



**REPUBLIC OF KENYA**

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

**HCCRC NO. 150 OF 2017**

**FORMERLY MACHAKOS HCCRC 40 OF 2014**

**REPUBLIC..... PROSECUTOR**

**-VERSUS-**

**BEATRICE WANTHI MUSEMBI .....ACCUSED**

**JUDGMENT**

1. **Beatrice Wanti Musembi** the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the Appellant on the 18<sup>th</sup> day of June 2014 at Ngwiwa village, in Nguumo location within Makueni county, jointly with another not before court murdered **AMK**.

2. The prosecution called eleven witnesses. The deceased AMK aged six (6) years was the son to Pw1 **Christabel Katua Wambua**. The deceased was living with his maternal grandmother Pw2 **Anastacia Munyiva Musyimi**. He was attending Glory Academy in nursery.

3. It is Pw2's evidence that on 26<sup>th</sup> May 2014 she received a call from her son **Silvester Nyamae** who lives in Ukunda. He was requesting her to visit them. His son Ngatia agreed to send his wife (*the accused*) to come and take care of the home. The accused came on 30<sup>th</sup> May 2014. She then travelled to Ukunda on 31<sup>st</sup> May 2014 leaving the deceased with the accused. He stayed in

Ukunda until 19<sup>th</sup> June 2014. On this date she called Florence Ndunda the deceased's teacher as she wanted to talk to the child. She was told the child had not gone to school.

4. Pw2 called Ngatia but the accused received the call and told her the child had gone to school. She promised to look for him and they continued communicating with no positive response. She advised the accused to report to the chief the next day as she continued informing neighbours. On 20<sup>th</sup> June 2014 she informed the mother (Pw1) about the missing child. She travelled home thereafter and involved pastors and others in prayer.

5. Pw3 **Carol Wayua William** runs a hotel at Makindu. She testified that on 18<sup>th</sup> June 2014 7:30 pm (*a Wednesday and market day*) she was brought a child said to have been roaming around the market. It is three women (*Wayua, Mrs. Maweu and Jennifer*) who brought the child. She knew the child AMK son of Katiwa her paternal aunt. She was busy with customers and so called pastor David Mutisya of Baptist church to get somebody to take the boy home, which was less than a Kilometer away.

6. Pastor David further entrusted the child to pastor John Nzuma to take him home. On 20<sup>th</sup> June 2014 she heard the child was lost. In cross examination she said she was aware the boy had been left with the uncle Ngatia as his grandmother had travelled. She knew accused as his cousin's wife.

7. Pw4 **Evangelist John Muema Njuguna** testified that on 18<sup>th</sup> June 2014 at 8:00 pm he was called by pastor David Mutisya of Baptist church to Kwituu hotel. He asked him to walk the deceased home. He knew the deceased who was a child. He was with his wife Josephine (Pw5). They left together and on reaching Mombasa-Nairobi road they met the deceased's uncle called Ngatia Ana Musyimi. They walked together until they entered the home, and they proceeded to their home.

8. After about ten meters away they heard the accused telling the deceased that if he did not explain where he had been he would see. He just heard the words as he had not known the accused. They proceeded with their journey. On 19<sup>th</sup> June 2014 9:00 am he passed by Kwituu hotel when Pw3 called him. She asked him if he had taken the child home. She told him the child had disappeared and he was required to record a statement with the police. He went as directed. He later learnt the child had been found dead.

9. Pw5 **Josephine Mwema** is wife to Pw4. She gave similar evidence to that of Pw4. She however added that as they passed Ngatia's home

she heard a voice crying and another talking to the boy saying “if he did not explain where he was he would see”. She turned to Ngatia and told him not to beat the boy since he appeared shocked. The voice issuing threats was of a female and it belonged to the accused as she was the only female in that house.

10. Pw6 **Diana MwikaliKinyiri** stated on 18<sup>th</sup> June 2016(sic) at 8:00 pm she was in her house with her children eating when she heard a child crying from her neighbour Anne Musyimi’s house. In that house also lived the accused and Ngatia. Ngatia is Pw2’s son and husband to the accused. She took no action as she had disagreed with Pw2 and never went to that compound. She later learnt of disappearance and death of the deceased.

11. In cross examination she said there was a home between her home and that of Pw2. She however knew the deceased’s voice since he used to play with her child.

