**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 10 OF 2010**

**REPUBLIC……………..………..………...……....PROSECUTOR**

**-VERSUS -**

**J M G….............................................................ACCUSED**

**JUDGEMENT**

The accused J M G faces two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on the 19th day of February 2010 at ***[particulars withheld]*** village in Huruma within Nairobi Area, he murdered B G and K G. The accused pleaded not guilty to the charge.

The prosecution called nine (9) witnesses in support of their case. Two of them were heard by Kimaru, J while the rest were heard by this court when it took over the case.

Precisely the facts of the case are that the accused and his wife A N PW1 who were married for about 9 years and blessed with three children aged between seven (7) and two (2) years. In the evening of 17th February 2010 the accused disagreed with his wife and ordered her to leave and go with the youngest child D M. The wife and child left for an undisclosed location. On 19th February 2010 around 11.00 a.m. the accused called PW1 using the phone of PW4 and threatened dire consequences if she did not come back home. The following day in the morning the bodies of the two children were found by PW4 lying on the bed with head injuries. PW4 had been sent by PW1 to confirm some information she had received from the accused through a telephone call that he had killed their children. After the incident the accused surrendered to the police and after investigations, he was later charged with the offence.

The evidence of PW1 is that she was married to the accused person for a period of about nine years. The marriage was troubled due to constant disagreements caused by excessive alcohol consumption by the accused. On 17th February 2010 the accused went home at around mid-night and forced PW1 to leave with her younger child aged two years. PW1 spent the remaining part of the night at a neighbour's house. The accused refused PW1 to take with her the older children B and K. When the accused telephoned PW1 in the morning of 19th February 2010 she refused to disclose where she was. He called her again at around 9.00 p.m. and told her that whatever happens to her children, she should not blame him. When the accused called PW1 around 11.00 a.m. from the phone of PW5, he told PW1 that he had already killed the children. This was confirmed the following morning by a neighbour and friend of PW1 namely W W (PW4).

PW4 testified that she was a neighbour and friend to the family of the accused person. She told

the court that on 19th February 2010 around 11.00 p.m. the accused borrowed the phone of PW4 to call his wife PW1. At that time PW1 had ran away from their matrimonial home due to some disagreements. The accused talked to PW1 in a range of anger and demanded to know where she was. PW1 refused to disclose her whereabouts and the accused warned her that something bad was to happen to her children. PW4 testified that when the accused talked to his wife twice on the 19th February 2010, he used her mobile phone. The accused talked to PW1 in the presence of the witness telling her that he would do something and that his wife should never blame him. The following morning PW4 was called by PW1 to go to her house and find out the state of her children. PW1 proceeded to the house and found the children dead lying on the bed and covered with a blanket. The accused was missing from the house. PW4 reported the matter to PW8 the village elder who then called the police. The scene was attended to and the bodies removed to the mortuary.

PW5 testified that the accused went to their home at Easleigh on 19th February 2010 at around 10.30 p.m. and borrowed her phone to call his wife. The accused was in a drunken state and looked disturbed. The telephone conversation focused on the marital differences between him and his wife. He then complained to PW5 that his wife had run away from home with the youngest child and refused to return. He then told PW5 that he had already killed the two older children who had been left under his care. PW5 did not take the accused seriously. It was the following day that she learnt from her brother that the children had been found dead in the house and that the accused had surrendered to the police.

PW8 the village elder testified of how he received a report from PW4 about the death of the deceased whom he knew as the children of PW1 Mama G and her husband J M (accused). He went to the house and saw the dead bodies before calling the police to the scene. He said that the police recovered a piece of wood stained with blood from the house which was believed to be the murder weapon.

The Government analyst PW3 found the blood on the piece of wood matching with that of one of the deceased persons namely K G. Dr. Oduor PW7 upon performing the postmortem formed the opinion that the cause of death of the two deceased persons was multiple depressed fractures on the heads.

PW6 recorded a confession from the accused where he admitted causing the death of his two children and claimed he was in a drunken state and did not know what was happening. PW9 visited the scene of crime and conducted investigations in the case.

In his unsworn statement of defence, the accused told the court that he had long-standing marital differences with his wife PW1 A N. He said the wife habitually ran away from the matrimonial home and went to her parents' home in Muranga where she at times rented a house to stay on her own. At the material time, PW1 had run away from home carrying the youngest child with her and leaving the deceased children in his care. He fed the two boys in the material evening and then left home for a drinking spree with his friends where he even smoked bhang. On his return to the house, he had lost his senses and did not even know what he did. It was later that he saw the dead bodies of his children on the bed. The accused said he was a frustrated man due to his troubled marriage.

