



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL CASE NO.38 OF 2009**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**B D K .....ACCUSED**

**J U D G E M E N T**

1. The accused was charged with 2 counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. In the first count it is alleged that on the night of 30th May 2009 in Kisumu District within Nyanza Province murdered one **F O O**. The 2nd count is that on the 30th day of May 2006 in Kisumu District within Nyanza Province murdered one M A.
2. The accused denied the charge and the prosecution called 6 witnesses to prove its case. Their testimonies can be summarised as hereunder.
3. **PW1 PHILIP OTIENO JERA** is the chairman of Kolwa West Location who on the material day – 30.5.2009 while in his house received a call from J A the grandfather to the 2 deceased children concerning the murder. He went to the scene, which was the beach shore at 5.30 a.m. and saw the 2 bodies. He called the area chief who then notified the police. The police came and took the bodies to the mortuary. On cross examination he said that he knew the accused person.
4. **PW2 P A** is the mother to the deceaseds. She testified that her husband, the father of the deceased children had died and together with the children they were staying with the accused as husband and wife. On the material night the other children namely R O aged 15 years and L A aged 12 years had gone to sleep at her sister's place.
5. She went on to say that the accused arrived home that night at around 12.30 a.m. and he asked him where he had gone. He replied that he had gone to drink alcohol. He then ate his food and demanded for cigarettes which the witness refused to go and buy for him. He then left and came back later at 3 a.m. He lit the light (lamp) and switched on the radio.
6. Thereafter, the accused tied the witness with a rope and threatened to kill her using a knife which he had in his pocket. The witness further said that she managed to struggle and freed herself. The accused made chase but she escaped. When she came back, she found that the children were missing and she raised alarm. People came and they started searching for them and were discovered dead at the beach at around 5 a.m. with stabbed wounds.
7. On 4.10.2009 the witness was called to identify the accused who had been arrested at Paga beach.
8. On cross-examination, she said that she could not scream as the accused had threatened to kill her.

She said that she did not see the accused go back to the house after the chase.

9. **PW3 DR. CHARLES K. MUTURI** produced the postmortem reports in respect to the deceaseds children. He found that **F O O** had deep cut wound on the left frontal region and a skull fracture. He formed an opinion that the cause of death was severe head injury secondary to assault.

10. As regards **M A** she had wound on the frontal part of the skull and compound skull fracture. He concluded the cause of death to be severe head injury due to assault.

11, **PW4 JOSHUA OMONDI OKULO** testified that he was awakened that early morning of 30.5.2009 by **J O** and **J A**. He knew the accused as he worked in his boat. He had employed him. He went with the search team to trace the accused, but they were unsuccessful but they managed to trace the kids whom they found at the beach shore and had already died. He saw the injuries they had sustained on their heads. He testified that he knew **P** the deceaseds mother who was staying with the accused. The said **P** had been married by one **O** who had since died. On cross-examination she said that **O** had not build a house and they were leaving in a rented house.

12. **PW5 J O M** was a resident of Dunga beach. **PW2 P** is his sister-in-law, He said that on 4.10.2009, she came to his shop and informed him that the accused had been arrested at Paga beach. He went together with others and identified the accused.

13. **PW6 P.C. HENRY KAMANDE** was tasked by inspector Wanyama to carry out investigation of the incident. He came to the scene and saw the 2 bodies. He also met **PW2**, their mother who narrated the ordeal to him. They took the bodies to the mortuary.

14, **PW7 P.C. PILESH BIWOTT** Produced the photographs of the deceaseds bodies taken at the scene.

15. When put on his defence, the accused gave unsworn testimony. He said that he left Dunga beach on the 5.2.2009 for Usenge at 7 p.m. for fishing exercise. He said that they experienced some engine problems after one week and called the owner of the boat who came and took it. He then went to Osieko and continued fishing. He came back on 3.10.2009 after 4 months. On 4,10,2009 he went to the beach where he was arrested and taken to the police station.

16. He admitted that **PW2** was his girlfriend. He said that he stayed with her and the children. He denied that he committed the offence.

### **ANALYSIS AND DETERMINATION**

17. There is no dispute that the accused and **PW2** were living in one house. The unsworn evidence of the accused corroborates this. He therefore knew the children very well. There is no direct evidence to link the accused to the offence as there is no such eye witnesses. Consequently they court shall have to employ the relevant circumstantial evidence to ascertain whether indeed the accused committed the offence.

18. First of all the accused did not challenge the fact that he came home at 12.30 a.m. on the material day. His evidence began on 28.5.2009 when he left Dunga beach for Usenge to go finishing. He nevertheless did not explain where he was on 30th May 2009. In any event his absence for 4 months was not convincing. He said that during that time there was less fish hence his absence for a period of 4 months.

19. I do not think that his alibi holds water. Although he had a right of giving unsworn testimony, the same respectively is not convincing. It has been held that:

**“unsworn statements have no probative or evidential value. Unsworn statements are not in evidential sense facts which either go to prove or disprove a point alleged by one party**

**and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.” See Mercy Kajuju & 4 others versus Republic (2009) eKLR.**

**20.** Circumstantially therefore there would not be any reason for PW2 to target the accused without any reasons. The threats he made to her and the chasing he gave clearly showed that the accused would have even perhaps killed her. The 2 children were in that house as clearly demonstrated by PW2.

**21.** Further there were sharp wounds on the bodies of the 2 children which points clearly to the use of the knife which he had threatened PW2 with.

**22.** In any event the accused did not back his alibi with any other concrete evidence. He did not even bother to call his fellow fishermen to demonstrate that indeed they had problems catching fish, due to less stock for the entire 4 months he was away. Neither did he call his employer to back up his assertion.

**23.** In the absence of any evidence to the contrary circumstantially , the prosecution has established that the accused murdered the children on the said early morning. One can easily conclude that the accused transferred his anger to the 2 innocent children after failing to get their mother. In any case, the accused was not the biological father of the children.

**24.** In the premises I do find that it is the accused who murdered the two children herein and I shall proceed to convict him under the provisions of Section 215 of the Criminal Procedure Code.

**Dated, signed and delivered this 8th day of March 2016.**

**H. K. CHEMITEI**

**J U D G E**

**In the presence of**

**.....for .state**

**.....for accused**