



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL CASE (MURDER) NO. 2 OF 2019**

**CORAM: R.OUGO J**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CYRUS ONDIEKI ALIAS MATIGIRISI.....ACCUSED**

**JUDGMENT**

1. **Cyrus Ondieki alias Matigirisi** hereinafter referred to as the accused is charged with Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are, on diverse dates between the 26<sup>th</sup> day and the 28<sup>th</sup> day of December 2018 in Kisii South Sub- County within Kisii County murdered DN.

2. The accused pleaded not guilty and the case proceeded to hearing. The Prosecution called 9 witnesses.

**PROSECUTION CASE**

3. Pw1 GMK testified that the deceased was her daughter. On the 25/12/2018 at about 7pm she left her home to look for DN. She saw her talking to the accused. She asked DN what she was doing with the accused whom she knew as Matigirisi. DN ran away to their home. On the 26/12/2018 DN left their home after she cooked their supper. DN did not return home. She did not return home on the 27/12/2018. On the 28/12/2018 she heard screams on her way to look for sugarcane. She was told that there a dead body. She was informed that it was DN's body. She went to the scene and found DN body covered with a sack (gunia) all her clothes were removed and she was tied with a cloth. Her clothes were place besides her. She had scratches on the neck and her hand was not okay. The chief was called and he called the police. Photos were taken and they took the body to Nyangena mortuary. They went back to the accused's house. Police broke the door to the accused's house, they found blood inside the house. DN's slippers which are red and white in colour were found under his bed. They also found bloody clothes in the toilet where the accused lives. The slippers and clothes were inside a plastic bag which were placed beneath the bed. The deceased had scratches on the neck and her hand was not okay. The deceased's body was taken to Nyangena mortuary.

4. Pw2 ZK testified that the accused is their neighbor and the deceased is her sister. That on the 26/12/18 she was with DN home. DN left them home after cooking supper for them. At 9pm the same day she met DN with Ondieki near the video place. She asked her sister to accompany her home. Ondieki told her to go home and that DN would follow. DN did not return home that night. The next day she met Ondieki and asked him the whereabouts of DN. He told her that they had parted ways. The next day they found DN inside a shamba dead. Her body was inside a sack. She had been strangled and she had a broken hand. She identified DN's slippers which she had on the night she did not return.

5. Pw3 ZK testified that DN the deceased is her cousin and the accused is her neighbor. That on the 27/12/2018 at about 4pm they were along the road. The accused whom she knows as Douglas went to her and asked her if she had heard DN being mentioned anywhere. She told him she had not. On the 28/12/2018 she heard that DN was found in the maize. She went to the scene. DN's body was in 2 sacks and she had been tied. Her clothes were besides her.

6. Pw5 Joseph Oyunge Mosumari an assistant chief of Bomokora sub-location testified that on the 28/12/2018 he received a call from Kerubo Joseph that a body had been found in a shamba of Mzee Nyamange. He went to the scene and found a body on the ground inside a sack. He learnt that she was called DN and that she was a student. DN's mother informed him that she had left home on the 26/12/2018 and did not return home. He was also told that DN had been seen talking to her boyfriend called Cyrus Ondieki. He did his investigations and proceeded to the accused's home with APC officers. He saw blood stains at his door and behind the house and in the latrine. Soil with blood was thrown in the latrine. He tried calling the accused. Later at 3 or 4pm he was told that the accused had been arrested by an AP officers. Later they visited the accused's house and found blood on the bed, mattress, blanket and on the ground. Photos were taken by scenes of crime officers. They found slippers in a basin under the bed. DN's mother identified the slippers. On the 30/12/2018 the accused led them to

a latrine in his home and they recovered a red T-shirt, a blue shirt and vest.

