



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Kitoo (Criminal Case 18 of 2016)  
[2021] KEHC 9761 (KLR) (19 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 9761 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL CASE 18 OF 2016  
RK LIMO, J  
OCTOBER 19, 2021**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JOSEPH NZOMO KITOO ..... ACCUSED**

**JUDGMENT**

1. JNK the accused herein, was charged with the offence of murder Contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars are that on 20<sup>th</sup> June 2016 at Kalia sub-location, Matinyani Location within Kitui County murdered BMN.
3. The accused person denied the charge and the prosecution has presented twelve witnesses to prove their case which case hinges on circumstantial evidence to the effect that the accused person was the last person seen with the deceased before she was later discovered lying dead with a rope around her neck and the body covered with a wheelbarrow not far from the house occupied by the accused person.
4. JM(PW1) told the court that she was home on the material day when her grandson BG and her granddaughter, the deceased came home. She stated that she gave them some food and that the accused later came to her home and asked the children to accompany him to pick some wild fruits. She stated that she asked the children not to go and chased the accused out of her home and thereafter left for the river. She added that after she came back, she found that the children had left home and her grandson B came back later alone telling her that the accused had earlier returned to her home and asked the children to leave with him. That she asked him where the deceased was and B told her that she had gone with the accused to one Mwangangi's home. That she asked her grandson to go to Mwangangi's home and look for the deceased but he returned and said that the deceased was not there. That when it got to 6.00pm, she asked her co-wife to accompany her to the home of the accused and when they



got there they found his grandmother who she stated was harsh to them. She testified that they looked into the house of the accused but did not see much but when they went to the back of the house they saw the body of the deceased covered with a wheel barrow. She stated that the deceased only had a T-Shirt on and was naked from the bottom half with a rope tied around her neck and that the police later came and took the body away.

5. FNN (PW2) the witness told the court that he received a phone call from his wife on the material day at 5.00pm telling him that their daughter was missing. He added that he went home and with the assistance of his friends went to look for her and when he was informed by PW1's grandson, BG that his daughter had left with the accused, he went to the home of the accused to look for her. He testified that he met the accused on the way and when he asked him about his daughter's whereabouts, he stated that she had left after they were done playing. That he also met the accused grandmother who quarreled with them for asking about the whereabouts of his daughter from the accused. She testified that she told them to go and check whether the accused had buried the child in the farm and that he proceeded to the home of the accused and after looking around he noticed a wheelbarrow at the back of the house and when they inspected it, they found his daughter's body. Underneath, he stated that she had a rope around her neck, and stab wounds on her chest and that she only had a vest on.
6. JMM (PW3) on her part testified that she returned home on the material day and upon inquiring about her daughter, she was informed that they did not know her whereabouts. She stated that PW1 told her that the accused had gone to their home earlier that day and asked the children to accompany him to pick some wild fruits. She added that she saw the accused who was playing football and when she asked him about the deceased, he told her that the deceased had gone to Mwangangi's home when she heard PW1 looking for her. She stated that she went to Mwangangi's home but did not find anybody home and she decided to call her husband, PW2 and informed him that their daughter was missing. She stated that she returned to the home of the accused to inquire about the deceased and when the grandmother of the accused saw her, she started quarrelling her asking her whether she suspected her of eating people. That the grandmother also said that she heard the deceased running towards Mwangangi's home and that she went home but returned to the home of the accused with PW2 and some neighbours who were assisting them in the search. She added that upon inspecting the home of accused, they saw a wheelbarrow behind the house and discovered the body of the deceased beneath it. She stated that the deceased had a rope tie around her neck and that she was also half naked.
7. BG(PW4) was a minor and after a vior dire exercise, the court determined that the witness who was a child was not seized of sufficient intelligence to take oath and even though he was capable of testifying, he was not going to be subjected to cross examination.
8. He told the court that he went to PW1's home with the deceased on the material day after school and after having some food, PW1 left for the river and the accused came to their home and gave them some fruits and asked them to follow him to his home and that when they got to his house, he showed them a spear and a knife but he did not do anything to the deceased. He testified that they went back home with the deceased but he did not see the deceased again.
9. Nicholas Kyalo Muli (PW5) Assistant Sub-Chief, Kalia Sub-Location told the court that he was called on the material day and he was informed about the missing child and was later notified after the discovery of her body at the home of the accused. He stated that he went to scene and found that the accused had been apprehended by members of the public. He stated that the body of the deceased lay on the ground outside the house of the accused and that she had blood on her neck and a rope tied on her neck adding that the police later came and arrested the accused and also took the body of the deceased away.



