



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**MURDER CASE NO. 4 OF 2012**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**PETERSON GACHOKI KAREITHI.....ACCUSED**

**JUDGMENT**

1. The accused person Peterson Gachoki Kareithi is charged with Murder contrary to **Section 203 as read with Section 204 of the Penal Code** in that on 29/4/2012 at around 9.00 Pm at Kiathi Village in Kirinyaga East District within Kirinyaga County, murdered Melody Wambui Gachoki.

2. The accused person denied the charge. The facts of the case are that the deceased in this case was the son of the accused with his wife Joyce Waguthii Gichovi (PW-2-). At the time of this incident the accused and his wife had separated after three years of living together owing to some domestic violence meted out on the wife.

3. On 29/4/2012 the accused person went to the home of his mother-in-law Madrine Kariuki Gichobi (PW-1) where the deceased was living. The accused asked PW-1- where Joyce (PW-2-) was. The accused took the deceased in this case Melody Wambui Gachoki by force from PW-1- who was taking care of her. When PW-2- returned home, PW-1- informed her that the accused had taken away the deceased. The two (PW1 & 2) looked for the deceased but could not trace her. It had rained heavily. PW-2- called the village In-charge by name Ngai and reported to him. He advised them to go the next day.

4. The next day PW-2- went to Ngai's place early in the morning. He advised them to go to the home of accused and find out if the child was there. She went but did not find any one. She then went and reported to the Chief who is called Fide. He advised them to go and report to the Police. Later on 2/5/12 the child was found in a ditch already dead at Rwathathi near the home of Hillary. Police went to the scene after being informed by the Chief Fidesius Gayimu Njagi (PW-7-). The body of the child was found with the head submerged in the water upto the chest. The body was photographed then removed from the scene. The accused was arrested from his home by elders and the Assistant Chief as irate members of the public wanted to beat him.

5. A post-mortem was done on the body of the deceased by Doctor Ndirangu Karomo (PW-6-) who formed the opinion that the cause of death of asphyxia secondary to drowning. The accused was then charged with this offence. The accused gave a sworn defence and told the court that the deceased was his daughter and PW-2- was his wife. At the time of the incident they were not living together. He told the court that on the material day she did not go to the home of PW-1- as alleged. On 2/5/12 he was arrested. He told the court that he was not involved in the killing of his own child.

6. I have considered the evidence adduced and the defence of the accused. The issue for determination is whether the accused is the one who unlawfully murdered Melody Wambui Gachoki with malice aforethought.

7. From the evidence tendered by the prosecution PW-1- Madrine Kariuko Gichobi who was the child's grandmother testified that on 29/4/2012 at about 9.00 Pm. She was at home with the deceased in this case. The mother of the child PW-2- had left her with the child as she had gone to the shop. It is at that time that the accused went to her house and enquired where PW-2- was. Upon being told that the mother (PW-2-) had gone to the shop, the accused pushed PW-1- and threw her to the ground. The accused then snatched the baby from her and left. The accused ran away with the baby.

8. PW-1- informed PW-2- as to what had happened upon her return. They started looking for the child.

9. PW-3- David Ngai Mwene who is an Elder at Kabaro village confirmed that on the material day at 10.00 Pm PW-2- called her and told her that the accused had snatched her child from her Grandmother PW-2-. She told her to go the next day.

10. PW-4- Mwangi Mwara testified that on 30/4/12 he was called by (PW-3-) who reported that the accused had snatched the child and PW1 & 2 were looking for the child. PW-3- told him he would send PW1 & 2 to him the next day. They went the next day and proceeded to the home of the accused but did not find him.

11. On the other hand PW-5- Henry Migwi Wambugu who is the Assistant Chief testified that on 2/5/2012 he received a call from the Chief Felicion Gatimu Njagi (PW-7-) who informed him that the body of deceased was found in a ditch. PW-5- confirmed that he was in the Chief's Office. On 30/4/12 when PW-1- & -PW-2- reported that the accused had taken the child by force. The Chief Felicion Gatimu Njagi (PW-7) testified that he had received the report that the accused had snatched the child from PW-1-. On 2/5/12 PW-7- received a report from an informer that there was a child in a ditch and he sent PW-5- to secure the scene as they waited for the police.

12. This chain of evidence shows that PW-1- and PW-2- reported the incident the same night and there was no doubt as to who had snatched the child.

