



REPUBLIC OF KENYA

High Court at Bungoma

Criminal Case 7 of 2006

REPUBLIC

PROSECUTOR

~VRS~

PETER MCHEMBI

WAKWABUBI

ACCUSED

JUDGMENT

A charge of murder

[1] The accused was charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of offence were that on 4th day of January, 2006 at Khamunialo Village, Lugusi Location in Bungoma District within Western Province, the accused murdered Daniel Otanga and Mike Okwili. The accused pleaded not guilty to the charges on 23/2/2006.

Evaluation of evidence

[2] The prosecution called a total of seven witnesses. PW1 Everlyne Nasipwoni Wafula testified that in May 2006, she was married to the accused person and together with her 3 children namely Margaret, Daniel and Mike aged 6 years, 3 years and 14 months respectively she lived peacefully with the accused.

[3] PW1 further testified that, on 4/1/2006, she left home together with the accused for Webuye to attend a clinic as she was pregnant. They locked the children, Daniel and Mike in the house. The accused then went back home while PW1 proceeded to the market to buy a *leso*. She then attended the clinic and went back home at 6.30 p.m. On arrival at home, she found the accused seated under a tree that was near their house. She also saw a T-shirt and a pair of shorts belonging to Daniel and Mike respectively where the accused was seated. According to her, the shirt was full of blood. On inquiring about what had happened, the accused replied that he had killed the evil spirits, and she should pick her ghosts and leave.

[4] She tried to get the keys from the window where they were not there. The accused had them and threw them down for her to open the house. On opening the house, her two children, Daniel and Mike were lying on the floor with injuries on their heads. PW1 screamed and called for help. Neighbors responded to the distress call and came. The police was then called in and took the bodies away. The accused was also arrested. The deceased children were not biological children of the accused as they were born out of an earlier marriage. But the accused knew of the earlier marriage.

[5] On cross-examination, PW1 said she did not witness the accused killing the children. She only found him seated under a tree in their compound and he looked drunk. He was not however asleep. She

confirmed it is the accused who gave her the keys to the house.

[6] On re-examination PW1 told the court that the accused was not a heavy drinker as such and he was not violent when he was drunk. He just acted normal.

[7] PW2, Tom Koli, was the biological father of the deceased children who were born out of a marriage he had with PW1. He did not know that PW1 had re-married. He only learnt from his father-in-law that his two children, Daniel and Mike had been killed. He later identified the bodies of the two for purposes of postmortem at Webuye District Hospital. He later buried the bodies. He said he does not know the accused.

[8] PW3 is a neighbor to PW1. She was at home on 4/1/2006 when she heard PW1 calling for help. She rushed to the house of PW1 where she saw two boys lying naked on the floor of the house. Both bodies had injuries on the head. The accused was also at the scene but kept quiet all through. Other neighbors also went to the scene and so were the police. The police took away the bodies. PW3 confirmed that PW1 married the accused 6 months before the incident, and at the time she already had the two children, who are the deceased herein.

[9] On cross-examination, PW3 said she did not witness the killing and she does not know who killed them. But she told the court that the accused was drunk on the material day.

[10] PW4, who is also a neighbor to PW1, came to the scene of the crime and heard the accused accosting his wife and saying to her *"come here, what sort of wife are you. Enter the house and remove the ghosts inside there. I cannot live here with you and the ghosts"*. The accused had the key to the house and he opened the house. On entering, PW4 saw two children who were naked and lying on the floor. They were dead. They were bleeding from the injuries suffered on the head and mouth. PW4 then rushed to call the mukasa, James Wanjala Khisa. Unfortunately, he was not at home, but he proceeded to the Chief's office at Lukusi where he found administration police officers and reported the incident to them.

[11] When PW4 returned to the home of the accused, he found the accused tied with ropes and lying next to the dead children. The chief went to the scene. The police too went to the scene and removed the bodies. PW4 says he found the behavior of the accused to be quite strange when he asked his wife to take away her ghosts. This evidence was re-affirmed in cross-examination.

