



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 37 OF 2015

REPUBLIC.....STATE

VERSUS

WILSON NJIRU NJAGI.....ACCUSED

JUDGMENT

1. The accused herein **Wilson Njiru Njagi** is charged with the **offence of murder contrary to section 203** as read together with **section 204 of the Penal Code**. Particulars of the charge are that on 20th May 2015 in Laikipia East Sub-County within Laikipia County he murdered **AW**. He pleaded not guilty.

2. The prosecution availed 11 witnesses, 7 of the witnesses testified before **Hon. Odero** before **Hon. Ngetich** took over the matter. The accused was informed of his rights under **section 200** and he choose to have the matter proceed from where it had reached.

PROSECUTION'S EVIDENCE

3. PW1, **Esther Njoki Gathumo** testified that on 20th May 2015, the accused woke her at 2.00 am and told her that they should sell the child **AW**. She said the following day while working in the farm, the accused ordered her to go and attend to the sheep and she left the deceased with the accused.

4. PW1 testified that on returning to the farm, she did not find the child(deceased) and on inquiry from the accused, he told her to look for her. She said accused later gave her 2,000/= shillings and told her that he had given the child to **Mama Lazaro**.

5. PW1 alerted neighbors who searched the child but did not find her. After 2 days, they found the remains of her stomach and jaws of her child in their farm. PW1 identified the clothes the deceased was wearing as yellow sandals, pink trousers, a pink dress with a white collar, and a white sweater all found at the scene. She further testified that the accused was not the biological father of the deceased.

6. On cross-examination by defence counsel **Mr. Mongeri**, PW1 stated that she had been married to the accused for 6 months and that she had 2 children at the time of the marriage. She said she did not report the issue of selling the child to anyone as the accused did not leave her sight and she feared that he could kill her. She couldn't state with certainty that the deceased was killed by the accused.

7. PW2 **Jane Gathoni** a sister to PW1 testified that on 20th May 2015 when she was leaving the farm PW1 called her and informed her that her child was missing and she assisted with the search for 2 days to no avail. She said she was later called by **Baba Michael** and informed they had found some parts of the child's body. She informed the police and proceeded to her sister's place and saw the child's intestines and lower jaw and clothes worn by the deceased before her disappearance at the scene.

8. PW3 **Josephine Syomuya Keveke** testified that on 20th May 2015 while at work, she heard a shout and she went to check at the neighbors and was informed that the child was missing. She said she participated in the search for the child and on 23rd May 2015 at around 3. 00 pm when she was going to fetch firewood, she heard a strong sound from the bushes and on checking she smelt a bad odor and saw flies. She called a boy who helped in checking where the foul smell was coming from and they saw the intestines which she could not tell whether they belonged to a human being or animal. She said she also saw some clothes. She called the deceased mother who identified the clothes as those of the deceased.

9. PW4 **Miriam Wambui** stated that she heard screams from her neighbor's house but she did not go to check as she was unwell but the next day, she was informed that her neighbor's child Wamboi was missing. She assisted in the search but did not trace her. On 23rd May 2015 she learnt from PW3 that the remains of the child were found in the bush. She said she accompanied her and saw the remains of the deceased

in the bush.

10. PW5 **Jane Wanjiru Njuguna** testified that on 20th May 2015, she heard shouts from her neighbors while on her way to the shop; she decided to check on them and she was informed a child was missing. She joined in the search and on 23rd May 2015 she was informed that a neighbor called **Josephine** (PW3) had seen the remains of the child in the bush and she went to confirm the same and saw the deceased clothes.

11. PW6 **Reuben Mathenge** testified that on 20th May 2015 he was called by the accused and informed that his child was missing and requested him to help in the search; he sent out one of his teachers to assist in the search with no trace of the child the next day at around 3.00 pm he joined in the search together with some of his students. On 23rd May 2015 he was informed the remains were found.

12. PW7 **Dr. Joseph Kamau Kinyua** who is attached to Nyahururu County Hospital in charge of medical-legal representative testified that on 2nd June 2015, he conducted an autopsy on the body of the deceased **AW**. He informed court that it was difficult to ascertain general features as the body was badly decomposed and the only available tissues were part of the intestines wall on the mild abdominal wall. He said he collected tissues for DNA and from the post-mortem report he concluded that the remains were for a human body.

