefore failed to prove the second ingredient it goes without say that the accused person cannot be seen to have acted with malice aforethought. In fact a consideration of the last ingredient will not serve any purpose in this matter.

18. I hence come to the conclusion that the information of murder facing the accused person has not been proved. The accused person is hereby found not guilty of the murder of **J S L** and is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of May 2017.

A. C. MRIMA

JUDGE