[12] PW5, the chief of Lukusi Location called OCS Webuye immediately he received the news on the death of the two deceased children. He, together with the OCS and police officers from Webuye proceeded to the scene where they found two bodies of young children lying on the floor in the accused's house. They also found the accused tied with ropes. The bodies had injuries on the head and face. PW5 knew the accused who had even at one time served some non-custodial sentence under his supervision.

[13] PW6, a medical doctor performed the post mortem on the body of Daniel Otanga on 9/1/2006. The relatives and a police officer were present during the post mortem. According to PW6, the person had died 5-6 days earlier. The body had a scalp wound transverse on the right side of the head – 5 cm long, a bruise behind the head and bleeding on the right side of the head. The cause of death was severe head injury (Epidural hematoma, right-side) due to blunt trauma. Post mortem report was produced as exhibit 1.

[14] PW6 also performed a post mortem on the body of Mike Okwili in the presence of the relatives and a police officer. The deceased was aged 1 ½ years and had died about 5-6 days earlier. The body had a bruise on the right side of the head and left elbow joint. There was a fracture of both left and right humerus, of both thigh bones, of both tibia and fibula. All ribs were also fractured and multiple depressed fracture of the skull. The digestive systems had bleeding spots on the large intestines. Multiple head fractures caused lacerations of the brain tissue. The cause of death was multiple fractures and injuries on the skull with lacerated brain, thorax (flai chest) and limbs-due to severe trauma. Fractures were uniform which an indication that torture was administered systematically. The report was produced as exhibit 2.

[15] PW7 a police officer no.61908 P.C., together with other police officer visited the scene on 4/5/2006 at 9.00 p.m. He found the accused in the house, and two bodies of young children, naked and with injuries were lying on the bed. PW6, recorded statements from the people present including PW1 who informed him that the accused threw keys to her when she asked for them. He however, confirmed nobody saw the accused inflict the injuries on the deceased children. He took the accused to be examined by an expert, and the accused was certified to be fit to plead and so he charged him with the offences of murder of the two children.

Case to answer

[16] On 18/5/2011, the court found that the prosecution had established a *prima facie* case against the accused and put the accused to his defence.

DEFENCE CASE

[17] The defence case was done and closed only on 19/2/2013 when the accused gave an unsworn statement. He did not call any other witness. He denies having killed the deceased children. He narrates the events of the fateful day i.e. 4/1/2006 that after having breakfast with the deceased children he left for Nzoia where he had been asked by Violet Nanjala to take Siundu Lukowa. He left his wife behind. But suddenly at Froi Market, PW1 and another lady called Helen found the accused in a hotel. PW1 told the accused that she needed to go to hospital. The accused persuaded PW1 to wait until the following day but she insisted she needed to go to hospital then.

The accused obliged and gave her a total of Ksh.260/= to purchase a *leso* and for treatment. When PW1 arrived at the hotel, the accused inquired from her, where she had left the children. She replied that she had left them with a neighbor called Lena Kuloba.

[18] They then parted and PW1 left for hospital and the accused continued with his *boda-boda* business. The accused then proceeded home but found nobody at home and could not trace the keys. He decided to rest under a tree and wait for his wife. His wife then came aboard a *boda-boda* whose cyclist was Joseph Werunga. The wife then got the keys and opened the house. Meanwhile, the accused remained seated under the tree and asked her to get him the radio to listen the 4.00 pm news.

[19] On opening the door, PW1 started screaming and Joseph Werunga came back to see what was happening as he had not gone far. Another person called Hudson Simiyu came and they, together with the accused entered the house to find out what had happened.

Hudson hit the accused with a stick he was carrying and asked Joseph Werunga to help him restrain the accused from entering the house as he feared the accused had a gun in the house and may use it to kill them. Many other people including the sub-chief came to the scene.

