



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL CASE NO. 3 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GEOFFREY KILEIYA LOSOLOI.....ACCUSED**

**JUDGEMENT**

**Introduction**

The accused is charged with murder contrary to section 203 as read with 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased, SLE. The offence was alleged to have been committed on 22/01/2019 at Lemek area in West Narok County.

The accused pleaded not guilty to the charge.

The prosecution called seven (7) witnesses in support of the charge.

Upon being placed on his defence in terms section 306 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, the accused elected to remain silent. He also did not call any witnesses in his defence.

**The prosecution case.**

The prosecution called DLE (Pw 2), who is the father of the deceased. It was his evidence that on 22/01/2019 the deceased had gone to graze the goats of Leah Namunyak Kashu (Pw 3). The deceased did not bring the goats back to the home of Pw 3. Instead the goats came home at 5.00 pm on their own. By 7.00 pm the deceased had not returned home. Pw 2 and his wife (Pw 4), went to search for the deceased in the nearby home. They did not find him there. Pw 2 and Pw 4 then concluded that their deceased son had gone to sleep in the home of Pw 3 and was to come home the following morning on 23/01/2019. They then returned to their home.

By the following morning the deceased had not returned. The parents then embarked on a search of their son. They were accompanied by their other son namely JLE (Pw 5). The mother of the deceased was shown by AM, a co-herder, where he was playing with the deceased. The other herdsman namely the accused told them that they should not release AM, until AM told them the whereabouts of the deceased. Furthermore, other neighbours who had arrived to assist in the search, asked AM, the whereabouts of the accused. AM led them to where the accused was grazing goats. The mother of the deceased then asked the accused the whereabouts of the deceased. The accused told her that he had not seen the deceased. The mother conveyed that message to her husband.

Furthermore, they went to where the accused had brought together the goats in the bush and found he had disappeared. They then sent AM to go and look for the whereabouts of the accused. AM returned and told them the accused was not where he was. The neighbours (Wakisii) then took different directions in the bush in search of the deceased. They found the deceased dead in the bush. Women then raised screams. The body of the deceased was lying face downwards. The pair of long trousers worn by the deceased had been cut in the leg of the deceased and used to clean his body.

The matter was reported to the village elder, who rang the police at the AP Camp at Lemek.

The father of the deceased then told them that it was the accused who killed the deceased, since AM was a longtime friend of the deceased. The father of the deceased told members of the public not to kill AM, since he was a longtime friend of the deceased. It was the evidence of the father of the deceased that the accused was a foreigner in that area, since he had only been there for three days. The father of the deceased then took a boda boda and went to Lemek Ap camp and found the police were ready with their vehicle. They then took the body of the deceased to the mortuary at Long'isa hospital. Upon arrival at the Ap Camp, he found that AM had been arrested and was in that Lemek Ap Camp.

A search was carried out for the accused and was subsequently arrested at Aitong centre.

While undercross examination the father of the deceased testified that the deceased was seen with AM. He also testified that members of the public wanted to kill AM, since they suspected AM as the person who killed the deceased. AM had lived for six months in the home of Nabaala, whose wife testified as Pw 3. Finally, it was the evidence of the father of the deceased that AM was between 13 to 14 years old and that he used to sleep with the deceased.

The prosecution then called ML (Pw 4), who is the mother of the deceased. Pw 4 testified that the deceased was aged seven (7) years old and was in class one. On a Tuesday the deceased went to graze the goats following his being sent away from school for failing to pay school fees. The deceased used to herd cattle with the AM. It was normal for the deceased to return home at 6.00 pm, after herding the cattle. On that day, he did not return home. At 7.00 pm they went to search for the deceased as the goats had returned home on their own.

Furthermore, Pw 4 testified that the following morning on 23/01/2019 they went to search for the deceased. She asked AM, the whereabouts of the deceased. AM replied that he left the deceased where they used to graze the cattle and goats. Alex also told Pw 4 that he left the deceased at 3.00 pm.

Pw 4 continued to testify that they were three herdsmen. One of them herded cattle, another herded sheep and the third one herded goats. Pw 4 also testified that it was the accused and AM, who drove the animals home that day. Pw 4 also testified that the deceased was a friend of AM. Finally, she testified that the accused escaped from the home of his employer, when the body of the deceased was found in a deep dry valley. And when the body was found the search party raised screams.

