



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 111 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

L K.....ACCUSED

RULING

The accused **L K** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the night of 25th and 26th November, 2013 at Githima Kuresoi District within Nakuru County, murdered L K”.

The accused entered a plea of ‘**Not guilty**’ to the charge and his trial commenced in the High Court at Nakuru on 7/4/2016. The prosecution called a total of six (6) witnesses in support of their case.

The brief facts of the case were as follows. The accused was the biological father of the deceased who was a boy-child aged between 3-4 years old. At the material time the accused and his wife (the child’s mother) were separated. The child’s mother **M B C** told the court that she had left her matrimonial home and returned to her parent’s home leaving the child behind with the accused.

PW1 G K told the court that the accused was his in-law. **PW1** was a 13 year old boy who at the material time had gone to visit the accused and to assist in planting maize. **PW1** stated that on 25/11/2013, he, the accused, the deceased and one ‘**K**’ a younger brother to the accused took supper together. Thereafter they all retired to bed. The accused slept in the same bed with the deceased whilst **PW1** shared a bed with K. The next morning **PW1** and K woke up and prepared tea. They attempted to waken both accused and the deceased but none of the two responded. The boys became alarmed and went to report the matter to their neighbour.

PW2 P K was a neighbour to the accused. He stated that on 26/11/2013 he sent his daughter called ‘**G**’ to go and collect milk from the accused’s home. The child went but returned and told **PW2** that the accused’s cow had not been milked that morning. The said ‘**G**’ returned with **PW1** and ‘**K**’ the two boys who lived with the accused. The boys informed **PW1** that they had tried to rouse the accused and deceased for breakfast but the two could not wake up. **PW2** alerted another neighbour called **J R N** and together they rushed to the scene.

Upon arrival at the accused’s house **PW2** and **PW3** testify that they found the child (deceased) lying on the bed covered with a blanket. The accused lay unconscious on the floor foaming from the mouth. Upon uncovering the child the two witnesses realized that he was already dead. They therefore turned their attention to the accused and forced him to drink a charcoal/mud mixture and a raw egg in an attempt to revive him. These measures were successful and the accused revived and was rushed to hospital where he was treated and later discharged.

The matter was reported to the police who came and removed the body of the deceased to the mortuary. The child’s mother **PW4** and her parents were informed of the death of the child. Upon conclusion of police investigations the accused was arraigned in court and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He opted to give unsworn defence in which he denied having killed his son.

This court must now analyze the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt.

The offence of murder is defined as follows by Section 203 of the Penal Code, Cap 63 Laws of Kenya:-

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

The prosecution is required by law to tender evidence sufficient to prove beyond reasonable doubt the following critical ingredients of murder

- (i) The fact as well as the cause of death of the deceased
- (ii) That the deceased by an unlawful act or omission caused the death of the deceased
- (iii) That said unlawful act or omission was committed with malice aforethought

In this case the fact of the death of the deceased cannot be in any doubt. **PW2** and **PW3** confirm that they found the child lying dead in the bed. **PW4** the child’s mother confirms that she saw the dead body of her child at the mortuary. All the witnesses who knew the deceased very well identify him as ‘**I K**’.

On the question of the cause of death all the witnesses who saw the body of the deceased state that they saw no obvious visible injuries to the body. **PW1** said he only saw a foam-like substance coming out of the deceased’s mouth. However **PW4** the dead child’s mother told the court that when she saw her son’s body she noted certain marks around the neck. This anomaly could well be explained by the fact that **PW1**, **PW2** and **PW3** may not have taken the time to examine the body closely. Once it was determined that the boy was dead, they all turned their attention to trying to revive the deceased who lay unconscious on the floor.

On the other hand **PW4** being the mother of the deceased would undoubtedly have taken the time to closely examine her son’s body, especially given the fact that he died in her absence. This would explain why **PW4** saw the marks around the neck which the other witnesses did not notice.

Conclusive proof of the cause of death was tendered by **PW5 DR. BISERA ANITA** a medic based at Molo District Hospital who produced the post-mortem report in respect of the autopsy conducted on the body of the deceased **P.exb 1**.

PW5 testified that upon external examination of the body bruises were noted around the neck of the deceased. Upon an internal examination it was noted that the neck had been fractured. The cause of death was opined to be ‘**strangulation leading to asphyxiation**’. **PW5** proceeded to state that

“I confirm that the bruises around the neck are consistent with the fracture of the neck”.

This was expert medical opinion evidence and was neither challenged nor controverted by the defence. It is clear that the deceased was strangled leading to the fracture of his neck and I do so find.