13. PW-1- knew the accused as he was her son-law. The accused snatched the child from the house of PW-1-. I find no reason to doubt PW-1-. The fact that they frantically reported to the Village Elder the same night and said that the accused had snatched the child shows that they were truthful. PW-1- had no reason to implicate the accused. The accused on his part did not allege anything that could have made PW-1- to implicate him. I find that the testimony of PW-1- reliable.

14. Though the accused denied that he killed the baby, he did not strike me as a credible witness. He gave long stories which were not relevant in an attempt to derail the court. Upon being cross-examined he admitted that when he was taken to the Police Station at Kianyaga he recorded a statement upon the statement being read to him it emerged that what he had told the court on oath was a pack of lies. When this was clear, he changed the story and said that he recorded the statement but it was not read back to him. This shows that the accused was not truthful and his defence though sworn cannot possibly be true.

15. I find that the evidence of PW-1- proves that the accused was the last person to be seen with the deceased when she was still alive. Thereafter the child was found in a trench submerged in the water with the head first.

16. According to PW-6- Dr. Ndirangu Karomo who performed the post-mortem, the deceased could have been dead for three days at the time the body was recovered. This piece of evidence shows that the deceased met her death the same day when the accused snatched her from PW-1-.

17. The accused through her Advocate Mrs. Rose Makworo submitted that the testimony of PW-1- was self-contradictory. On allegation that PW-1- had said he met Joyce at the road, there is no contradiction as in her evidence in Chief she did not say where she met Joyce. In any case PW-2- testified that PW-1- met her on the road. PW-1- was not cross-examined as to who else she was living with her. She however said the other child of Joyce had gone to sleep. PW-1- was not cross-examined as to whether the brother of PW-2- was living there. There were no contradictions on material particulars.

18. It is trite that not all contradictions will render the evidence incredible. Minor contradictions will be ignored by the court. The **Court of Appeal in the case of Erick Onyango Ondeng –v- R(2014) eKLR** stated as follows on the issue of contradictions.

*“----- not every contradiction would cause the evidence of a witness to be rejected, there would need to be more to the contradictions”.*

19. The court cited with approval the **Court of Appeal of Uganda decision in Twehangane Alfred –v- Uganda Cr. Appeal No. 139/2001 (2003) UGCA** where it was stated –

*“As noted in the Uganda Court of Appeal in Twehangane –v- Uganda Cr. Appeal 139/2003 it is not every contradiction that warrants rejection of evidence. As the court put it:*

*With regard to contradictions in the prosecution case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the court thinks that they do not affect the main substance of the prosecution case.”*

20. As I have pointed out the contradictions pointed out the contradictions pointed out are a creation of the defence, that do not exist. They do not affect the evidence of PW-1- & 2. I find no reason not to rely on the evidence of PW-1- & 2. As submitted by the prosecution there was credible direct evidence that the accused is the one who pulled the deceased from PW-1- on 29/4/2012 and thereafter the deceased was found dead.

21. In his submission the accused states that the cause of death was not established as the Doctor who conducted the post-mortem stated that the deceased had no visible injury. That blood had accumulated on the abdomen which he said had been caused by the fact that the body had been lying for long after death. That the Doctor did not conduct investigations to confirm whether the child died as a result of drowning.

22. The Doctor, Ndirangu Karomo (PW-6-) testified that the cause of death was asphyxia secondary to drowning. At no time in his testimony did the Doctor say he did not investigate to confirm whether the child died as a result of drowning. The Post mortem form **Exhibit P-1** states that the cause of death was asphyxia 2 degrees – Secondary to drowning. I find that there is no dispute as to what caused the death of the deceased.

23. There is direct evidence as I have stated above linking the accused to the death of the deceased. He snatched the child from PW-1- on an ill motive which I find was to cause her death as she had disagreed with the mother.

24. I find that the prosecution tendered sufficient evidence to prove that the child died in the hands of the accused soon after snatching him from the hands of PW-1-. On the issue that the Investigating Officer and the Scenes of Crime Officer were not called, the prosecution called several witnesses who witnessed when the deceased was removed from a trench. Hillary Gichoya PW-8- in particular testified that he is the one who spotted the child in the trench which he had dug in his shamba. He telephoned the Chief who went to the scene. The Chief telephoned police who went and retrieved the body from the trench. This body was later identified by PW-1- & -2-to the Doctor who performed post-mortem as the body of the deceased in this case. PW-8- testified that there was a footpath about 30 feet away from the trench where the deceased was found.