[20] The sub-chief then asked Joseph Werunga and Hudson Simiyu why they had restrained the accused from entering the house, and wanted to know whether this is yet another ploy to accuse the accused like they did last time- alleged that he had burned their sugar cane plantation. The sub-chief then requested the members of public, who had tied the accused's legs and hands, to take the accused into the house. The police arrived and arrested the accused.

[21] Simon Musila and Chirchir are the police officers who arrived at the scene. They knew the accused person and they knew that he was separated from his former wife called Joyce. The two thought he had killed the children of Joyce but they realized later that the deceased children are PW1's. The police then took the accused for treatment where he received stitches on the wounds he had suffered in the hands of the public.

COURT'S VIEW

Guilty state of mind (*mens rea*)

[22] These are criminal charges. The prosecution must prove every element of the offence *beyond any reasonable doubt* for a conviction to ensue. The law requires that, the prosecution establishes both guilty state of mind to commit the crime of murder, and the actual wrongful deed of murder (i.e. physical component of the crime) that was committed by the accused.

[23] From the evidence of PW1, the accused was a seasoned drinker and was never violent when he was drunk. He behaved normally. PW1 also told the court she, together with her children, was living peacefully with the accused. She did not adduce any evidence or provide a hint which would suggest that the accused could have harbored any intention to harm the deceased children. Indeed PW1 said that the accused all along knew that the deceased children were from the previous marriage with Tom Koli.

Actual wrongful deed of murder (*actus reus*)

[24] The murder herein, to say the least is most outrageous ambition that a savage human being can harbor to inflict all possible hurt upon a person, regrettably in this case, on children of tender ages. It is a beastly act done by a person who was beyond any possibility of attending to any motions of reason or humanity. The person who did it was much misanthrope only comparable to abhorred ruffians or mohocks of the yore [as they were called] whose avowed design of talent was to cause sore mischief and extreme barbarities upon innocent persons. But the question remains; was this heinous crime committed by the accused? The question should be answered by looking at the evidence provided by the prosecution.

[25] None of the witnesses saw the accused killing the children. All evidence being offered is circumstantial. The best evidence that was offered by PW1 in her testimony was that the accused on the material day left PW1 at the market and went back home. When PW1 came back home, she found the accused seated under a tree outside their house, and near him were a T-shirt and a pair of shorts belonging to the late Dan and Mike respectively. Mike's shorts were covered by blood. This aspect of the evidence by PW1 is critical and I shall return to it in a short while.

[26] PW1 also testified that the accused is the one who had the keys to the house except she is the one who opened the house. Moreover, according to PW1, the accused told her to open the house, get her ghosts out and leave. This evidence by PW4 is an attempt to corroborate the evidence of PW1. PW4 testified that when he arrived at the scene he heard the accused saying to his wife "*come here' what sort of wife are you. Enter the house and remove the ghosts inside there. I cannot live here with you and those ghosts.*" From the record, it is clear PW4 was not the first person to arrive, as, by the time he arrived, there was already a crowd at the scene. PW3 was also at the scene but she testified that the accused just stood saying nothing as his wife was crying. From the evidence of PW1, PW3 and PW4, it seems PW3 is the one who arrived earlier than PW4 in response to the call of distress by PW1. PW4 said he found some neighbors already there including PW3. So the testimony of PW3 that *the accused just stood there and said nothing* is quite a contradiction of, and raises a serious doubt as to the evidence by PW4 that he heard the accused saying to his wife (PW1) "*come here' what sort of wife are you. Enter the house and remove the ghosts inside there. I cannot live here with you and those ghosts.*"

[27] There is one major omission on the part of the prosecution- the blood-stained clothes which were alleged by PW1 were near where the accused was seated under a tree at his home. This was an invaluable piece of evidence which the Investigating Officer (IO) should have considered in his investigations. But, the IO did not tender any evidence or even mention the presence of the blood-stained clothes, or what became of them if at all they were there. They were not submitted for any examination or produced as exhibits. Although all witnesses testified that the bodies were naked, nobody, except PW1 talked about any blood-stained clothing. I find this to be a fatal lapse on the part of the prosecution, as it breaks the chain of circumstantial events which could have recorded an irresistible conclusion in the mind of the court that the accused committed the wrongful deed of murder.