13. PW8 **Constable Yusuru Sora Abadir** testified that on 20th May 2015 at around 1.00 pm, the accused went to the station to report that a child was missing. He said the accused was asked to go and search further for child and bring feedback later; and at 7.00 pm he arrived with villagers to police station and he was arrested together with the wife on suspicion by villagers that they had a hand in the disappearance of the child.

14. PW9 **Constable Daniel Kibet** testified that on 21st May 2015, a report of a missing child was made by **Esther Njoki** in the presence of 2 APC officers and the accused. She stated that before the disappearance of the child, the accused had proposed to sell the child, and the accused was the last person with the child as he had told her to go and tend to the sheep. She said she was away for 20 minutes and on returning did not find the child with the accused.

15. PW10 **Sergeant Kosgei Joel No.76356** testified that he holds a certificate in Basic Forensic from DCI South C Nairobi and was gazetted as a crime officer on 18th January 2010. He testified that on 23rd May 2010 at around 6.15 pm, he proceeded to the murder scene of **AW** and took photographs. He said the first photograph shows a general view of the bush where the stomach contents, the deceased's cloth and plastic shoes were found. The 2nd photo shows the intestines closely. The third and fourth photos show a close view of plastic sandals, while the 5th photo shows a close view of the piece of clothes that were said to belong to the deceased. He produced as evidence his report made on 4th April 2017.

16. PW11 **Corporal John Cheruiyot No. 69393** testified that on 20th May 2015 he was informed by the DCIO of the murder of the child. He said that he went to the Nakuru Police Post and took the accused to Nyahururu Police Station. He said the accused on interrogation said he left the child on the roadside and on coming back, the child was not there and, on the 3rd, day clothes, intestines parts, and shoes were found at the crime scene. He said the mother of the deceased identified the clothes as belonging to her deceased child. He took samples of the intestines parts and blood from the mother for examination.

THE ACCUSED DEFENCE

17. DW1 **Wilson Njiru Njage** adduced sworn evidence. He stated that he knows the deceased **AW** who was his child aged 3 years. He had married **Esther Njoki (PW1)** as his 2nd wife and they lived together as a family with the deceased, her sibling, the mother, and his other 2 children from his first wife.

18. He stated that on 25th May 2015 he was with the 2nd wife, the deceased, and their young child, and at around 10.00 am while they were at the farm, he asked his wife (PW1) to go and check the sheep and he went to check the cattle and when his wife returned, she asked him where the deceased was and he informed her that she was taking care of the young one. He said they checked her but she was not there and requested neighbors to help look for the child but they did not find her. He said he called the school and asked the headteacher to allow the students to assist in the searching of the child but they did not find her. He said he was arrested together with his wife.

19. He denied the offence and said he could not kill her as she was his child and he loved her. He said the police failed to conduct proper investigation and that he was arrested for a crime he did not commit.

20. The prosecution chose not to file submissions and relied on the evidence on record.

ACCUSED'S SUBMISSIONS

21. The accused through his advocate filed submissions on 6th June 2021 and submitted that the prosecution failed to satisfy the ingredients of the offence of murder.

22. On whether the ingredients of murder have been satisfied, counsel submitted that the prosecution did not establish the motive or malice aforethought on part of the accused and further the deceased's body was not traced and the DNA submitted did not generate any profile and cited the case of **Joseph Kimani Njau vs Republic (2014)** where the Court of Appeal stated as follows: -

“.....that the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution...”

23. On whether the body of the deceased was identified, the defence counsel submitted that the body of the deceased was not found and the evidence adduced by the prosecution witnesses shows only body parts of a human being and the only thing linking the body part to the deceased are the clothes allegedly worn by the deceased before the disappearance. He submitted that the DNA report indicates that the samples submitted for the DNA failed to match that of the mother and thus the parts identified don't belong to **AW**.