In addition to the foregoing two witnesses the prosecution also called JAE (Pw 5), who is the brother of the deceased and a boda boda rider at Lemek. Pw 5 joined his parents (Pw 2 and Pw 4) in the search of the deceased on 23/01/2019 at 10.00 am. He followed the prints of a puppy which used to accompany the deceased to a dam and did not find the deceased there. When Pw 5 asked AM for the whereabouts of the deceased, he replied that he had left the deceased with the accused. AM told Pw 5 that the accused had told him he (the accused) had given the deceased work to do elsewhere.

The search party raised screams. As a result, AM escaped.

Following the finding of the body in the deep dry valley, AM escaped to the home of his employer namely Pw 3, but the neighbours chased and arrested him. When the police arrived they re-arrested him. The police then asked AM as to why he was escaping. AM replied that it was because the deceased was his friend and had heard that he was now dead.

It was the evidence of Pw 5 that his deceased brother was aged seven (7) years. Pw 5 also testified that it was not the duty of the deceased to herd the goats. He only herded the goats that day because his brother Sammy had gone for lunch and the deceased, who had been sent away from school for failing to pay fees, stood in for Sammy.

Pw 5 continued to testify that apart from the livestock of Robert Nabaala that were being grazed there, there were other people who grazed their livestock in that same area. Also while under cross examination, Pw 5 testified that he wrote in his police statement that AM escaped because he was shocked of the death of the deceased.

The first time Pw 5 asked AM the whereabouts of the deceased, AM told him that he had left him (the deceased) where they were herding the animals. When asked the same question the second time by Pw 5 in front of some women, AM told Pw 5 that he had left the deceased with the accused herding the animals in the bush. After searching for the deceased, the women asked AM again the whereabouts of the deceased. He replied that the accused had led the deceased into the bush.

Pw 5 continued to testify that before AM was arrested, the women asked him the whereabouts of the deceased. He replied that the deceased had been given work in the bushes by the accused.

Furthermore, Pw 5 testified that the CID police arrested AM because he knew the movements of the accused; but he was released three days after his arrest.

AM never returned to his work place after being released by the police. Finally, Pw 5 testified that AM was sixteen years old and that the small dog that was with the deceased returned to their home, the night when the deceased went missing.

The prosecution also called Leah Namunyak Kashu (Pw 3), the wife of Robert Nabaala. Pw 3 testified that the deceased was herding their goats, when he met his death. It was her testimony that when she asked the accused for his identity card, the accused gave her an identity card bearing the name Christine Letukei. He told her name that his name was Kirisi. When she asked him as to why the identity card was bearing a lady's name, the accused replied that this was due to an error. She went to the scene, where AM had been arrested. She found the hands of AM had been tied.

And in response to who killed the deceased, AM denied being the killer of the deceased and pointed to the accused as the killer. AM referred to the accused as a Maasai. It was her evidence that the accused is a Msamburu man. This was on 23/01/2019.

It was her further evidence that the accused had accompanied AM in going to graze her animals. Thereafter the police and the chief arrived. The accused was not at the scene, but was later arrested at Aitong. Pw 3 testified that AM was arrested the same day and he alleged that it was the accused who killed the deceased. The accused had run away. Finally, it was her evidence that the accused was in her home between 19/01/2019 and 23/01/2019.

The prosecution also called No 201805 PC Calistus Masengeli (Pw 6), who on orders of his superiors went to Lemek AP Camp on 25/01/2019 and re-arrested the accused and proceeded to take him to Mulot police station.

The prosecution also called No. 99774 PC Dennis Masaki (Pw 7), who was attached to DCIO Narok south and was the investigating officer. AM told Pw 7 the following. The accused told the deceased to accompany him (the accused) in taking the goats to a nearby bush. When AM asked the accused the whereabouts of the deceased, the accused told him (AM) that he got employment for the deceased at a certain place. It was then that accused and AM drove the animals to the home of Pw 3. These were the events of 22/01/2019. Pw 7 then took the body of the deceased to Long'isa hospital mortuary; which body had been found on 23/01/2019.