10. Kennedy Mulaa Mulwa (PW6) stated that he was among the people who had been looking for the deceased adding that he also went to the home of the accused where the body was discovered under a wheel barrow, half naked and with a rope tied around the neck. He stated that by the time he reached the home of the accused a large crowd of about 50 people had already gathered because it was alleged that the deceased has been seen going to the home of the accused. He also stated that he found the accused's grandmother quarrelling with members of the public who were part of the search party.
11. Isaac Musyoki (PW7) also testified and corroborated the narratives given by the other witnesses that he was part of the search party that sought for the missing child and eventually located her lying dead at the home of the accused.
12. Makau Nguthu (PW8) similarly, testified and gave the same narrative adding that he saw the body of the deceased child with blood on the chest and genitals. He also stated that there was a rope around her neck adding that the body was half naked next to a big wheelbarrow.
13. Nzomo Muoki (PW9) the father of the accused on his part stated that he was home the material day as he was unwell and that he had been taken to hospital and returned later in the afternoon. That from 6.00pm that day, different people begun going to his home looking for the deceased as well as the accused. He stated that it was being said that the missing child had been seen with the accused and that he showed the search party where the accused lived and that the body of the deceased was discovered outside his son's house beneath a wheel barrow. He stated that he saw a rope tied on the neck of the deceased. He also stated that the wheel barrow that covered the body belonged to him but it was rarely used because it was too big.
14. Dr. Muriithi Miano (PW10) a medical doctor from Kitui County Hospital testified on behalf of Dr. Mutuku a deceased colleague who passed on in 2018. He produced a post mortem report prepared in reference to the deceased on 24<sup>th</sup> June 2016. He stated that the doctor noted that the deceased had bruises around her neck, that her face was slightly swollen and that she had marks on her chest which appeared like nail marks inside her body and that from examination, that in the inside, her lungs were reddish, that her lymph nodes and tract were enlarged and that her hymen was absent. The doctor indicated that the evidence pointed to the possibility that the deceased had been sexually assaulted. Further, that the spinal code had a fracture around the neck and the cause of death was established as cardio-pulmonary collapse due to suffocation. The witness produced the post mortem report as P Ex 4.
15. Bernard Odoyo (PW11) a Police Officer from Matinyani Police Station testified on behalf of his colleague CIP David Lubau who was the investigating officer but was on transfer. The witness produced a report prepared by the Investigating Officer which was marked as PEXH 5. The officer also indicated that he was among the officer who went to the scene on the material day. He stated that he found members of the public at the scene and that they wanted to beat up the accused as it was stated that he was the last person who was seen with the deceased. He also stated that the body was half naked when the officers arrived at the scene and that it had a rope around the neck and that the accused and his grandmother were arrested on suspicion of having a connection to the murder. Further that samples were collected from the body of the deceased and forwarded to the government chemist for examination. The witness produced the wheel barrow which was used to cover the body of the deceased, marked as PEXH 1, the manila rope found around the neck, marked as PEXH 2 and a blood stained T-shirt marked as PEXH 3, a report from the Government Chemist which was marked for identification and an exhibit marked as PEXH 7.
16. Henry Kiptoo (PW12) a government chemist who conducted forensic analysis on samples collected from the body of the deceased testified as follows; that his office received a blood sample in a bottle collected from the accused, blood sample collected from the deceased, vaginal swab on 24<sup>th</sup> June 2016.



