



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 22 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL TERA TONOSHO.....ACCUSED

J U D G M E N T

The accused **SAMUEL TERA TONOSHO** is charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that **SAMUEL TERA TONOSHO** on the 19th day of March 2019 at Kamarang village, Sasuri Location in Cheptais Sub-County within Bungoma County murdered **MTM**.

The case for the prosecution is that on **19.3.2019 PW2 WKM** the father of the deceased sent deceased at 6.30 p.m. to the home of one Edwin to collect milk. Edwin's house was about 300 meters away. She did not come back. At 7 p.m. he sent his other child Morgan to go and check on her. Morgan went to the home of Edwin and was informed that the deceased had been there and left.

The next day they continued with the search and found body of the deceased in a trench near the home of Edwin. She had injuries on the hands and was bleeding. Police were informed and took the body to the mortuary.

PW6 FCK the mother of the deceased Melvin testified that she sent the deceased to the home of Edwin to collect milk at 6.30 p.m. She did not come by 7 p.m. She sent Morgan to go and check on her but was informed she had been to the home and went away. The next day she inquired from the wife of Edwin who told her she had not seen the deceased the previous day. She then heard people screaming from near the home of Edwin. She went there and found deceased

PW7 MK a minor aged 11 years old testified how he was sent to check on deceased at home of Edwin. He met Edwin who told him deceased had gone back. The next day he heard that Melvin had died.

PW8 Carol Chepkwemoi the wife of Edwin testified that she had not seen the deceased on 19.3.2019 when she was sent to her home. She had last seen her on 17.3.2019 while playing with her children.

PW9 Ben Naimoi Serene a nyumba kumi official testified that on 24.3.2019 he received information that Tera (accused) was being suspected of killing the deceased. He met accused and his uncle Watia. He asked accused if he had committed the offence. He denied. Accused's uncle then urged him to take accused to police otherwise he will be killed by members of public. The witness and accused's brother took accused to Kanganga police station.

PW10 No. xxxxxx PC Meta Wellington was at Chesikaki police station when he received information from Winsor Kiboi and his wife who are the parents of the child that their child had been found dead on a farm. He and PC Achieng and Mulika visited the scene and found the body of the deceased in a farm. He observed the body and saw it had bruises, clothes were blood stained and there was a discharged from the deceased private parts. They took the body to Kimilili hospital mortuary. The accused later took himself to Kinganga police station where he was arrested.

On being cross examined by Wamalwa R, he stated that another person Cleopas Ndiwa was arrested as a suspect. He denied that he ever assaulted the accused.

PW11 No. xxxxx Segt Philip Ribis the Investigating officer took over the investigations from Chesikaki police station. He received information that the deceased who was aged 5 years had been defiled and killed.

There were 2 suspects arrested in connection with the offence, accused and one Ndiwa. He escorted them to Kimilili sub-county hospital where he obtained blood sample, finger nails, pubic hair from each of the suspects. The doctor who performed the post mortem took a vaginal swap of the deceased. He spoke to accused who confessed to the defilement and murder. He released the other suspect Ndiwa

PW12 Alfred Samia Ndiema received information from one Elizabeth that deceased had been killed and accused arrested as a suspect and was at the police station. He went there and spoke to accused who was in custody. Accused told him that he had killed the deceased due to drunkenness.

PW13 Richard Kimutai Langat Government analyst based in Kisumu testified that he received the following items for DNA analysis.

1. Pubic hair for accused.
2. Blood sample of accused
3. HVs of deceased.
4. Finger nails of deceased.
5. Pubic hair of Cleopas Ndiwa
6. Blood sample of Cleopas Ndiwa.

He subjected the items to DNA analysis. From the DNA profiles showed that the High Vaginal swap belonged to deceased and had no genetic relationship with DNA of accused and Cleopas Ndiwa. He explained that if during defilement a person uses a condom, there would be no sperm in the High Vaginal Swap and so no DNA will be generated for sperm.

The accused upon being put on his defence gave sworn evidence. He testified that he went to Uganda on 17.3.2019 upon being called by his boss Mr. Juma. He came back from Uganda on 24.3.2019. He passed through his aunt who informed him of the murder of the deceased. She informed him that he was a suspect and urged him to go to the police station. He and Ben went to the police station where he was detained and assaulted. He was later charged with present offence.

The accused called **DW2 Ben Kipkania Naimoi**. He testified that on 17.3.2019 accused passed through his home and informed him that he (accused) was going to Uganda. On 24.3.2019 he received information that the mother of deceased was saying accused had murdered a child. He asked accused about it but accused denied. The accused was however afraid of mob injustice as members of public were looking for him. He advised accused to go to the police post. He escorted the accused to the police post where he was arrested.

Mr. Wamalwa for the accused filed written submissions. Counsel submitted that there was no eye witness who testified that he saw accused killing the deceased. He submitted that the accused had offered alibi defence stating that he was in Uganda when offence was committed, and that the prosecution case was premised on suspicion which however strong it is cannot form a basis for conviction.

The accused is charged with the offence of murder contrary to Section 203 of the Penal Code. Sec. 203 provides:

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

The ingredients of the offence of murder which the prosecution must prove beyond reasonable doubt are:

- a. The death of the deceased.**
- b. The unlawful cause of death**
- c. That in causing death the accused committed it with malice aforethought.**
- d. That there is direct or circumstantial evidence placing the accused at the scene of the crime.**

PW1 Dr. Wanambisi Caleb Wataa who performed the post mortem on body of the deceased testified that the deceased had multiple bruises on both upper and lower limbs, and on the neck, there was clotted blood on the Majora, and bruises on chicks. He formed opinion that cause of death was due to fractured base of the skull causing severe head injury. He took a high Vaginal swap and blood sample for DNA analysis.