12. Pw7 **Florence NdindaWembe** is a nursery school teacher at [Particulars Withheld] academy. She testified that all children had been released to go home on 18<sup>th</sup> June 2014 around 3:00 pm. On 19<sup>th</sup> June 2014 around 11:00 am Pw2 called to talk to the deceased. She notified her that the boy had not reported to school. She called again at 4:00 pm over the same issue.

13. She added that on 20<sup>th</sup> June 2014 9:00 am her neighbour came inquiring about him again and she told him the boy had not come. Later Ngatia came asking about the same issue. Pw2 also made inquiries on 23<sup>rd</sup> June 2014 at 8:00 am. She later learnt the boy’s body was found cut in pieces. She confirmed that the child was last in school on 18<sup>th</sup> June 2014.

14. In cross examination, she said usually classes ended at 12:00 noon. The children would be collected but the deceased used to go home alone. She did not avail the register but she knew he had been marked absent on the said date.

15. Pw8 **MusyokaMwambi** learnt of the missing child on 26<sup>th</sup> June 2014 11:00 pm. On 27<sup>th</sup> June 2014 he learnt of the arrest of the accused. At 3:00 pm he joined the officers and chief **Tobias Mutukotosee** where the child was buried. The accused was also in the motor vehicle. At the scene they found many people and the police. The accused led them to the grave where she had buried the child and they found body parts of the child. The same were wrapped and taken to the A.P post at the chief’s place.

16. In cross examination he said the deceased was a pupil at his school and on 19<sup>th</sup> June, 2014 he was not in school. He confirmed having gone to where the body was buried with the accused and others.

17. Pw9 **No. 205576 Inspector Joseph Kuto** received a report about the missing child on 21<sup>st</sup> June 2014. On 25<sup>th</sup> June 2014 he received more information and on 27<sup>th</sup> June 2014 he summoned Mr. and Mrs. Ngatia to come and see him. They did not but, Pw2 came and told her Mr. and Mrs. Ngatia were not at home. She gave him Mr. Ngatia’s number but he could not be reached. He sent two officers to go and look for the accused and she was brought.

18. The accused explained to him what Ngatia had done and killed the child whom they buried five (5) kilometres away at Kalungu area. She took them up to where the child was buried under a boulder. He called the OCS Makindu who came with three officers in a vehicle. The officers removed the body which was in pieces. The head was not found. The parts were wrapped and taken to Makindu mortuary.

19. In cross examination he said it’s the accused who first made the report of the missing child. On 25<sup>th</sup> June 2014 William Musyimi and Patrick Ndege mentioned Mr. and Mrs. Ngatia as having beaten the boy badly. The accused led them to the burial site.

20. Pw10 Dr. **Lynn Kiema** conducted the postmortem. She said the body was disfigured and cut into 12 pieces. The cutting was at the joints. The cause of death was severe mutilations and bleeding. She produced the postmortem report as EXB1. The body was identified by the Pw2, Isabela Katiwa and Wambua.

21. In cross examination she said the injuries were not consistent with jembe cutting at joints as was the case here. She said a body could only be pulled to tear if it had been dead for over six months. The body was rotting, she said.

22. In re-examination she said they are able to differentiate when a body is mutilated either alive or dead. She explained that bleeding out of mutilation causes all blood to flow out and causes heart failure.

23. Pw11 **No. 235788 C.I Gerald MuthuiNdirangu** is the investigating officer. He said by the time they went to Kivundwani to look for accused and her husband, the two had gone into hiding. Accused was later traced in Kambu Kilungu sub-location Makueni county. She was brought to the station where she explained to them how they had disciplined the deceased for coming home late and he collapsed and died. She also told them where they had buried the body at night.

24. An exhumation order was obtained on 27<sup>th</sup> June 2014 by the OCS and the accused was arrested. He charged the accused based on the evidence of Pw4 and Pw5 who had heard screams from the deceased and the utterances by the accused. He recovered a jembe as the murder weapon but the Government chemist did not find anything on it. Mr. Ngatia has not been traced in spite of the searches.

25. In cross examination he said he did not visit the grave but it was where the accused’s husband had been buried. Though he did not check the register he was certain that the deceased was in school on 18<sup>th</sup> June 2014. The teacher had told him so.

26. When placed on her defence the accused elected to give a sworn statement with no witnesses to call. She said she used to sell vegetables /

groceries at different market places and had a program for them. She said she was married to Evans Ngatiaof Makindu. She was also employed there to take care of a child as a maid. She slept with the child in the same room in Pw2's house. Mr. Ngati slept in a different house where they could meet as husband and wife to fulfil themselves.