The next critical question is whether it was the accused who so strangled and killed the deceased. There was no witness who actually saw the accused put his hands around the neck of the deceased and strangle him. **PW1** who slept in the same house with the accused and deceased stated that he heard no noise or commotion at all from their bed during the night. The prosecution seeks to rely on circumstantial evidence to prove their case.

In the case of **KARIUKI KARANJA Vs REPUBLIC [1989] KLR** the court held as follows

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution”.

Similarly in the case of **JUDITH ACHIENG OCHIENG’ Vs REPUBLIC [2009]eKLR**, The Court of Appeal sitting in Kisumu held that

- i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established***
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused***
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that in all human probability the crime was committed by the accused and none else”.***

In this case **PW1** told the court that they all ate supper together and retired to sleep. **PW1** and ‘**K**’ slept together whilst the accused slept with his son (deceased) on the same bed in his room. The next morning, the deceased is found with a broken neck having been strangled.

The question may arise whether it was **PW1** or ‘**K**’ who strangled the deceased since they too slept inside the same house that night. In my view neither **PW1** nor the other boy ‘**K**’ had any reason or motive to kill the child. **PW1** stated that he had only been there for 3 days, having come to assist in planting maize. The two boys both woke upon 26/11/2013 and prepared tea. They attempted to wake up both the accused and the deceased. If any one of them had killed the deceased, they would not have been trying to wake him up the next day.

After failing to rouse the accused and deceased **PW1** and ‘**K**’ did not attempt to run away or escape. **PW3** told the court that the two boys

came to his home to inform him that they had been unable to rouse their ‘uncle’ and his son. Again this is not the behavior of persons who had committed murder. The two boys acted honestly and responsibly by going to report to an adult neighbour. I am satisfied that there is no evidence to link either **PW1** or the other boy ‘K’ to the death of the deceased and as such I exclude the two as possible suspects.

The accused slept in the same bed with the deceased. In his defence the accused admits as much. On the night of 25/11/2013 the deceased was alive and well and took supper with all the family. Indeed under cross-examination **PW1** reiterates

“All the time I was there the deceased was fine.... He was not sick. The deceased always slept with his father.....”

The next morning on 26/11/2013 the deceased was found dead with his neck broken. There is no evidence and indeed no suggestion that any intruder entered the house during the night. **PW1** confirms that he heard no commotion or noise at all during the night. The deceased was a mere toddler. He could not have strangled himself. The circumstantial evidence points squarely at the accused as the person who strangled the deceased and broke his neck. No other possible conclusion can be drawn from this set of facts.

In his defence the accused concedes that he took supper with the family after which he retired to sleep in the same bed with the deceased. The accused claims that he has no idea what happened during the night. He only woke up to find his son dead and himself in hospital. This defence amounts to a blanket denial. There is no evidence that the accused suffered from any form of mental disability that would cause him to act without conscious awareness of what he was doing. I observed the demeanour of the accused as he gave his defence. He was shifty and evasive and in my view was not telling the truth.

From the evidence it is clear that the accused strangled and killed his son and then ingested some poisonous substance in an attempt to end his own life. This is how the accused was found lying unconscious in his bedroom. Fortunately for accused the quick action by **PW2** and **PW3** saved his life and he was rushed in hospital where he was treated and made a full recovery.

I reject the accused’s defence that he has no idea what happened. I find that it was the accused who strangled the deceased and caused his death. The *actus reus* for the offence of murder has in my view been proved.

The last ingredient for the offence of murder requiring proof is ‘*mens rea*’ or the mental element of the offence. ‘*Mens rea*’ which is described in law as ‘malice aforethought’ is defined in 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)

(d)”

In this case the accused a fully grown adult man strangled a 3 year old boy. The pressure and force applied was sufficient to break the little boy’s neck. There can be no doubt that the intention behind this act was to kill the deceased or to cause grievous bodily harm. Undoubtedly the accused was venting his anger on the innocent child, due to the desertion by the child’s mother from the matrimonial home. I am satisfied that it has been proved that the accused acted with malice aforethought. The *mens rea* for the offence of murder has been proved.

Based on the foregoing I find that this charge of murder has been proved beyond all reasonable doubt. I therefore convict the accused as charged.

Dated and delivered in Nakuru this 12th day of June, 2017

Mr. Ochang holding brief for Mr. Orege

Mr. Chigiti for State

MAUREEN A. ODERO

Judge

Court – Mention on 15/6/2017. Notice to issue to Mr. Orege