It is not in dispute that PW1 left the matrimonial home with her youngest child D M leaving the deceased children under the care of their father at their home in ***[particulars withheld]*** village in Huruma Estate. The evidence of PW4 was that the accused went to her house on the material morning and called his wife from PW4's phone. After the accused talked to his wife on phone, he gave the phone to PW4. PW1 complained that she had left home after being assaulted by the accused and swore not to return to the home. The accused returned to PW4's house in the evening at around 9.00 p.m. and called his wife again using her mobile phone. The couple talked for about 30 minutes and disagreed. He then threatened to do something bad if his wife did not return home. There is evidence from PW1 and PW5 that the accused called his wife again at around 11.00 p.m. and informed her that he had killed the children. PW4 later confirmed that the accused had made good his threat.

There was no eye witness to the offence thus rendering this case wholly dependent on circumstantial evidence. In the case of **Mwangi vs. Republic (1983) KLR 522** it was held:

**“1.**

**An offence of murder can be established by evidence rendered directly pointing it or by evidence of facts from which a reasonable person can draw the inference that murder has been committed;**

**2. In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.**

The facts presented to the court by the prosecution are that the deceased persons were living with their father in the house after their mother left the home due to marital disagreements. The accused called his wife PW1 on phone several times pleading with her to return home and warned of dire consequences if she failed to come back. The last phone call was made on the material evening around 9.00 p.m. in the presence of PW4. Around 11.00 p.m., the accused made another call using PW5’s phone and talked to his wife in PW5’s presence. He told her that he had killed their children. He also communicated the same message to PW5 but she did not believe him. It was confirmed the following morning by PW4 and later PW8 that the two children were in deed lying dead on their bed with severe head injuries. The doctor PW7 confirmed that the cause of the death was due to the multiple head injuries in respect of both deceased persons.

The accused person gave a confession to PW6 where he admitted hitting the deceased persons on their heads until he saw B G bleeding from the nose. He said he was in a state of drunkenness when he did it. The cause of the frustration was due to his wife’s habits of running away from home and leaving the children unattended.

In his defence, the accused said he has never denied the offence but went on to explain the factors which led him to commit the offence. The defence was a replica of the confession recorded by PW6.

**Section 111** of the **Evidence Act** states:

**“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**

**(2) Nothing in this section shall –**

**a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or**

**b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or**

**c) affect the burden placed upon an accused person to prove a defence or intoxication or insanity."**

The burden of proof of existence of circumstances bringing the case within an exception of the general rule lies on the accused. The accused in this case did not make any attempt to prove existence of any facts on which he could be said to be innocent. He admits the offence in the statement of confession and in his defence but raises the defence of drunkenness.

The evidence adduced by the prosecution irresistibly points the guilt at the accused person as opposed to any other person. The blood stained murder weapon was recovered and produced in evidence. PW3 the Government Chemist found the blood on the piece of wood to match with that of K G. The weapon was a blunt object which PW7 Dr. Oduor confirmed was the cause of the multiple blunt trauma on the heads of the deceased persons.

In the case of **Tepen vs. Republic (1952 )** A.C. at page 489 Lord Normand said:

**"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another… It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence".**

Upon closely examining the circumstantial evidence before me, I come to a conclusion that there are no other co-existing circumstances which would weaken or adversely affect the inference. In my considered opinion, the circumstantial evidence is so watertight and excludes the possibility of another person having murdered the two deceased. It is my finding that the prosecution has established that the accused did the act which led to the death of the two deceased.

The next issue for determination is whether the accused had malice aforethought or the intention to kill the deceased persons. The prosecution's evidence is that the accused disagreed with his wife who left home with the youngest child leaving the accused to take care of the two elder children. The evidence of PW4 and PW5 was that the accused complained of his wife's habit of running away from home. PW1 testified that she left home two days before the incident. The accused unsuccessfully tried to persuade his wife to come back home. PW4 and PW5 who at different times lent their mobile phones to the accused to call his wife testified about the content of the conversations. PW4 said when the accused talked to his wife at 9.00 p.m., he told her that whatever she will find when she returns, should not be blamed on him. Earlier in the day the accused had talked to his wife and threatened to do something if she did not return home. According to PW4, the accused was angry when he talked to his wife for he spoke in a high tone. It is the same evening that the accused killed his children and then left home to his sister's house at Easleigh. Although the accused did not disclose what he was to do, it was later confirmed to be the killing of his sons.