27. It is her evidence that on 18<sup>th</sup> June 2020(Wednesday) she prepared the child for school. After he left at 7:00 am for school she left for Salama market at 7:30 am. Ngati was left in the house. She finished her business at 9:00 pm and arrived home at 10:30 pm finding no one at home. She called Ngati who told her he was on the way but without the child. He arrived at 10:50 pm and said the child had not returned from school. She then told her husband that they should notify Pw1 and Pw2.

28. She called Pw1 but was not able to reach her. She found Pw2 whom she informed and she advised that they look for the boy the next day. The next day they went to look for him despite her husband's reluctance. At the market they met Pw3 who she asked if she had seen the child. Pw3 said David Mutisya had brought her the child but she had advised him to bring him to their house. The said David never testified.

29. She went to David's and missed him. The wife told her, he was away on a journey. She went from school to school and house to house in vain. On 20<sup>th</sup> she reported at Kiundwani police post. She was with mama Mwendwa. On 22<sup>nd</sup> Pw1, Pw2 and aunt Mutindi arrived. They found her with Mwikali her husband's grandmother. Her husband was nowhere to be seen. On 23<sup>rd</sup> morning Pw4 and Pw5 came and informed them how they met her husband on 18<sup>th</sup> June at night and gave him the boy who had been given to them by David Mutisya.

30. On 27<sup>th</sup> at 9:30 am she was at Ilingoni primary school to look for the boy. A police officer came and informed her she was required at the police post. They went and she was placed in cells. Police officers came and she was taken to a scene on a bodaboda. They met many flies there and the place had been dug. The officer was talking of a dead body.

31. They returned to the police post from where she was driven to Makindu police station. She met Pw11 and another officer as Pw11 referred to her as a murderer. He beat her using a stick on the back. She was in the cells for 18 days. Pw11 threatened to kill her as he interrogated her. She never admitted killing the boy. She denied taking police to the scene. She insists the boy was given to Ngati her husband.

32. In cross examination she said she lived with Ngati from 2013 – 2014 and prior to that she was a maid for Christopher Musembi their neighbour. She started taking care of the deceased in 2014 and he was a good boy, giving her no problems. She reported his missing to Pw2. He did not disappear from her hands she said.

33. She also said she was forced to record a statement she knew nothing about. She confirmed that in that home was only herself, AMK and Ngati. Ngati disappeared on 22<sup>nd</sup> June 2014. The child was found in Kamungu where the grave was. She said she never talked of decomposed body parts.

34. In re-examination she said she signed documents after being threatened by police with death. Pw4 – Pw6 were not close neighbours. That if they heard AMK crying nothing stopped them from coming to check. She denied that anyone had come to the house that night upon her arrival or even the next morning.

35. Both parties filed written submissions. Learned counsel for the prosecution Mrs. Ann Penny Gakumu for the prosecution did present all the evidence that was adduced during the trial. It is her submission that the fact and cause of death was proved by the postmortem report (EXB1). She has submitted that there was no eye witness but the available circumstantial evidence confirms that the accused committed the offence. She refers to the case of **Republic –vs- Taylor Weave & Donovan (1928) 21 Cr. App R. 20** where the court held:

*“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.”*

She equally referred to the cases of **Sawe –vs- Republic (2003) KLR 364 & Abanga alias Onyango –vs- Republic Criminal Appeal No. 32 of 1990 UR.**

36. Counsel contends that the evidence by Pw4 and Pw5 confirms that the deceased met his death in the home of the accused and her husband who is at large. They heard the accused threaten the child. Pw6 also heard the child crying from the accused's homestead on the night of 18<sup>th</sup> June 2014. She dismissed the defence as a mere denial.

37. She also submits that the accused and her husband disappeared when investigations were on going in respect to the disappearance of the deceased. She contends that there is consistency in the prosecution case and asked the court to find that the accused participated either actively or passively in the unlawful act of murder.

38. She referred to section 20 and 21 of the Penal Code which were considered in the case of **Njoroge –vs- Republic (1983) KLR 197 at page 204** where the Court of Appeal stated:

*“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common object of the assembly.”*

39. In support of this she relied on the evidence of Pw4 – Pw6 showing that the deceased was at home that night. She argues that the accused

lied by claiming that the deceased never returned home that night. Further that she ran away from her matrimonial home to conceal the happenings of the night. Counsel also submits that the manner of commission of this act proves both *actus reus* and *mens rea* of this offence.