25. APCPL Charles Muthama (PW-9) testified that he arrested the accused in connection with this offence after the body of the deceased was traced. He never testified that he was not aware of the murder.

26. There is no lacuna in the prosecution case owing to the fact that the Investigating Officer and Scenes of crime Officer were not called. What the court had to determine is whether the facts were sufficiently proved. There are no particular number of witnesses who are required to prove a fact. There is no particular mode required to prove a fact unless the law provides that it be proved with particular evidence like for example evidence of experts. **Section 143 of the Evidence Act (Cap 80 Laws of Kenya)** provides:-

*“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for the proof of any fact.”*

The Court of Appeal in the Case of **Jacob Muthée & 8 Others –v- R. Cr. Appeal 259,255 – 257** adopted the decision in **Bukenya & Others –v- Uganda (1972) E. A. 349** and stated –

*“in a criminal trial the prosecution has a duty to call or make available all witnesses necessary to establish the truth ----- and is not required to call a superfluous number of witnesses”.*

27. The evidence tendered by the prosecution sufficiently proves that the deceased’s body was retrieved from a trench and it is only the accused person who was arrested in connection with the murder. Failure to call the Investigating Officer and the Scenes of Crime Officer is not fatal to the prosecution case and there are no doubts cast in the case for failure to call them as witnesses.

28. I will now deal with the issue of malice aforethought.

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

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

**Section 204 of the Penal Code** provides:-

*“Any person convicted of murder shall be sentenced to death.”*

29. The incidences of malice aforethought are enumerated at **Section 206 of the Penal Code**. It is provided –

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

*a) An intention to cause 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 body harm is caused or not or by a wish that it may not be cause.*

*c) An intent to commit a felony.*

*d) An intent 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.”*

30. The prosecution has a duty to prove that the accused had the intention to cause the death or to do grievous harm to the deceased. I have considered the case of **Anthony Ndegwa Ngari –v- Republic (2014) eKLR** where the ingredient of the offence were properly articulated. That is to say:-

**a) The death of the deceased occurred.**

**b) That the accused committed the unlawful act which caused the death of the deceased.**

**c) That accused had malice aforethought.**

31. The prosecution has established that it is the accused who caused the death of the deceased. The defence of the accused was a mere denial.

32. I have stated earlier that I found the testimony of PW-1- credible and reliable. The accused snatched the deceased from PW-1- after confirming that the mother of the child was not at home. The intention was to cause her death. The deceased, a child aged slightly over One year was thrown in a trench full of water head first. The accused had knowledge that act of throwing the child of that age in the trench full of water would result in death. The act did actually result in death. The accused was normal and would have known that his action would lead to the death of the deceased. Doctor Joseph Thuo (PW-10-) the Consultant Psychiatrist who examined the accused on 14/5/2012 found that the accused had no mental abnormality. He is mentally fit to stand trial. The report was produced as **exhibit P-2-**. The accused committed the actus reus of the offence with the necessary mensrea.

33. The principle on the standard of proof of beyond reasonable doubt in cases of this nature was illustrated in the case of **Miller -v- Minister of Rensions (1947) 2 All ER 372-373, Lord Demning** where it was stated as follows:-

*“The 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 doubt. The law would fail to protect community if it admitted fanciful possibilities to defeat the cause of justice. If the evidence is so strong 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 least probable, the case is proved beyond reasonable doubts but nothing short of that will suffice.”*

34. The prosecution is under a duty to prove that the accused caused the death of deceased. The death is proved by medical evidence or other cogent evidence. This principle was stated in **Benson Ngunyi Nundu -v- Republic Cr.Appeal No. 171/1984.**

35. In this case the prosecution proved that the accused picked the deceased at night only for him to be found dead. There can be no other reasonable conclusion than that the accused is the one who drowned the deceased and caused his death. The cause of death was asphyxia due to drowning.

36. The prosecution proved the ingredients of murder. The accused had malice aforethought to cause the death of deceased through an act of omission, that is drowning and the deceased died due to asphyxia due to drowning. The prosecution proved the charge against the accused beyond any reasonable doubts. I find the accused person guilty as charged and I convict him under **Section 322(2) of the Criminal Procedure Code.**

**Dated at Kerugoya this 24<sup>th</sup> Day of April 2020.**

**L. W. GITARI**

**JUDGE**