24. The defence counsel further submitted that there was contradiction in prosecution case in that the witnesses did not give a clear chain of events as the evidence adduced failed to point out who saw the body and who reported the matter to the police. He cited the case of **Dinkerrai Ramkrishna Pandya v Republic Appeal No. 106/1950 EACA** where the Court stated that: -

“It is difficult to distinguish the truth from the untruth and as who was telling the truth and who was telling lies where evidence is contradicted”

25. The defence counsel further submitted that the accused was arrested and held in police custody because his child was missing and not because he had committed murder, yet he was charged with the offense of murder hence the charge was defective.

26. Further that evidence adduced by the prosecution was not sufficient to convict the accused as PW7 testified that they could not ascertain if the remains adduced as evidence belonged to the deceased and as per the evidence of PW8, the accused was detained because he had a bad reputation in the village. Counsel submitted that the accused's defense was credible as his statement is corroborated by PW1 who was with him in the farm when the child went missing.

27. Counsel further submitted that the accused was keen in finding the child as he participated in the search and also asked neighbors to help in the search and also went to report the matter to the police station.

28. In conclusion, the defence counsel submitted that the evidence of the prosecution was not circumstantial as the evidence adduced by the prosecution did not directly point at the accused as the perpetrator of the act. That the accused should not be convicted on mere suspicion unless the case is proved beyond a reasonable doubt. He urged this Court to find that the accused has no case to answer and be acquitted.

ANALYSIS AND DETERMINATION

29. I have considered evidence adduced and submissions by the defence counsel and find the following as issues for determination: -

- i. Whether the deceased was murdered
- ii. Whether there is evidence beyond doubt linking the accused to the murder

30. **Section 203 of the Penal Code** provides that: -

“Any person who of malice aforethought causes death of another personally an unlawful act or omission is guilty of murder.” Section 206 of the Penal Code on the other hand sets out the circumstances which constitute malice aforethought. In light of the above provisions, the prosecution, in this case, must prove; -

- (a) The death of the deceased and the cause of that death,**
 - (b) That it is the accused herein who caused that death by either an unlawful act or omission and;**
 - (c) That in causing the death of the deceased, the accused had malice aforethought.**
- (i) Whether the prosecution proved that the child was murdered.**

31. There is need to prove that the child died. Post-mortem report indicate it was difficult to ascertain general features as the body was badly decomposed and the only available tissues were part of the intestines wall on the mild abdominal wall. The doctor concluded that the remains were for a human body. At the scene clothes and shoes identified as belong to the deceased child were found by PW3 and were identified by the mother PW1. There is therefore no doubt that the remains found in the bush belonged to a human and the fact that the child's clothes and shoes were found at the scene connect to human remains found at the scene. That rules out any doubt that the child was murdered.

(ii) If the above is in the affirmative, did the prosecution adduce evidence linking accused to the murder of the deceased child?

32. PW1 testified that when she was in the farm with the accused, the accused asked her to go and tend the sheep and she left the deceased with the accused, and on returning she did not find the deceased. The accused testified that when they noticed the deceased was missing, he suggested that they check her at the house as she was taking care of the young child and when they failed to find her, he called the headteacher of the nearby school to help in the search.

33. From evidence adduced by the child's mother, she never took long before going back to the farm; she found the girl missing. The accused was left with the deceased before her disappearance. He is the one seen last with the child. When asked, he said the deceased girl was looking after the young child in the house. In the case of **Stephen Haruna v The Attorney General of the Federation {2012} LPELP 782** the Court held as follows: -

“The Law requires a person last seen with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased. onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased.”

34. The accused did not give proper explanation as to how the child disappeared from his sight. Further, the child’s mother stated that the accused had proposed sale of the child to her the previous day and after disappearance of the child, he gave her kshs 2000. In my view the accused has knowledge or involvement with the death of the child.

35. Further, in the case of **Teper V. R. [1952] AC 489** the Court held as follows: -

“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 accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

36. There is no doubt that circumstantial evidence has been adduced which link the accused to involvement in the death of the deceased.

37. In view of the above, I find that the prosecution has proved the charge of murder against the accused herein beyond a reasonable doubt. I find the accused guilty of the offense and proceed to convict him accordingly of the offence of murder as charged.

JUDGMENT dated, signed and delivered via zoom at **Nakuru**

THIS 29TH DAY OF SEPTEMBER, 2021

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

JENIFFER - COURT ASSISTANT

MS. MOENGA FOR ACCUSED

RITA FOR THE STATE