



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 13 OF 2014**

**REPUBLIC..... STATE**

**VERSUS**

**GIDRAFF KIRUHI MATHENGE..... ACCUSED**

**JUDGMENT**

1. MWW was eight years old in 2014. She was last seen alive by her grandfather, Isaac Ndegwa on 13/01/2014. On that day, she woke up early in the morning and went to school. She was a Standard Two student at [Particulars withheld] Primary School. Both her grandfather, Isaac, and her uncle, Boniface Ndegwa, saw her as she went off to school.

2. On that day, the Headmaster of [Particulars withheld] Primary School made the fateful decision that all students whose parents had not brought in their in-kind contributions of timber off-cuts for building the school fence would be sent back home to bring the same. These instructions were communicated by the headmaster to the Deputy Headmaster, Evanson Ndirangu Gichungu. The children were sent home at around 8:00am by the Headmaster, Mr. James Munau.

3. The testimonies of Mr. Evanson Ndirangu Gichungu, the Deputy Headmaster, who testified as PW2 in this trial, and that of Ms. Rose Njoki Ndirangu, the class teacher of the Deceased, who testified as PW3, indicate that the Deceased was in school in the morning of 13/01/2014. She was sent home, along with other children, to go get timber off-cuts to build the school fence. According to the testimony and records of Ms. Ndirangu, the Deceased did not come back to school after they had been sent off.

4. This testimony is also borne out by the testimony of the Deceased's grandfather who live with the Deceased, Isaac Ndegwa. Isaac testified as PW8. He recalled that the Deceased came back home to collect the timber off-cuts. She found him working in the compound. He looked for an off-cut and gave her to take to school. That was the last he saw her alive. That evening, the Deceased did not come back to school.

5. Isaac, the grandfather, and Boniface Ndegwa, the uncle (who testified as PW4), both testified that another child by the name W brought the Deceased's school bag back home that evening.

W is the younger sister to Gidraf Kirihi Mathenge. Gidraf Kirihi Mathenge is charged with the murder of the Deceased contrary to Section 203 as read with Section 204 of the Penal Code.

W was the Deceased's classmate and friend.

6. When the Deceased did not return home in the evening of 13/01/2014, the grandfather (Isaac) and the Uncle (Boniface) started searching for her. They could not find her that night. In the morning, Isaac went to school and met with Mr. Gichungu. He reported that the girl had never made it home that evening. Ms. Ndirangu, on the other hand, confirmed that the girl had not made it to school after they had been sent home to collect the timber off-cuts.

7. By 14/01/2014, it was clear that something was amiss. The Deceased was missing. The local authorities and the neighbours were mobilized to start a search for the young girl. On 15/01/2014, there was a burial in the village so search efforts took a down turn. They resumed on 16/01/2014. Among those leading the search party were David Mwaura Ngure (who testified as PW1); Simon Kahiho (who testified as PW5); and Samuel Muriithi Wanjohi (who testified as PW6). Samuel is an uncle to the Deceased as well. Isaac and Boniface joined the search party as well. About fifty people were involved in the search.

8. It was David Mwaura Ngure who first saw the body of the Deceased. Tucked in a cypress trees farm, the body was lying on the ground still dressed in the green school uniform. Upon seeing the body, David shouted to the rest to attract their attention. David, Boniface, Simon and Samuel all similarly described the scene: the body lay on the ground still dressed in school uniform. The ground was sloping. The neck

seemed loose. The eyes appeared gouged. The legs were slightly apart. The Deceased had been pulled up and her thighs were visible. There were bruises on the face. Her shoes were nearby as was the timber off-cut her grandfather had given her to take to school.

9. This off-cut found near the body of the Deceased, which was identified by the grandfather in Court, was the tell-tale sign that the Deceased never made it to school on 13/01/2014. Someone must have waylaid her on her way back to school. It was a sad and tragic end to the life of the innocent child.

10. The question turned to who had committed this heinous act. It would appear that investigations soon narrowed down to Gidraf Kiruhi Mathenge, the Accused Person. It is not clear what led to this focus. From the evidence adduced by Isaac, the grandfather and Boniface, the Uncle, it would seem that the focus was because

W brought the Deceased's bag back home. W allegedly told Isaac that she had left the Deceased with the Accused Person. However, W was not called to testify to confirm this. It is not even clear if she recorded a statement. The Investigating Officer, Sergeant Omar Baholo, who testified as PW11 did not explain why and how they zeroed in on the Accused Person as the prime suspect in the murder.