40. On the burden of proof, she relies on the case of **Woolmington –vs- DPP 1935 A C 462 and Miller –vs- Minister of Pensions (1947) 2 ALL ER 372 – 373 where Lord Denning in the Miller case** stated:

***” The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof of beyond reasonable doubt does not mean beyond shadow of doubt...”***

Its therefore her contention that the circumstances in the two mentioned cases are similar to those of the present case.

41. Mr. Musau for the accused in his submissions presented the evidence adduced before this court. He has submitted that it is the duty of the prosecution to prove its case beyond reasonable doubt. He referred to **Elizabeth Waithegeni Gatimu- v- Republic (2015) eKLR. Bakare – v- State (1985) 2 NWLR; United States –vs- Smith, 267F. 3d 1154, 1161; WaitaMunyoki –vs- Republic (2018) eKLR&J.O.O –vs- Republic (2015) eKLR** among others to support the submissions.

42. Submitting on what reasonable doubt is, counsel has cited the case of **Miller –vs- Minister of pensions (1947) 2 ALL ER 372** where it was stated:

***“That degree is well settled. It need not reach certainty, but it must carry a high degree or probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course 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 doubt, but nothing short of that will suffice.”***

43. It’s his submission that the prosecution did not prove its case as it did not call any eye witness and failed to produce Evans Ngati in court yet he was the last person to have been seen with the deceased. Other witnesses who were not called were pastor David Mutisya, William Musyimi and Patrick Ndege. Further that the alleged exhumation order obtained by the OCS was not produced.

44. Counsel has submitted that no DNA report was produced and the identification of the body by Pw2 was not sufficient. He referred to the case of **Republic –vs- Charles Mwitikinyua & 2 Others (2013) eKLR** where Lessit J. stated:

***“The one single reason why I find the prosecution case falls in shambles is the botched identification method adopted by the prosecution. The body in this case was identified by means of toe nails on one leg. The body had only one leg, the left one. The right one was missing. Pw5 and Pw6 identified the body as that of their late brother by two nails. It is amazing that in the digital age as we live in, DNA, the most 100% means of identifying a person even if minimal parts of the body have been recovered was ignored all together. Identification of toe nails is not a fool proof method of identification. If it was the face, or the entire body one would be content with the identification. The doctor’s finding that the body had decomposed to some degree adds to the uneasiness in the evidence of identification.”***

45. He urged the court to be persuaded by the said authority and hold that the method of identification cannot stand in law. The reason being that the head was missing from the deceased’s body and the body had started rotting.

46. It is counsel’s submission that the confession allegedly made by the accused was not done in accordance with section 25A (i) of the Evidence Act, Rules 4-8 of the Evidence (*out of court confessions Rules*), 2009. To support this, he relied on the case of **Rubic –vs- Elly Waga Omondi (2015) eKLR**. He said the evidence of Pw9 falls short of the above requirements and Article 49(1) (d) of the constitution.

47. It is his further submission that Article 49(1)(f) provides for the accused to be arraigned in court before the lapse of 24 hours unless the 24 hours lapse outside ordinary court hours or on a day that is not a working day. To support this, he has cited the case of **Albanus Mwasia Mutua –vs- Republic (2006) eKLR**. He argues that the accused herein was held in police cells for 18 days before being arraigned in court for plea taking. That the accused was assaulted and insulted by Pw11 at Makindu police station. That her right to human dignity guaranteed under Article 28 of the constitution of Kenya and other international conventions were violated.

48. This is now the case before court for determination.

49. The accused person faces a charge of murder. Murder is defined under section 203 of the Penal Code as follows:

***(203) Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

Further, section 206 of the Penal Code defines malice aforethought as:

***(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 caused or not, or by a wish that it may not be caused;***

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

50. For a charge of murder to be proved the following must be established by the prosecution.

- i. The fact and cause of death.
- ii. That the accused's act of commission or omission led to the death of the deceased (*actus reus*).
- iii. That the act of commission or omission was accompanied by malice aforethought (*mens rea/intention*).