Mr. Wamwayi for the accused relied on **Section 13** of the **Penal Code** in his submissions that at the time of commission of the offence, the accused was so intoxicated to an extent of temporary insanity. The counsel said the defence of the accused which was supported by the evidence of PW9 the investigating officer and PW6 the officer who recorded the confession explains his state of mind. He was so frustrated in his marriage to an extent that he resorted into excessive drinking like he did in the material night. The counsel urged the court to accept the accused's defence and should it find him guilty of the offence, accept the defence of drunkenness in pursuance with the provisions of **Section 13**.

**Section 13** of the **Penal Code** provides**:**

**(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**

**(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that**

**such act or omission was wrong or did not know what he was doing and –**

**(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**

For intoxication to be a defence to criminal charge, it must be established that the accused at the time of the act or omission did not know that such act or omission was wrong or did not know what he was doing. Such state of intoxication must have been caused without the consent of the accused but by malicious act of another person or he was temporarily insane at the time of the act or omission. The defence of the accused is that he did not know what he was doing when he killed his children. The evidence of PW4 of the threats to do something bad for which no one should blame him is evidence of premeditation. The accused took the chang'aa or any other agent of intoxication voluntarily. He first went to drink alone and then returned home. Later he joined his friend and they went drinking together. There is no evidence that the accused was forced to take the drink. The cigarette he smoked which he said the stuff in it was bhang was snatched by accused from the grip of his friend one Ndung'u.

**Section 13** of the **Penal Code** is only applicable where the intoxicating agent is forced on the person. When a person voluntarily intoxicates himself, the provisions cannot be applied in his favour. PW1 was very categorical that in the morning of the material day the accused told her on phone that wherever she finds her children, she should not blame him. This evidence was corroborated by PW4 to whom the accused repeated the same threat. There is no doubt that the accused was going through a difficult time emotionally after his wife left him with the two children to look after. PW1 said it is accused who chased her away at midnight of the 17th February 2010 and ordered her to go away with the youngest child. He was to follow her up in a short while on phone demanding to know where she was and trying to persuade her to come back home. When PW1 failed to disclose her whereabouts and refused to return home, the accused was very bitter and threatened to do something which PW1 would regret. The accused killed the children the same the evening of the same day. On 19th February 2010 he made the threat. The circumstances are such that the accused had formed the intent to kill his children earlier in the day when he communicated to his wife and to PW4. The drink he took in the evening was meant to give him the dutch courage to execute his plan.

In his defence, the accused gave the time he returned to his house and struck the deceased persons as 8.45 p.m. When he went to call his wife using PW4's phone at 9.00 p.m., it follows that he had already committed the offence. This was confirmed in his own defence as he narrated the chain of events of the material evening.

In the case of **John Kaberi Njoroge vs. Republic (1988) eKLR**, the Court of Appeal cited the case of **Michael Sheehan and George Alan Moor (1975) 60 Cr. Appeal R. no. 308** where it was observed:

**"In cases of drunkenness and its possible effect upon the defendant's *mens rea* is in issue, ………there were fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent, the jury should merely be instructed to have regarded to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."**

Similarly, I find that the evidence before me, proves that the necessary intention to kill was there at around 11.00 a.m. on the material day. This was about 8 hours before the accused went on a drinking spree. The intent had been formed prior to the events which followed that evening and which the accused heavily relies in his defence. The appellant's partial intoxication if at all at the time he committed the

offence was not of such a magnitude as to amount to insanity. The accused's marital problems are not sufficient to justify the heinous act.

I find the defence of intoxicating not acceptable in this case and reject it accordingly.

The accused inflicted very severe injuries on the heads of the deceased using a thick piece of wood. The deceased were children of tender age of seven and nine years respectively. The accused understood that the injuries on the children would have a fatal impact. The severity of the injuries support the mental state of the accused that the killing was premeditated and that he did not aim to only cause harm to the deceased but to kill them in a well-executed plan. The prosecution has established the ingredients of the offence of murder against the accused beyond reasonable doubt.

I therefore find him guilty and convict him accordingly contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

**F. N. MUCHEMI**

**JUDGE**

**Judgment** dated and delivered in open court on **3rd** day of **June 2014** in the presence of:

1. Mr. Konga for Okeyo for State
2. Mr. Wamwayi for accused
3. Accused present

**F. N. MUCHEMI**

**JUDGE**