11. In any event, the Accused Person was arrested and investigations began. The primary investigation, it turned out, was forensic. The Investigating Officer secured from the scene where the body was found the following items:

- a. Vegetative leaves
- b. Soil
- c. The inner wear worn by the Deceased
- d. A black petticoat worn by the Deceased
- e. A green school dress worn by the Deceased
- f. A navy blue jacket worn by the Deceased
- g. A green sweater worn by the Deceased
- h. A brown sweater worn by the Deceased

12. Later on, the Investigating Officer facilitated the collected of the following items for analysis as well:

- a. Underwear worn by the Accused Person
- b. Blood sample drawn from the Accused Person
- c. A high vaginal swab on a swab stick from the Deceased
- d. A buccal swab of the Deceased's mother – EW.

13. Meanwhile, the body was taken to Nyahururu District Hospital where Dr. Frida Odero performed the autopsy. Dr. Joseph Karimi Kinyua testified on her behalf and produced the Post-Mortem Report as an exhibit. Dr. Kinyua has worked with Dr. Odero for two years and is familiar with her handwriting; and Dr. Odero was away for further studies. The Defence stipulated to the production. The pathologist found bruises on the anterior neck, collapsed trachea and collapsed lungs in the respiratory system. On the genito-urinary system, she found a perineal tear with massively injured soft tissues accompanied by a distortion of the introitus and injured vaginal walls. The head had gorged out eyes. The doctor concluded that the cause of death was cardiorespiratory arrest secondary to strangulation.

14. As aforesaid, none of the witnesses linked the Accused Person to the murder of the Deceased. The only tangential evidence was that of Isaac and Boniface. Both said that the Deceased's bag was brought by the Accused Person's sister who was a classmate of the

Deceased; and Isaac went as far as saying that W had told

him that she (W) had left the Deceased in the company of the Accused Person. It is not clear why W was not called to verify this information if true.

15. In any event, it was left for the forensic evidence to link the

Accused Person with the murder of the Deceased. The Prosecution's theory was that the Accused Person, who had only recently been circumcised, waylaid the Deceased, defiled her; and then killed her and hid her body in the bushes.

16. The samples collected were, thus, sent to the Government Chemist for analysis. It was desired to examine the items and determine the presence and origin of blood stains, semen and spermatozoa. Elizabeth Waithera Oyiengo, a Government Analyst at the laboratory of the Government Chemists Department in Nairobi performed the analysis and appeared in Court to produce her results as PW10.

17. Ms. Oyiengo's analysis revealed that the jacket; inner wear; and sweater which were indicated to be as of the Deceased was stained with blood of human origin which on comparison with the blood of the Deceased's mother revealed that the blood belonged to the

Deceased. The analysis further showed that the soil and the leaves recovered from the scene was also moderately stained with blood of human origin. The analysis further showed that the petticoat; dress; green sweater and panties worn by the Deceased were not stained with blood or semen.

18. Tellingly, however, Ms. Oyiengo found that the Accused Person's

DNA or blood was not present in any of the items taken for analysis.

In particular, the Accused Person's DNA profile was not found in the High Vaginal Swab or on the panties worn by the Deceased. What is more is that the no semen, spermatozoa or blood stains were found on the underpants worn by the Accused Person which were taken for analysis.

19. Differently put, the forensic analysis did not at all link the Accused Person with the homicide of the Deceased. None of the items sent for analysis showed that the Accused Person was present at the scene; and his DNA profile was not found at the scene. Even more imperative, the analysis showed that the blood stains on the leaves recovered at the scene generated a DNA profile of an unknown male.

20. What the forensic analysis makes clear is that there was present a male at the scene who most likely committed the heinous murder. However, the forensic analysis makes it even clearer that there is no evidence at all that the male who was present at the scene was the Accused Person.

21. The conclusion, then, is ineluctable. While there is sufficient evidence that the Deceased tragically met her death on 13/01/2014, there is no evidence which demonstrates beyond reasonable doubt that it is the Accused Person who committed the homicide; and that he did it with malice aforethought. The end result, then, is that the Prosecution has not discharged its burden to prove beyond reasonable doubt the charge preferred against the Accused Person.

**22. It is, therefore, my finding that the Prosecution has failed to prove beyond reasonable doubt all the three elements of murder against the three Accused Persons. Consequently, I find that the Accused Person is not guilty of the offence of murder of MWW.**

**I, accordingly, acquit the Accused Person under section 322(1) of the Criminal Procedure Code. He shall be set at liberty unless otherwise lawfully held in custody.**

23. Orders accordingly.

**Dated and delivered at Nakuru this 23<sup>rd</sup> day of April, 2020**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Verne Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media and select members of the public were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.