Further, that on 28<sup>th</sup> August 2016, they received a black biker and a brown baby top. He stated that the instructions included establishing whether there were spermatozoa in the samples or whether there was any relationship in the samples collected. The witness stated that after they did analysis, he did not detect any spermatozoa. he however indicated that the items forwarded to them had a lot of blood on them which could have musked the spermatozoa (if any) making them undetectable. He also confirmed that the blood on the items belonged to the deceased. He produced the forensic report marked as PEXH 6 and exhibit memo marked as PEXH 7. He added that if specimen is not well preserved, the spermatozoa would not be seen.

17. When placed on his defence, the accused in a sworn statement denied committing the offence adding that he was 13 years old at the material time though by the time he was testifying he was 19 years old. He conceded that on the material date he played with deceased together B (PW4) and after their play, he escorted both B and deceased home. He testified that he met PW3 later that day and that when she inquired about the deceased, he told her he was not aware about her whereabouts adding that he also gave a hand in trying to locate her together with his grandmother. He testified that as they were searching for her, he heard screams coming from his home and that he was arrested by members of the public baying for his blood because the body was discovered outside his house.

18. In his written submissions, the accused submits that the prosecution's case is based the doctrine of last seen as there were no witnesses to the murder. He has relied on the case of *Sawe versus Republic* (2013) eKLR which set out that reliance on circumstantial evidence should ensure that all evidence leads to the guilt of an accused person. On the doctrine of "last seen with" the defence relied on the Indian case of *Anjan Kumar Sarma vs State of Assam Criminal Appeal No. 560 of 2014* to support his argument that the mere fact that the accused was the last person to be seen with the deceased was insufficient to find a conviction in the absence of additional evidence implicating the accused. He contends that the prosecution failed to prove actus reus as well as mens rea.

19. Analysis and Determination

The accused as observed above is charged with the offence of murder contrary to Section 203 which states;

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

20. There are 3 crucial elements which must be established by the prosecution and proved beyond doubt if a charge of murder to be sustained The Court of Appeal in *Anthony Ndegwa Ngari v Republic* [2014] eKLR list the three elements that the prosecution has to prove in order to secure a conviction on the charge of murder against an accused person as;

“

- a. the death of the deceased and the cause of that death;
- b. that the accused committed the unlawful act which caused the death of the deceased and
- c. the Accused had the malice aforethought this constitutes 'mens rea' of the offence.”

21. The issue for determination in this matter are well cut out and I will consider them one by one.

22.



(i) i) Fact of death and Cause

This fact is not disputed. The evidence of the parents PW2 & PW3 are well corroborated by the medical evidence of Dr. Muriithi Muano (PW10). The deceased died and the cause of death was established to be cardiopulmonary collapse due to suffocation.

The prosecution's witnesses account that they saw a rope tied around the neck of the victim clearly corroborates and explains the cause of death.

23.

(ii) Whether the accused caused the unlawful act that caused the death of the deceased.

As observed at the beginning of this judgement, the prosecution's case solely hangs on circumstantial evidence. There is no one who saw the accused commit the heinous crime.

According to the testimony JM, (PW1) the grandmother to the deceased who was at home at the material time and date, the accused went to their home after the deceased child and B (PW4) had finished taking lunch and asked the children to accompany him but the grandmother says she declined the proposal and sent the boy (accused away) before proceeding to the river probably to fetch water and on her way back home, she found that the children were not at home.

She further states that her Grandson B (PW4) later went back and reported that the accused had gone with the deceased to Mwangangi's home.

24. It is apparent from the account given by PW1, PW2 & PW3 that the evidence on last seen was based on the evidence of BG (PW2), a pre-unit child who could not testify on oath due to his age.

