



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 34 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

G O M.....1ST ACCUSED

L O O.....2ND ACCUSED

RULING

1. L O O (2nd Accused) was jointly charged with G O M (1st Accused) for the offence of murder contrary to **Section 203** as read with **Section 204 Penal Code**.
2. The particulars of the offence stated that on 24th July 2014 at [Particulars withheld] village, [Particulars withheld] sub location, Kaksingri East location in Suba District, they jointly murdered D A. Both accused denied the charge. The 2nd accused died in the course of trial.
3. The prosecution's case was that G had inherited J A (PW1) who was his late brother's wife. They had a child who is the deceased (a 3 year old girl). The couple had lived together for about 1 year and 7 months.
4. On the night of 24th July 2014 G arrived home at about 9.00 p.m. from his place of work, picked a quarrel with J and assaulted her. She ran to her elder brother in-law's (Baba O) house to seek refuge, leaving the child behind. The 1st accused followed her there and told her that L O O had cut the child. She rushed back to her house, only to find the child (D) lying on the floor, facing up. She had a cut across her head running from the left ear to the right ear. She explained that she had not seen the 2nd accused when she fled from 1st Accused and when they got back to the house, he was not there.
5. D O O (PW2) a biological brother to 2nd accused and cousin to 1st accused confirmed that PW1 went to his house and informed him that she'd had a misunderstanding with 1st Accused but before she could go any further with his narration, 1st Accused arrived.
6. 1st Accused requested them to go and assist the child whom he said had been injured by O. So he accompanied them back to their house and found the child lying dead on the floor with a cut on top of the head. There was no one else inside the house. He advised 1st accused to report the matter to police.
7. L O O (a neighbour to the two accused persons) was at home at about 9.00 p.m. on the material date when he heard PW1 saying **"I am tired of all this."** He went to PW2's house and found PW1 there. Just

as PW1 was beginning to narrate her woes with 1st accused, the latter arrived asking for help saying the child was hurt, and he claimed that O was the one who had cut the child. He too confirmed going to the scene and finding the child lying dead but he did not see 2nd Accused anywhere.

8. APC CAROLINE ACHIENG (PW4) confirmed that the 1st accused went to the D.O.'s office in Sindo on 24th July 2014 at about 11.30 p.m., accompanied by three other persons. He reported that he'd returned home from work and had a domestic quarrel with his wife J A, and in the process the 2nd accused came with a panga intending to cut him, but instead he cut the baby. CPL Koech (PW7) booked the report and since it was late at night, the officers visited the scene the next day and collected the body.

9. PW7 got information regarding the whereabouts of 2nd accused, so he proceeded to the place where 2nd accused was performing some work using a panga and arrested him. He took away the panga on suspicion that it was the same one which had been used to hack the child.

10. Meanwhile SGT ROBERT MUTAI (PW8) before investigating and realized that G (1st accused) was giving contradictory information, so he decided to arrest him for further investigation.

11. On further interrogation 1st accused said actually he was the one who had killed the child and hidden the murder weapon. He led PW8 to his house and said the panga he'd used was under the bed. PW8 recovered two pangas but 1st accused could not specify which of the pangas was used to hack the child.

12. The panga recovered from 2nd Accused plus the other two were taken to the Government analyst for examination but no sufficient finding relating to the child's death was made.

13. PW8 explained in court:-

“I established that G was the only person who mentioned 2nd accused saying he witnessed 2nd accused hacking the child and even went to report the APs. Later he changed his story to say he was the one who killed the child.”

14. On cross examination, PW8 confirmed that after investigations, 1st Accused called him aside saying he should release 2nd accused because he was the one who had killed the child and even took PW8 to the place where he had purportedly hidden the murder weapon.

15. However, PW8 was suspicious about 1st Accused's conduct, and suspected some mischief, especially because 1st Accused was not giving him a satisfactory explanation about his movements that night.

16. There is no dispute that the young girl was hacked to death minutes after her mother fled from their house to escape further assault from the 1st accused. The child was left inside the house in the company of the 1st accused.

17. DR. THADDEUS ONDICHO (PW5) who conducted a post mortem on the child's body observed a deep cut wound on the skull which traversed the head – the skull were fractured and there was profuse bleeding into the brain. The cause of death was internal bleeding due to a cut wound on the head and the post mortem report was produced as **Exhibit 5**.

18. The three pangas were submitted to the Government Chemist for examination and analysis. The child's blood stained clothes as well as both accused's blood, and the first accused's blood stained jacket, were also submitted to the Government Chemist for DNA profiling analysis. PW6 (ELIZABETH WAITHIRA OYIENGO) a Government Analyst prepared a report which found that 1st accused's jacket was stained with the same blood that was on the child's clothes.

19. Does the evidence in any way link the 2nd accused to the offence? Does it establish a prima facie case

against him to warrant him being placed on his defence?

20. There is not a scintilla of evidence that even suggests that the 2nd accused was anywhere near the scene on the night in question. There is no suggestion as to what motive he could have had to kill the child.

21. The person who had displayed a violent disposition and who had been left with the child was the 1st accused G O M (now deceased). The panga recovered from the 2nd accused did not have any blood stains, and it remains 1st accused's secret why he claimed that 2nd accused had killed the child, and why he later changed his story. I find that the evidence tendered is not sufficient to warrant placing the 2nd accused on his defence and I enter a finding of NOT GUILTY under **section 306(1) CPC**.

Delivered and dated this 7th day of **September, 2016** at Homa bay.

H.A. OMONDI

JUDGE