7. Pw6 No. 43313 Sgt. Charles Kiprono an officer attached to scenes of crime testified that on the 28/12/2018 at 14.37 hours he proceeded to Bomokora with a team of officers to a maize plantation. Joseph an assistant chief showed them a body of a female which was partially covered on the face and lower limb. On checking he found a dead body of a female child identified by the mother as DN aged 14 years. He took the following photographs (1) a close general view photo showing members of public in the maize plantation where the body had been dumped, (2) a close view of the deceased's body covered with a white gunny in the face and the lower limbs as shown on the foreground under an avocado tree, (3) a close up view of the deceased's body strapped with a brown lesso, (4) a close up view of the deceased's uncovered body showing multiple bruises marks on the neck, (5) a close up facial view for identification, (6) a close up view photo showing a blue skirt and long sleeve shirt found besides the body, (7) a close up view of the suspect's house which was identified by the area assistant chief seen pointing, (8) a close up view inside of the house bedroom showing a blood stained mattress, (9) a close up view portion of the mattress stained with blood recovered for analysis and (10) a close up view inside the bedroom showing sandals recovered underneath the bed similar to those which had been worn by the deceased identified by the mother. On the 30/12/2018 at the request of the DCIO Gesonso he went back to the accused's home and the accused identified to them a pit latrine of about 10 feet deep which he alleged to have thrown some clothes inside. He took a photo (no. 11) of a close up view of the latrine showing some clothes inside slightly covered with soil, (12) a close up view of the pit latrine showing a person who volunteered in retrieving the clothes inside the pit latrine and a close up general view showing the area assistant chief and police officers pointing the recovered clothes on the ground and the suspect's house which had been razed down by the members of public, (13) a close up view photo showing the clothes spread on the ground one red T-shirt, one blue T shirt and a piece of a white bed sheet all stained with blood. He later processed and printed the photos under his supervision and produced them as exhibits 7 (a) to (n).

8. Pw7 Doctor Murebu Peter Momanyi testified that he conducted a postmortem of DN on the 31/12/2018. He noted that she was an female of African origin 14 years old. On external appearance he noted that there was bruises in the perineum region and left thigh. There were scratch marks and bruises around the neck. There was central and peripheral cyanosis noted which occurs as a result of lack of oxygen. On internal appearance there was a crush on the neck trachea and thyroid art crushed or squeezed. On the cardio-vascular system the right and left carotid vessels were compressed. On the genito-urinary system her hymen was broken with blood clots in the vagina. He concluded that DN's cause of death was due to asphyxia secondary to manual strangulation. He took the following specimens, her blood. A vaginal swab and pubic hair for forensic examination.

9. Pw8 Cpl. Margaret Kamau testified that on the 28/12/2018 she was called by the DCIO Kisii South and informed that there was a body dumped in a maize plantation at a place called Bokeire. She proceeded to the scene with her colleagues and found the body of a young girl who was identified as DN a 14 year old. The body was wrapped in 2 sacks one from the legs and the other from the body. The body had physical scratches on the neck, back and thighs. Next to the body there were clothes which were identified as her clothes, an underpant, black skirt and a white vest. Scenes of crimes took photos of the scene. The assistant chief informed her that the accused had been arrested and was at Kerona police post. They proceeded there and rearrested the accused. They took the accused to Gensoso police station and the body to Nyagena hospital for preservation. At about 6pm the same day he got a call from the DCIO that the chief had called him from the accused's home and told him they had found evidence that could help. She proceeded to the accused's home together with the accused. The assistant chief and the deceased's mother were at the said homestead. They found blood stains on the ground in the accused's house and a blood stained mattress. They collected the blood stain from the ground and the portion of mattress that had the blood stain. Under the bed they found a basin with some clothes. They removed the clothes and found red and white slippers. The deceased's mother identified the slippers as DN's slippers. They went back to the police cells and book the accused. On the 30/12/2018 the accused led to his home and they recovered a blue T-shirt stained with blood, a red T-shirt stained with blood, a white piece of cloth stained with blood which had been buried in a pit latrine. The post mortem was done on the 31/12/ 2018. All specimens taken from the deceased and the accused were taken to the government chemist for analysis. From their investigations they established that the accused was the last person seen with the deceased after she went missing on the 26/12/2018. She also established that the accused and deceased had a relationship. The accused was leaving alone. Later the accused was charged with murder.

10. Pw9 Richard Kimutai a government analyst testified that on the 31/1/2019 he got a memo from police officer Washington Mwiti from DCIO Kisii South, the accused was Cyrus Ondieki and the deceased was DN. He received blood samples of DN (marked A), a piece of mattress blood stained recovered from the house (marked B), a pubic hair taken from DN (marked C), pubic and blood sample from the accused (marked D) and a high vaginal swab and buccal swab from the deceased (marked E). The piece of mattress was moderately stained with blood of human origin. The pubic hair (marked C & D) had no similarities on microscopic analysis. The DNA profiles generated from the blood stains from the mattress (item B) and high vaginal swab (item E) matches the DNA profiles of DN (deceased) The DNA profiles of Cyrus Ondieki had no generic relationship with the submitted items B, C and E

11. During the prosecution case there was a trial within trial conducted and I ruled that the accused's confession statement was inadmissible.