25. I have keenly gone through the evidence of B (PW4) and though he implicates the accused person as the last person seen with the deceased, it is hard to solely rely on his evidence given that, owing to his age (around 5 years old) and the fact that the evidence could not be tested through cross-examination. The weight given to such evidence is light and requires corroboration to stand.

26. In the case of *Republic versus Elizabeth Anyango Ojwang* [2018] eKLR, the court referred to the Indian case of *Anjan Kumar Sarma vs. State of Assam*, Criminal Appeal No. 560 of 2014 where reliance on the doctrine of last seen to infer guilt was discussed as follows;

“The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence...There must be something more establishing connectivity between the accused and the crime...It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.”

27. What I understand by these authorities is that even when the doctrine applies, it is advisable to seek some corroborative evidence instead of solely relying on the doctrine of last seen. In this case, evidence from the accused person himself, PW4 and his own grandmother was that he was indeed in the company of the deceased in the last hours of her life. There is also evidence that her body was discovered in their home and there was no explanation as to how it ended up there hidden under a wheel barrow.



28. The accused person conceded that he was with the deceased and PW4 and that he played with them for around 45 minutes in his home compound which is about 100 metres away from home of deceased in his estimation. He further explained that after the play, he escorted them back home.

He further testified that the mother to the deceased (PW3) later went to him and inquired about the whereabouts of the deceased and that he joined a search party.

29. There was no explanation given by the accused or his father (PW9) to explain how the body of the deceased ended up in their compound and covered by a wheelbarrow which PW9 conceded was his. This circumstantial evidence could have had weight to implicate the accused but for negating forensic evidence tendered by Henry Kiptoo (PW12). The witness testified that the forensic analysis on the items sent to him, connected the blood traced with only that of the deceased.

The evidence given by the Doctor (PW10) and Makau Nguthu (PW8) indicating that the victim was defiled before being murdered did not link the accused with the act of defilement. This because the report from Government Chemist never traced any spermatozoa.

In the absence of any other positive or reliable evidence linking the accused with the act that caused the death of the accused apart from the doctrine of last seen which I find weak for the aforementioned reasons, it is not safe for this court to find that the element of actus reus was clearly proven against the accused.

30.

(iii) Mens rea

This element is also missing from the prosecution's case. In the absence of the element of actus reus, this element on its own even proven cannot found a conviction. To get a conviction however the Prosecution was expected to prove all the ingredients of murder beyond reasonable doubt. It is however not enough to simply prove that the action of the accused caused the death of the deceased. In *Joseph Kimani Njau vs. Republic* [2014] eKLR the Court of Appeal stated that: -

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, 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...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

31. Flowing from the above, it is evidently clear that a prosecution's case hanging on circumstantial evidence actus reus and Section 206 of Penal Code (i.e. where an intention to kill can be inferred) cannot found a conviction because for a conviction of murder to be sustained both elements must be proved beyond any reasonable doubt.

32. This court is not satisfied that the threshold was achieved in this case because though there is evidence (discovery of body at the home of deceased) linking the accused with the murder, the same leave some



doubts about who was actually responsible. Was it the father of the accused? Or the grandmother who PW2 stated was hostile when she and other members of the search party seen the deceased? The reasons why she was uncooperative and openly hostile is left to speculation but more importantly, is that the circumstantial evidence linking the accused with the murder is negated by existence of such other likely possibilities or inferences that can be drawn from the circumstances obtaining and in such circumstances as I have said above, it is unsafe to sustain a conviction.

33. In the end this court finds that despite the industry shown by the Investigation Officer who I must commend for the investigations carried out, the prosecution's case fell short in the end as I have stated. For that reason, I find the accused not guilty and he is hereby acquitted, unless otherwise lawfully held.

**DATED, SIGNED, AND DELIVERED AT KITUI THIS 19<sup>TH</sup> DAY OF OCTOBER 2021.**

**HON. JUSTICE R.K. LIMO**

**JUDGE**