51. The evidence adduced before this court in respect to this case is purely circumstantial. There was no eye witness to the killing of the deceased. Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events on circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

52. There are many decisions by the superior courts on circumstantial evidence and how it should be treated. In the case of **Abanga alias Onyango –vs- Republic** (*supra*) the Court of Appeal set out the tests which should be applied when dealing with circumstantial evidence. These are:

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
- iii. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

53. Later in the case of **Nzivo –vs- Republic (2005) I KLR 699** the Court of Appeal held thus:

***(5) In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.***

54. Mr. Musau for the accused has raised the issue of the accused having been kept at the police station for 18 days before being arraigned in court and this was in violation of Article 49 (1)(d) (f) of the constitution. He has also submitted that the accused was also assaulted and insulted. **Article 49(1)(d)** of the constitution provides:

An arrested person has the right –

***(d) Not to be compelled to make any confession or admission that could be used in evidence against the person;***

**Article 49(1)(f)** provides

An arrested person has the right –

to be brought before a court as soon as reasonably possible, but not later than –

***i. Twenty – four hours after being arrested; or***

***ii. If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.***

55. Upon perusal of the record, I have noted that the accused was first arraigned in court on 14<sup>th</sup> July 2014. At no point did she or her advocate raise the issue being raised now. I am certain that if that was raised before the court, the then trial court would have addressed the issue. Secondly the charge facing the accused is a serious offence involving loss of a life and it carries a sentence of death if one is found guilty.

56. Failure to be arraigned in court within 24 hours alone is not an automatic ground for acquittal. Such a claim would require an investigation. The best way of handling it would be to file a claim for damages for unlawful detention among others. The same goes for the claim of the accused having been beaten and insulted. The accused should have raised this at the earliest opportunity (14/7/2014) for the same to be investigated. Pw11 was not cross examined on this either. These issues have only been raised in the accused's defence for the first time i.e. – six years down the line. It cannot be the basis for an acquittal.

57. Pw1 and Pw2 who are the mother and grandmother of the deceased have testified of the disappearance of the deceased aged six (6) years. The boy disappeared on 18<sup>th</sup> June 2014 and his body was recovered on 26<sup>th</sup> June 2014 which was eight (8) days after the disappearance. This

child had lived with his grandmother (Pw2) for five years. She is the one who identified the recovered body by looking at the toes. The mother (Pw1) was not able to identify it.

58. The witnesses also confirmed that the body was rotting and had been dismembered. A postmortem was conducted on the mutilated body and the cause of death was found to be severe mutation by cutting the body with a sharp object severely leading to cardiopulmonary failure. A death certificate No.578741 was issued. I therefore find the fact and cause of death to have been proved.

#### **Whether the accused was involved in the killing.**

59. The disappearance of the deceased first came to light when Pw2 called the school teacher (Pw7) with an intention of talking to the child. This was on 19<sup>th</sup> June 2014 and she was told the child had not come to school. This evidence was confirmed by Pw7 (*the teacher*). The next thing Pw2 did was to call the accused and her son Ngati on Ngati's cellphone. It's the accused who received it. She told Pw2 that the child had gone to school on that day and she promised to go and look for the child. So the accused told Pw2 that the child had gone to school on 19<sup>th</sup> June 2014.

60. This is very crucial evidence because it was never disputed through cross examination. In her defence she changed her story to say that the child never came home on 18<sup>th</sup> June 2014 after school. Which one had she told Pw2 had gone to school on 19<sup>th</sup> June 2014? If indeed he went to school from her house on 19<sup>th</sup> June 2014 as she told Pw2 then he was there on 18<sup>th</sup> June 2014 after school.

61. Pw3 was brought this child on 18<sup>th</sup> June 2014 at about 8:00 pm. He had been found loitering at the market. None of those who handled him tried to find out from him why he was loitering at that time at the market instead of going home. They would have assisted this child had they been sensitive.

62. Pw4 and Pw5 who are husband and wife were assigned the duty of taking the deceased home which they did. They even met with uncle Evans Ngati on the way and he pretended to have come to pick the boy. Pw4 said when the boy saw Ngati he was shocked and went ahead of them. They ensured that Ngati and the deceased had entered the home. Pw5 further cautioned Ngati not to beat the boy who was in shock.

63. Within a short distance of leaving, Pw4 and Pw5 heard a female voice saying if he (deceased) did not explain where he had been he would see. For Pw4 and Pw5 to hear means the words were spoken in a loud voice. On the other hand, Pw6 a neighbour who knew the deceased well as he was a friend to her child heard him crying that night. She said the deceased used to play with her child so she knew his voice.