Pw 7 was still looking for AM to attend court and testify as a prosecution witness as at 15/10/2019. On 05/11/2019 the prosecution with the consent of the defence counsel sought and obtained an adjournment to enable them to trace AM.

Furthermore, during the resumed hearing on 27/01/2020, the prosecution again sought and obtained an adjournment till 28/01/2020. This was the last adjournment. On 28/01/2020 the prosecution again sought an adjournment, which was refused. As a result, the prosecution closed their case.

Finally, the prosecution called Dr. Eric Kibet Mutai (Pw 1), who performed a postmortem on the body of the deceased on 02/02/2019 at Long'isa district hospital. The body of the deceased was identified by Lekolol Ewoi. Upon examination Pw 1 found the following. Bruises on the right neck. There was a loose anal sphincter, which was not normal. This he concluded was evidence of a possible anal penetration. In respect of the head Pw 1 found that it was freely mobile, which he found was abnormal. There was a broken hyoid bone of the neck. There was also necrosis of lateral neck muscles.

As a result, Pw 1 concluded that the cause of death was due to pulmonary arrest due to strangulation and anal penetration. He then produced the report as exhibit Pexh 2. Mobility of the neck was evidence of a broken cervical spine, which is consistent with strangulation. The anal penetration was old. There were no fresh injuries on the anus. The anus was funnel shaped, which suggested frequent anal sex.

While under cross examination Pw 1 testified as follows. The anal sex was in the remote past. The deceased was aged ten (10) years old. The anal penetration was not the cause of death.

### **The submissions of the prosecution**

Although, the prosecution had a right to sum up their case in terms of section 306 (3) of the Criminal Procedure Code, they did not make any submissions.

### **The defence case**

Upon being placed on his defence on 09/03/2020 in terms section 306 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, the accused elected to remain silent. He also did not call any witnesses in his defence.

### **The submissions of the defence**

Ms Saika for the accused filed written submissions in which she urged the court to acquit the accused. She submitted that the deceased died at the herding grounds that are not fenced. According to counsel the grazing grounds were open communal herding grounds for all persons belonging to the extended Nabaala family.

Furthermore, counsel submitted that the prosecution did not present evidence showing the connection between the strangulation of the deceased and the participation of the accused. There is no direct evidence that the accused strangled the deceased.

Counsel further submitted that the accused elected to remain silent, which is his constitutional right. The reason for this is that the accused cannot be called upon to assist the prosecution in their case against him. Counsel cited a number of authorities in respect of circumstantial evidence including but not limited to *Republic v Catherine Karimi Nyanga, High Court, Criminal case No. 28 of 2015*. Based on this authority she submitted that for a court to conviction on such evidence it must meet the test of that evidence, which must point only to the accused as the perpetrator of the crime.

Furthermore, counsel submitted that the evidence of the investigating officer (Pw 7) is not credible. Counsel further submitted that Pw 7 relied on the prosecution case theory of "*last seen alive with*" to charge the accused. This theory places a duty on the accused to give an explanation relating to how the deceased met his death.

### **Issues for determination**

After considering the evidence of the prosecution in the light of the applicable law, I find the following to be the issues for determination.

- 1) Whether the circumstantial evidence points exclusively to the accused as the person who caused the death of the deceased.
- 2) Whether the evidence supports murder or manslaughter.
- 3) What are the final appropriate orders?

## Issue 1

There is no direct evidence that connects the accused with the death of the deceased. I therefore find that the evidence against the accused is circumstantial in nature. The prosecution evidence through the parents of the deceased (Pw 2 and Pw 4) was that their seven-year-old deceased son had on 22/01/2019 taken the goats of Pw 3 for grazing in place of his brother Sammy, who had gone for lunch. The deceased had been sent home for failing to pay school fees. The accused and AM were also herdsmen of Pw 3. The deceased had gone to graze the goats with their small puppy.

In the course of grazing, the accused told the deceased to accompany him in moving the goats to another area for grazing, according to Pw 2 and Pw 4. The deceased complied. At the end of the day, the accused and AM, drove the animals to the home of their owner Pw 3. The deceased did not return the goats that he had taken for grazing. Instead those goats returned to their owner's home on their own unaccompanied by the deceased.

The parents unsuccessfully tried to look for their deceased son in the neighbourhood on 22/01/2019. The following day on 23/01/2019 the parents with the assistance of members of the public managed to trace the body of their deceased son, that was lying in a deep dry valley.