[28] The story narrated by the accused may not be trust worth. The demeanor of the accused when he was testifying indeed suggested he was not telling the truth. However, despite these observations, this is a criminal case. It is never the question of whether the accused is trust worth or not, for, if that were the case, it would be tantamount to asking the accused to prove his innocence, which would be a complete

inversion of the true position of the law. The legal burden of proof lies on the prosecution to prove the guilt of the accused beyond any reasonable doubt. That burden never shifts from the shoulders of the prosecution to the accused person. See the opinion of Viscount L.C in **H.L. (E) WOOLINGTON v DPP [1935] 462** at page 481 on the golden thread that runs the entire legal discourse of the 1700 on the legal burden of proof in a criminal proceeding.

[29] The incidence of legal burden of proof should not however be confused with the incidence of evidential burden. Some legal scholars refer to evidential burden as *reverse burden of proof*-a term I detest as it offends the law and confuses the two incidences which are quite distinct in a legal proceeding. The following rendition is relevant to this case and for posterity.

[30] The legal burden of proof rests with the party who must prove an allegation. In criminal cases, the legal burden of proof rests with the prosecution. In civil cases, the legal burden of proof initially lies with the plaintiff, but depending on the nature of the claim, it may be on the defendant also, and a good example is where there is a counter claim.

[31] The evidential burden on the other hand is created when the party with legal burden has adduced such *prima facie* evidence that the other party will fail without further evidence. In a criminal case, the evidential burden is created when the prosecution has established a *prima facie* case against the accused person or where the law has created a rebuttable presumption or a statutory defence on the accused. At that stage, if the accused does not offer any evidence at all, the accused may be convicted. This does not negate the constitutional right of the accused to remain silence, for; conviction will not be based on the fact that the accused has not tendered evidence, but because, after the court has evaluated the evidence, it is satisfied the prosecution has proved the charges beyond any reasonable doubt. In civil cases the difficult is not as great as the party who does not offer any or further evidence on a *prima facie* case having been established, risks judgment being entered against that party. Likewise, the successful party will succeed because he has proved the case on balance of probabilities. Unlike criminal cases, in civil cases, it should be noted, the evidential burden keeps on shifting depending on who is trying to prove what relevant issue on the basis that "*he who asserts must prove*". Evidential burden is sometimes referred to as the "*burden of passing the judge*". For further understanding of these concepts of law see the **Black's Law Dictionary, Halsbury's Laws of England**, cases of **R v Ex parte Kebilene, R v Ewards, R v Lambert et al.**

Test of circumstantial evidence

[30] The instant case should largely be decided on circumstantial evidence, and the law on circumstantial evidence is now well settled. In the case of **REX V KIPKERING ARAP KOSKE AND 2 OTHERS [1949] 16 EACA 135**, the predecessor to the Court of Appeal, Kenya stated:

"As said in Wills on "Circumstantial Evidence" 6th edition P.311," in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

[31] To the above principles, a third one was introduced by the decision of the same Court in the case of **SIMON MUSOKE v [1985] EA 715** when it quoted with approval the judgment of the Privy Council in **TEPER v R [1952] AC 480** at page 489 that:

"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 inference."

[32] I have found that there is no chain of circumstantial events which could enable the court to record an irresistible conclusion that the accused committed the wrongful deed of murder he is charged with. In sum, the prosecution has failed to prove its case beyond any reasonable doubt. The accused is therefore

accordingly acquitted under section 215 of the Criminal Procedure Code.

Dated, signed and delivered in open court at Bungoma this 4th day of April, 2013

F. GIKONYO
JUDGE

In the presence of:
Kibelion for State
Accused present
Khisa Court Assistant

F. GIKONYO
JUDGE