## **DEFENCE CASE**

12. When put on his defense the accused elected to give a sworn statement. He testified as follows; he recalls that 28/12/2018 he was home. 2 people from the community policing went to him and told him that he was required at the chief's office. He locked his house and started to go with them. They made a call and they told them they go to Gensoso. At Gensoso he was told to enter the cells and at 4pm and then the chief of their area and the 2 areas came and he was told that they wanted him to write a statement on how the deceased was killed. The deceased was his neighbor and she was a person he knew very well. He was a boda boda rider. He heard that DN had been murdered. He told them that he would not write the statement. Margaret and Okechi who were witnesses told him to write the statement. When he refused they beat him up. He wrote the statement because they beat him up. He does not know anything about the death of DN. That on the 25/12/2018 the girl stopped him to hire him to take her somewhere then her mother came out and found them talking. Her mother stopped her and took her away. He did not see her again. He was arrested on the 28/12/2018. Community policing people and the police went to his home on the 28/12/2018. They left him at the police station. He was not there when they visited his home. He was taken to his home on a Monday. He found his house burnt. He was not at his home when they took the samples which were produced. He was at the police station at the said time. They took 2 t-shirts and a piece of the mattress. They took his samples blood, nails and hair. The community people did not testify yet they arrested him. That there was someone else who was arrested and at 6.30 the chief called Margaret and told her that the person had been

arrested. The person is called Mutungi Ombuna. He was arrested as a suspect. His ID card was found at the place. He does not know the station he was taken to. The person of the ID card was not arrested. He asked the court to release him and to consider both sides. He was not involved with the death of the deceased.

13. The prosecution and defence filed written submissions. The prosecution submitted that it had proved its case beyond reasonable doubt. It was submitted that the prosecution is relying on circumstantial evidence to link the accused to the commission of the crime and also applying the doctrine of last seen. Reliance was made on the case of *Ahamad Abolfathi Mohammed and Another vs. Republic [2108] eKLR* and *Anjan Kumar Sarma vs Atate of Assam, Criminal Appeal No. 560 of 2014* and *Sawe vs. Republic [2003] eKLR*. It was submitted that the accused was the person last seen with the deceased. Further that there was evidence that when the accused's house was searched there blood on the mattress in the accused's house, which matched the blood of the deceased, slippers belonging to the deceased. That an inference could be drawn that it is the accused who had a hand in the murder of the deceased.

14. Ms Nyanaro for the accused submitted that the prosecution had not proved their case against the accused beyond reasonable doubt. It was submitted that if the accused and the deceased had a relationship then it was a normal thing for the deceased's sandals to be found in his house. That the t-shirts produced were masculine and were not identified by her family. That the fact that the accused's house was ransacked in his absence casts doubt on the evidence presented in court. That there was no Ob produced in court to read the exact circumstance of the case and that there was no explanation of the ID card that was found at the scene. That though samples were taken from the accused's nail there was physical examination of the body of the deceased to confirm if the finger prints or the alleged scratches on the deceased's body matched that of the accused. That the report presented by the government analyst after sampling the blood samples and vaginal swab as well as her pubic hair did not match or link anything to the accused.

### ANALYSIS AND DETERMINATION

15. The offence of murder is defined under section 203 of the Penal Code as: - *"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."*

16. From the definition, the prosecution must prove beyond any reasonable doubt, the fact of the death of the deceased, the cause of death and proof that the deceased met her death as a result of an unlawful act or omission on the part of the accused persons, and lastly proof that the said unlawful act or omission was committed with malice aforethought.

17. With regard to the first and second issue, on the fact and cause of death, Pw1, Pw2, Pw3, Pw4 and Pw5 who saw the deceased's body. Pw7 doctor Merubu produced the post mortem report as PExh.1 which disclosed that deceased's cause of death was due to asphyxia secondary to manual strangulation. The fact and cause of death of the deceased was proved to the required standard.

18. On the third issue, it must be proved beyond reasonable doubt that the deceased met her death as a result of an unlawful act or omission on the part of the accused. There was no direct evidence adduced to show the accused murdered the deceased. The prosecution relied on circumstantial evidence. The Court of Appeal stated as follows in *John Mutuma Gatobu vs Republic, Criminal Appeal No. 78 OF 2013*.

