



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 15 OF 2009

REPUBLIC

VERSUS

RICHARD WACHIRA KARIMI

JUDGMENT

Richard Wachira Karimi was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. The particulars are that on the 26th day of October, 2008 at Kimunye, Mt. Kenya forest in Kirinyaga District of the Central Province, he murdered LWM (W). He pleaded not guilty to the charge.

The background of the prosecution case against the accused can be traced to the testimonies of W's parents and paternal grandmother. Her father BM (PW1) testified that on 26 October, 2008, he was at home with W, who was then aged 8, together with his two other children and his mother. At about 4 PM his mother sent W to buy tomatoes from a shop which, in his estimation, was about 800 meters from their home. When she delayed in returning, M got concerned and followed her to the shop in the company of his wife, JW (PW2). The latter was W's step-mother; her real mother was living with her parents after she separated from M three years before.

Lucy Wagwateka (PW5), the shop attendant where W had been sent confirmed to W's parents that indeed W had been at the shop and that she had purchased tomatoes but that she had left in the company of the accused and a three-year-old boy whom she named as M. The accused is said to have bought the two children some bun. She also told them that the accused had carried the young boy on his bicycle while W followed closely behind. The couple proceeded to the M's home but neither M nor W was there. M's parents joined W's parents to look for their children but their search could not yield anything that evening.

On the following day, one M called and told M that his pupils had told him that a small child had been seen in a certain house near Mt Kenya forest. He went there together with M's father and indeed found M but not W. M told them W had left with the accused on the latter's bicycle. M proceeded to the accused's home; he found his mother who told him that the accused had left the previous day. He went to his previous wife's home thinking that perhaps W may have gone there; the mother to his estranged wife told him that W was not there.

It was only on 28 January, 2009 that he received a call from the police asking him to visit Kimunye police base and identify the remains of a deceased person. When he went there, all he found were skeletons and clothes which his daughter wore on the day she disappeared. The police told him that they had recovered these things from Mt Kenya forest, about half a kilometre from the police base.

During cross-examination, M admitted that previously, there had been a court dispute between him and his previous wife over the custody of W. The mother was given custody but she allegedly surrendered the custody to W's father when she remarried. Later, the two reconciled and lived together again for a year before the mother left for the second time. M also testified that M had been found at the home of one Jumaa where he had sought refuge after he was abandoned on the road. It was his evidence both Jumaa and his wife had since died.

EW (PW3), M's second wife, W's paternal grandmother, CR (PW7) and the shopkeeper, Wagwateka, corroborated M's testimony; however, his wife added that she was the one who made the report of their daughter's disappearance to the police on 27th October, 2008 and that she had lived with W for three years before her disappearance. The shopkeeper testified further that on the material day, the accused arrived on a bicycle at her shop first and bought cooking oil. As he made to leave, he heard W ask him to buy her a cake. She confirmed that she had come to the shop in the company of a small boy. The accused carried this small boy on his bicycle as W followed them. On her part, Ruguru testified that she lived with W and her brother and indeed she is the one who sent W to buy tomatoes on the fateful day.

DKK (PW9), M's father-in-law also corroborated M's testimony to the effect that on 27 October, 2008 M went to his home to enquire the whereabouts of W.

M's ex-wife, JW (PW2) testified and confirmed that indeed W was one of her three children with M; the two had been married for eight years before they separated. She knew the accused because he was a neighbour at her previous husband's home. When she got information of the disappearance of her daughter from M on 27 October, 2010 she went to make a report to the police but she was informed that a report had

already been made. After two weeks, she was summoned at the police station and put in custody. She remained in the police custody for one week before the police asked her to record a statement against the accused. She was returned to police cells when she declined and told the police that she knew nothing about the accused. Although she was subsequently released, the police kept arresting her and locking her in cells from time to time. She was initially charged with the accused with an offence related to kidnapping but the charge was later withdrawn. She initially stated in her evidence in chief that she did not have any dispute with her former husband over the custody of W; however, she admitted during cross-examination that indeed such dispute existed and that she had been given custody of all the children.

It was while she was in custody of the children that M requested her to let two of the children, including W, visit their paternal grandparents. She allowed them to go; however, he never returned them to her.

Police constable Jackson Kiprop (PW4) took photographs of the skeletons and W's clothing at the police station. He testified that the skeletons and clothing were in a sack and were identified to him by corporal Machelu; the latter told him that he had collected these things from Mt Kenya forest and that he had identified them to him as being W's remains and belongings.

Stanley Karani Njoka (PW6) testified that it was him who received a call from an anonymous caller on 28 January, 2009 telling him that he had stumbled on human skeletons at Mt Kenya Forest. He informed the area assistant chief who in turn informed the police. On the following day, he accompanied police officers and village elders to the forest where they found the skeletons and clothes. The area chief and the police officer collected the bones.

The Assistant Chief of Kimandi sublocation, Jamleck Kabue Gatimu (PW7) corroborated Njoka's testimony and also testified that he knew the accused and that at one time he was thought to have been killed by a criminal gang who suspected that he had kidnapped a child. A body thought to be his was even buried. However, the accused resurfaced on 19 January, 2009 when the chief arrested him and handed him over to the police.

The Assistant chief of Nchugu location, Luke Nchoe (PW12) testified that he too received a call from an anonymous caller on 28 January, 2009 to the effect that he had seen a human skeleton in a forest at Kairegi village. He proceeded to the scene with sergeant Machelu, Stanley Njoka and police constable Leshau. Together with members of the public, they conducted a search that day but they could not find anything because it was dark. On the following day, they recovered skeletons scattered all over and clothes. They took these things to the police station.