Who inflicted the injuries from which the deceased died?

PW2 WKM the father of the deceased testified how the deceased had been sent to collect milk at the home of Edwin but he did not come back. The next day the deceased was found dead on a trench near the home of Edwin, with injuries on the face, head and hands. In cross examination he testified that he did not see the accused that day.

PW4 Edwin Kipruto Keben was with PW2 the father of deceased when PW2 received a telephone call that deceased had been found dead.

He went with PW2 to the scene and confirmed the same. He confirmed that he did not see the accused on 19th or 20th March 2019.

PW5 No. xxxxx Copl Mulindi Olando received the report of the murder and visited the scene. On arrival at the scene they found deceased and empty plastic bottle. At the scene he received information that accused was a suspect but had escaped to Uganda. Accused was later brought and he handed him over to DCI for charge and caution which was taken by chief Inspector Mwadime now deceased.

PW6 FCK the mother of the deceased testified how she went deceased to collect milk from home of Edwin but did not come back. The next day while at home she heard people screaming and on going there found it was deceased body which had been found. Later accused was arrested in connection with the death.

PW9 Ben Naimoi only escorted the accused to police at his request as he feared being killed on suspicion of killing deceased. **PW11 Segt Philph Ribis** the Investigating officer took over the file from Chesikaki police station. He found that there was 2 suspect. Tera, the accused and Cleopas Ndiema. He caused that finger nails and pubic hair samples taken to Government analyst for DNA analysis. The report which was produced by PW13 Richard Kimutai made a finding that from the DNA profiles of the deceased High Vaginal swap had no generic relationship with the DNA of accused and Cleopas. None of these prosecution witnesses testified that they saw accused inflict injuries on the deceased. It means therefore that there was no eye witness to the murder and therefore no direct evidence.

The prosecution evidence which the prosecution sought to rely on is what the accused is alleged to have stated in a charge and cautioning statement made to the OCS Chesikaki police station Chief Inspector Mwadime. The said C.I Mwadime is reported to be now deceased. He therefore did not testify and the alleged charge and caution was never produced. Since that was the basis of connecting accused to the murder and the confession or charge and caution was never produced, there exists a gap in the prosecution case.

The other evidence by the prosecution of DNA analysis of finger nail and pubic hair of the accused did not match the High Vaginal swap of the deceased as tendered in the report Exh...It therefore showed that there was no evidence that the deceased was defiled by the accused.

None of the prosecution witnesses who testified stated that he/she saw accused killing the deceased. In short there was no eye witness to the commission of the offence. The prosecution called PW12 Alfred Salmia Ndiema who testified that on 25.3.2019 he went to the Kinganga station where accused had been arrested and placed in cells and he told him (witness) that he had killed the child due to drunkenness. **PW11 No.xxxxx Segt Philph Ribis** who took over the file as Investigating officer in this issue testified:

“The witness statement were taken by Chesikaki police station. I interrogated the 2 suspect. Tera confessed to the defilement and killing. I did not find any witness. The OCS Chesikaki police station recorded the confession of Tera. There was no evidence against Cleophas Ndiema. Tera is the one on the screen.”

On 15.5.2021 Mr. Thuo for state applied for witness summons to among others to the OCS Chrispinus Sindao Mwadime to appear in court and testify on 25.10.2021. Until the close of the prosecution case this witness did not testify as he was by then deceased. The confession referred to by the Investigating officer was not therefore produced in evidence. This is the only document according to the investigating officer which connected the accused with the death of the deceased. That being so the evidence on record remains on the suspicion that it is accused who committed the offence.

In the case of **MARY WANJIRU GUCHIVA –VS- REPUBLIC CRIMINAL APPEAL NO. 17 OF 1998** the court held as follows:-

“...However strong, suspicious is cannot proved by evidence. Before a court of law convict an accused person of an offence, it ought to be satisfied that the evidence against him is over swelling and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life....”

In the case of **JOO –VS- REPUBLIC (2015) eKLR** the court of appeal held as follows:-

...**104 JOO –VS- REPUBLIC (2015) eKLR** when the court stated as follows:-

“...It is not lost to this court that the offence which the Appellant faced was such a serious once had ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This court holds the view that it is better to acquit ten guilty persons than to convict one innocent person...”

Before a court of law finds an accused guilty of an offence, it must be satisfied that the offence has been proved beyond any reasonable doubt. What amounts to reasonable doubt was settled in by Lord Denning in **Miller –vs- Ministry of Pensions (1947) 2 ALLER 372** where he stated:-

“.... That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect community if it admitted fancily possibilities to deflect the course of justice. If the evidence is so showing against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the leant probable, the case if proved beyond reasonable doubt but nothing short of that will suffice...”

In this case considering all the evidence I am not satisfied that that standard has not been attained by the prosecution evidence adduced. I therefore find the accused Samwel Tera Tonosho not guilty of the offence of murder and acquit him under Section 215 CPC. I direct the

accused Samwel Tera Tonosho to be set at liberty unless otherwise lawfully detained.

DATED AT BUNGOMA THIS 29TH DAY OF MARCH, 2022

S.N RIECHI

JUDGE