***"It is common ground that the entire case against the appellant was circumstantial. It has been stated in numerous cases that in order to justify a finding of guilt, the circumstantial evidence, taken as a whole, ought to be such that the inculpatory facts lead to the irresistible conclusion of guilt and that there should be an absence of any co-existent facts that are exculpatory or explicable on any other reasonable hypothesis save the guilt of the person accused. See TEPER –VS- REPUBLIC [1952] AC 480; KIPKERING ARAP KOSKEI & ANOR –VS- REPUBLIC [1949] 16 EACA 135 and NDURYA –VS- REPUBLIC [2008] KLR 135".***

19. The evidence adduced points to the accused as the person last seen with the deceased. The accused admits that he knew the deceased. Pw1 saw the deceased on the 26/12/2012 before she left. On the 25/12/2018 Pw1 had seen the deceased and accused together talking. Pw2 saw the deceased and the accused on the 26/12/2018 at the video place at 9pm. They even spoke and the accused told her that DN would follow her home. The same night the deceased did not return home. The accused was a person known to all Pw1, Pw2 and Pw3. Pw3 met the accused on the 27/12/2018 and he inquired from her if DN had been mentioned anywhere. On the 28/12/2018 the deceased was found murdered. The same day the accused was arrested and his house was searched. DN's slippers which were identified by Pw1 and Pw2 were found in the accused's house. Pw2 testified that they were the same slippers the deceased had when she left their home. Inside the accused's house was a blood stained mattress and blood on the ground and outside too. The piece of mattress which was blood stained was taken to the government analyst for examination. The report indicates that the piece of mattress was moderately stained with blood of human origin and that the blood stains from the mattress and the high vaginal swab matched the DNA of the DN. The report confirms that DN was inside the accused's house. The photographs of the blood stained mattress taken inside the accused's house were admitted as evidence and was not challenged by the accused. The accused admitted that the police visited his house, but denied being present at the time. This evidence links the accused with the commission of the offence.

20. On the doctrine of 'last seen', Lesiit J in *Republic v E K K [2018] eKLR* stated as follows: -

*"Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of Moses Jua V. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the 'last seen alive with' doctrine held:*

*"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."*

*In yet another Nigerian case the court considering the same doctrine, in the case of [Stephen Haruna V. The Attorney-General of the](#)*

Federation (2010) 1 iLAW/CA/A/86/C/2009 opined thus:-

*"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."*

Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh, JT 2006 (4) SC 16 the court held:-

*"that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."*

21. The accused person was the last person seen with the deceased. Though the prosecution has a duty to prove their case beyond reasonable doubt, the circumstance of this case require the accused to give an explanation having been the last person to be seen with the deceased. The accused in his defence explained why he wrote a statement and denied that he was with the deceased or that he was involved in her death. He cast doubt on the prosecution evidence by saying that there was an identity card of one Mutungi found at the scene and that the community policing persons who arrested him were not called. In the case of Keter V Republic [2007] 1 EA 135 the court held inter alia thus:

*"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."*

22. Considering the evidence adduced the accused was last seen with the deceased on the 26/12/2018 and was found dead on the 28/12/2018. The time the accused was seen with the deceased when she was alive and found dead was within 2 days. The blood in the blood stained mattress which was confirmed to be that of the deceased clearly leads to the conclusion that the deceased died in the house of the accused and he disposed of her body thereafter. I find that the prosecution adduced sufficient evidence from which to infer guilt on the part of the accused.

23. Lastly on malice aforethought the Court of Appeal in John Mutuma Gatobu vs R ( supra) stated as follows:

*"That leaves the question of malice aforethought. With respect to the appellant's learned counsel, malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code thus;*

*"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;*

*(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is cause or not, or by a wish that it may not be caused;*

*(c) An intent to commit a felony;*

*(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."*

*There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.*

*We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them of malice aforethought and that his conviction for Murder was fully merited.*

In this case the cause of death was asphyxia secondary to manual strangulation. The deceased was strangled to death, manual strangulation led to the death of DN, malice aforethought was established. I find that the prosecution has proved their case beyond reasonable doubt. The accused is guilty of the murder of DN and he is convicted accordingly as charged.

**DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF SEPTEMBER 2021.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Accused**

**In person**

**Ms Nyanaro**

**For the Accused**

**Mr. Kaino**

**Senior State Counsel ODPP**

**Ms Rael**

**Court Assistant**