The brother of the deceased namely JAE (Pw 5) and AM assisted the parents of the deceased in looking for the deceased.

Furthermore, when AM (who did not testify) was asked as to the whereabouts of the deceased he gave the following replies. The first time Pw 5 asked AM the whereabouts of the deceased, AM told him that he had left him (the deceased), where they were herding the animals. When asked the same question the second time by Pw 5 in front of some women, AM told Pw 5 that he had left the deceased with the accused herding the animals in the bush. After searching for the deceased, the women again asked AM the whereabouts of the deceased. He replied that the accused had led the deceased into the bush.

The members of the public who were assisting in the search for the accused wanted to kill AM, whom they suspected as the person who killed the deceased. The father of the deceased intervened and stopped them from killing AM, after telling them that AM was a longtime friend of the deceased.

After the dead body of the deceased was found in a deep dry valley, AM attempted to run away but was chased and arrested by members of the public; who then tied his hands. AM was taken to the AP Camp at Lemek and detained there for three days and then released. Following the discovery of the body of the deceased, the accused escaped but was arrested later at Aitong and charged with this offence.

The accused was arrested and charged with the murder of the deceased because he was the last person seen with the deceased. Additionally, the escape of the accused after the dead body of the deceased had been found was another piece of evidence that formed the basis of the case against him.

The court may only convict an accused person on circumstantial evidence if it exclusively points to the accused alone as the perpetrator of the crime charged. In another words, the circumstantial evidence must form an unbroken chain of evidence that points only to the accused as the person who committed the offence. Any break in that chain of evidence will lead to the acquittal of the accused. See *Republic v Phylis Grace Karimi, Embu High Court, Criminal Case No. 29 Of 2015*.

In the instant case, the prosecution has only proved that the accused was the last person seen with the deceased. The prosecution has not proved as to what happened between the time the deceased was last seen with the deceased until his body was found dead in the deep dry valley. The evidence Pw 5 in this regard is that apart from the animals of Robert Nabaala (the employer of the accused), which used to graze in that area, there were other people who used to graze their animals in the same area. These other people had the opportunity to cause the death of the deceased. In other words, the chain of evidence does not point to the accused alone as the person who had the exclusive opportunity of causing the death of the deceased.

Furthermore, the conduct of AM in his responses to the questions put to him by both Pw 5 and the women who were in the company of Pw 5, as to the whereabouts of the deceased raised suspicion. Additionally, he was arrested and held by the police for three days before being released. I agree with Ms. Saika that AM was a prime suspect.

The evidence of Leah Namunyak Kashu (PW 3) that it was AM, who first alleged that the accused had killed the deceased. This evidence taken together with the replies of AM to PW 5, clearly shows that AM is accessory after the fact in terms of section 396 of the Penal Code. The DCIO South Narok is hereby directed to arrest and charge AM with the offence of being an accessory after the fact.

It is clear from the foregoing that AM was an essential potential witness for the prosecution. The prosecution was unable to trace and call him as a witness, despite being granted two adjournments to trace and avail him as their witness.

In the circumstances, I find that the accused is not the person who caused the death of the deceased. I therefore find him not guilty of murder.

## Issue 2

I find as credible the evidence of Dr. Eric Kibet Mutai that the cause of death of the deceased was due to strangulation. This was clear from the evidence that the neck was mobile; which was due to a broken cervical spine. The broken cervical spine was consistent with strangulation. I find as credible the medical evidence that the anus of the deceased was funnel shaped, which was due to frequent anal sex, but Dr. Eric Kibet Mutai testified that this was not the cause of death.

In view of the foregoing evidence, I find that the evidence clearly proves that the offence disclosed is murder.

**Issue 3**

Pursuant to the provisions of section 322 (1) of the Criminal Procedure Code, I hereby acquit the accused person of murder.

The accused is hereby ordered set free unless otherwise held on other lawful warrants.

**Judgment signed, dated and delivered at Narok this 28<sup>th</sup> day of May, 2020 through video link with Ms Torosi for the Republic, the accused, Ms Saika for the accused person and the court assistant Mr. Kigotho.**

**J. M. BWONWONG'A.**

**J U D G E**

**28/05/2020**