64. In her defence the accused claims that she arrived home on the night of 18<sup>th</sup> June 2014 and found no one at home, though her husband Evans Ngati joined her later. Further no visitor came there that night. The evidence of Pw3 is that the boy was brought to her hotel at 8:00 pm. She contacted pastor David Mutisya who in turn got Pw4 and Pw5 to take the child home. She said the child's home was less than a kilometer from the market. They walked home and it was at night. It is obvious they were there well past 8:00 pm.

65. The evidence on record is that in that house, lived Evans Ngati, accused and the deceased for the time Pw2 was away. There was no other female person living there. The accused did not make mention of any other female person living there. It follows that the voice that Pw4 and Pw5 heard was that of the accused. There was also no other child living there. The crying voice was that of the deceased as stated by Pw3 and Pw6.

66. Mr. Musau for the accused submitted that failure to call pastor David Mutisya, William Musyimi and Patrick Ndege as witnesses was fatal to the prosecution case. The role these persons played was so minimal and would not add anything to the prosecution case. Pastor David was asked to identify a person who could take the deceased home. He identified a fellow pastor and his wife (Pw4 and Pw5) whose home is not far from the deceased's home.

67. Pw4 and Pw5 are the ones who took the deceased home as they have testified. It's their evidence that was critical and not pastor David's. All that William Musyimi and Patrick Ndege did was to request Pw9 **No. 205576 Inspector Joseph Kuto** to find out from Evans Ngati and his wife (*accused*) what happened to the deceased as they were the ones staying with him which was an undisputed fact.

68. Besides that, there was nothing else they did. Their evidence would have added no value to the prosecution case. I therefore find that the prosecution did not err by failure to call those witnesses. **Section 143** of the Evidence Act provides:

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

It follows that a fact may be proved by one witness if the said witness is credible. However, as I have stated above there was no real need of calling the three (3) mentioned persons.

69. Pw9 testified that upon receiving information, the accused and her husband, were nowhere to be seen. The accused was finally traced by A.P officers on 27<sup>th</sup> June 2014 and brought to the station. Upon interrogation she led officers to the place where the body parts of the deceased were retrieved from a grave.

70. Pw8 **Musyoka Mwambi** a civilian also witnessed the recovery of the body parts. In her defence she admitted having gone to a scene which had been dug and it had many flies. She did not make any mention of the recovered parts. The evidence of Pw8 and Pw9 confirms the recovery of the body parts in the presence of the accused.

71. The defence has raised issue with the identification of the body and referred to the case of **Charles Mwitikinyua & 2 Others** (*supra*) where Justice Lessit dismissed the prosecution case due to a botched identification. That case can be distinguished from this one. In the case of **Charles M. Kinyua** (*supra*) there was no other evidence connecting the accused save for that botched identification by a brother who simply said he could identify the toe nails because they resembled his. There was nothing else to corroborate it.

72. In the instant case the deceased was aged six (6) years. Pw2 said she had lived with the deceased for five (5) years. She had brought up this child since he was one (1) year old and so could identify him. I do not therefore find her identification to be botched.

73. There was no recorded confession produced before this court which had to comply with the provisions of the Evidence Act. All that the court has considered is the accused person taking the police to the place where the deceased's body parts were found. Nobody forced her to do that. Had that been the case, the trial court would have been informed from the word "go" since the accused was represented.

74. From the evidence of Pw4 and Pw5 which was not shaken in cross examination the accused was one of the last persons to be with the deceased when he was alive. She was heard shouting at the boy on the night of 18<sup>th</sup> June 2014 and the boy was heard crying by Pw5 and Pw6. That was the last time the boy was heard of. She later led the police to where the body was retrieved from. This evidence is so corroborative.

75. On proof of malice aforethought I find that the manner of the killing of the deceased speaks for itself. His body parts were chopped into several pieces. The pain he must have gone through cannot be explained by any human being. It reveals that there was a real intention to kill and thereafter a plan to dispose of the body without any trace.

76. I am left with no doubt that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis other than that of guilt. The circumstantial evidence is sufficient to support a conviction in line with the numerous decisions cited. For my part I find the accused guilty and convict her accordingly of murder contrary to section 203 of the Penal Code.

Orders accordingly.

**Delivered, signed & dated this 30<sup>th</sup> day of July 2020, in open court at Makueni.**

.....

**H. I. Ong'udi**

**Judge**