



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL CASE NO. 4 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD KIBET BUSIENEI alias CHAGICHA.....ACCUSED

JUDGMENT

1. The accused person in this case, BERNARD KIBET BUSIENEI ALIAS CHAGICHA is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the charge are that on 27/1/2017, at [particulars withheld] village in Menet Sub-location within Bomet County; the accused person with malice aforethought murdered AC.

3. The prosecution called a total of eight (8) witnesses whose evidence in summary was as follows; PW1 CCC said on 27/1/2017 she went to school at 1p.m to sign books for the children and left the deceased AC and her brother K at home.

4. When PW1 returned at 3p.m she did not find the deceased.

K told her she was missing. PW1 said the accused was a neighbour. He ran away when he heard the child was being looked for from house to house. The body of the deceased was found in the house of the Accused person.

5. PW2 COSMAS TOWET who is the assistant chief MENET Bomet East said on 27/1/2017 he heard screams at 7.30p.m. He said he was told a child was missing. They started looking for the child and found the body in the accused person's house.

6. PW2 said there was a wire on the child's neck and blood on the private parts. The face of the child was covered with a manila rope. He said the house was locked from outside with a padlock and the accused person had disappeared.

7. PW3 WILLIAM CHESIMET also said at 7.30p.m on the material day he heard screams and proceeded to the scene of crime where he was told a child was missing. They decided to check the houses and found the body of the child in the house of the accused person on a bed.

8. In cross examination PW3 said the accused is his nephew. He said the accused used to be a drunkard who used to steal and assault people.

9. PW4, EKM said CC is her first born. He said the child was sodomised and raped and then strangled.

10. PW5 DR. RONALD KIBET said he did a Post Mortem Examination on body of the deceased on 30/1/2017. He said the body had blood secretion in the nostrils and strangulation marks around the neck. He said there was blood on the genitalia and rectal region. There was a gaping and opening with lacerations at 6 o'clock. The Doctor said the region between the vagina and anus (perineum) had bruises and tears. The doctor said the cause of death was strangulation.

11. PW6 RICHARD KIMUTAI a Government Analyst based at Kisumu said the following items were forwarded to him;

1. Blood samples of the accused
2. Blood samples of the deceased.
3. High vaginal swab from the deceased.

4. High rectal swab from the deceased.
5. Blood stains from navy blue trouser.
6. Blood stains from the blouse of the deceased.
7. Blood stains from the trouser of the accused.
8. Red T-shirt for the accused.
9. Blue jeans, blouse, brown trouser stained with human blood.
10. Navy blue trouser stained with human blood.

12. PW6 was asked to do DNA profiles from those samples and he said upon analysis, he found that the red T-shirt and navy blue trouser were stained with blood that matched the DNA profile of the deceased.

13. PW7 SERGENT RONALD MOMANYI is the investigating officer who arrested the accused person and took the samples to the Government analyst. He said he found the accused person's trousers and red T-shirt stained with blood on the bed.

14. PW8 NO.611 CPL KIBOMA took photographs at the scene and produced them as Exhibits.

15. Upon the close of the prosecution case, the court found that the accused person had a case to answer and placed him on his defence.

16. The accused person gave a sworn statement and said on 27/1/2017 he left his house at 6a.m and went to Eldoret Hospital. He said he was treated and he stayed there overnight. The following day he returned to Longisa where he met a neighbour and some AP's who said they were searching for him.

17. He said he asked why he was being arrested and he was told he would explain at the police station. He was searched and his money Kshs.3,525/= was taken away. At the police station he was kept for a while and hospital documents were taken away. He was taken to Bomet Police Station and then charged with this offence.

18. I have considered the evidence on record together with submissions by the parties. The accused is charged with the offence of murder which is defined under section 203 of the Penal Code thus:

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

“Section 206 of the Penal Code provides for malice aforethought thus:- Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

(a) an intention to cause the death of or to do grievous harm to an 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 harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony,

19. The evidence against the Accused person is circumstantial. The body of the deceased was found in the accused person's house. The deceased had been defiled and sodomized and strangled.

20. In the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** the court held as follows on the issue of relying on circumstantial evidence as the basis for a conviction;

“Lord Heward, CJ, stated as follows on circumstantial evidence in R v. Taylor, Weaver & Donovan [1928] CR. App. R. 21:

“It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial.”

(See also Musili Tulo v. Republic Cr. App. No. 30 of 2013).

Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence.

In Abanga alias Onyango v Republic, Cr. App No. 32 of 1990 this Court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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.”

(See also Sawe v. Republic (supra) and GMI v. Republic, Cr. Ap. No. 308 of 2011.)

21. I find that the evidence against the accused person though circumstantial is water-tight. The essential ingredients of the offence of murder required to be proved by the prosecution against the accused stands as follows:

- a. **The death of the deceased.**
- b. **That the death of the deceased was unlawful.**
- c. **That in causing death the accused had malice aforethought.**
- d. **That it was the accused who caused the death of the deceased.**

22. The body of the deceased was found in the Accused person's house. There is evidence that the Accused person who was a neighbour of the deceased ran away when the pw2 and pw3 started searching for the deceased from house to house. The accused person not only murdered the deceased but he also defiled and sodomised her.

23. The Doctor who did the postmortem confirmed that the cause of death was strangulation following sexual defilement and sodomy.

24. There is also evidence that accused person's red T-shirt and navy blue trousers had blood samples which matched with the DNA of the deceased's blood sampled.

25. The defence by the accused person is an alibi. He said he had gone to Eldoret Hospital where he stayed overnight and he was arrested on his way home. I find that there is evidence that he fled the scene when the search for the deceased commenced.

26. I also find that his purported alibi was raised too late at the trial. In R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

22. I accordingly find the accused person guilty as charged and I accordingly convict him.

Dated and delivered at Bomet this 3rd day of August, 2020.

A. ONGERI

JUDGE