On his part, the Government analyst, Albert Gathuri Mwaniki (PW8), informed the court that on 20 February, 2009 he received for analysis samples of the accused's blood and saliva, the deceased's pant, a long trouser and a dress. He was required to ascertain the presence of spermatozoa, semen and blood stains on the clothes. He was also required to classify the saliva and the blood samples of the deceased.

He established that the deceased's clothes were not stained with semen or spermatozoa but that her underpant was slightly stained with blood group B. The accused's blood was found to be of group O while his saliva was categorized as 'group O secreta'.

The case against the accused was investigated by Corporal Joseph Ochieng (PW10). His initial brief was to investigate a case of theft of a child. The child's mother was suspected to have stolen her because of a long-standing domestic dispute with her husband. However, she was released when it was established that there was no evidence linking her with the disappearance of the child in question.

It was also the investigation officer's evidence that the accused was a suspect because he disappeared from his home to an unknown place. Later, he was thought to have died and even a body thought to be his was recovered from a river bank and surrendered to his mother. When the accused resurfaced, he was arrested and charged when he told the investigations officer that he had been tasked by the W's mother to take her from M's custody. With this information, he charged both the accused and the mother with the offence of stealing a child.

Sometimes later, the accused told him that in fact he murdered W and disposed her body in a forest; he then led the investigation officer and his colleagues to the scene. They couldn't locate the scene the very first time; according to the officer's evidence, the accused asked for more time to locate the scene. On the second visit, they recovered, a rib bone. At the time of recovery, he was in the company of a scenes of crime officer. Before then he had received some report from Kimunye police post that some bones and clothes had been recovered from Kimunye forest. He referred all these remains to hospital for postmortem.

The postmortem was conducted by Dr Njue but his report was produced in court by Dr Obiero Okoth. According to the report, the postmortem was done on 23 February, 2009 at Kerugoya district hospital. The 'body,' according to the pathologist, was identified by M and one Charity Ruguru. It consisted of bones in a sack. They comprised one complete skull, one shoulder bone, one right clavical bone, 21 ribs, both humerus, 18 vertebrae bones and two femur; six molars, canines and incisors were absent. The thyroid bone was also not found.

In his opinion, the bones were that of a child but the sex of the child could not be established. There was a possibility of animal predation, meaning that the animals could have scavenged on the bones. Most crucially, the doctor opined that the cause of the death could not be established.

When he was put on his defence, the accused stated on oath that though he worked in Kimunye between June, 2008 and January, 2009, he did not kill the deceased. He admitted that on 26 October, 2008 he went to buy a cigarette from Wagatweka's shop and found two children; of the two children, he knew W and that she asked him to buy her a mandazi. He carried the other child on his bicycle but left W behind. On the same day he met W's mother. Later the two of them were arrested and charged. While in police custody, he was taken to where the remains of a human body were found.

This is all there is to the evidence that I have to evaluate and determine whether indeed an offence under section 203 of the Penal Code was committed and if so whether it was committed by the accused. Section 203 itself reads as follows:

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

At the very least, the prosecution must prove death of a particular person in order to establish a case of murder under this section; it must also go further and prove that the death was not a natural occurrence but that it was instigated by an act or omission of another person which, in all circumstances, was unjustified or unlawful. The act or omission must have been deliberate and the perpetrator must have deliberately set out to kill or maim the deceased; in other words, it must be established that the perpetrator was ill-motivated or had malice aforethought.

The person alleged to have been murdered here is a minor of female gender aged 8 at the time of the murder. None of the prosecution witnesses witnessed the murder if at all she was murdered as alleged by the prosecution. The evidence the state presented towards this direction is indirect or circumstantial. As far as I understand the prosecution case, the circumstantial evidence of the fact of death would comprise first, the disappearance of the deceased; secondly, the recovery of human skeleton or bones in a forest suspected to be those of the deceased; thirdly, the recovery of the clothes which the deceased wore the last time she was seen.

As far as the link between the suspected murder and the accused is concerned, the prosecution case was simply that the accused person was the last person seen with the deceased.

The question that this court needs to consider is whether this evidence is sufficient enough to prove the facts in issue; that is, whether W died, and if so, whether she died as alleged; and, whether the accused was behind the murder.

The discovery of the human bones or skeleton from the forest, no doubt, influenced the state's conclusion that W may have been murdered. I say so because it is clear from the evidence of the investigations officer that it is upon this discovery that previous charges of either kidnap or child theft initially preferred against the accused and W's mother were withdrawn and substituted with the present charge of murder.

But the discovery of the bones or skeleton could not have been an end in itself; in other words, it could not simply be assumed that the bones were W's remains without expert or scientific opinion to back such assumption. In what I think was an omission on the part of the investigations, these bones or the skeleton were not subjected to any forensic analysis to determine whether they were that of W. As a matter of fact, the handling of this piece of evidence was what one would regard as amateurish. The investigations officer testified that he recovered a rib bone from the forest. Police constable Jackson Kiprop (PW4), the scenes of crime officer, testified that he was told that corporal Machelu had picked other bones in the forest and taken them to the police station. The bone that the investigations officer and those that are alleged to have been recovered by the corporal Machelu were mixed up together yet it was not established whether they were of the same being. It is also inexplicable that rather than secure the scene where the bones and clothes were found and engage the scenes of crimes officers to take photographs and make records of the scene, corporal Machelu chose to gather the bones and the clothes, pack them in a sack and take them to the police station. To compound the prosecution case even further, he did not testify and perhaps shed some light where he got the bones and the clothes from.

I am aware that the Government pathologist in his report concluded that the bones and in particular the skull were that of a child but his brief was limited to establishing the cause of death. If anything, he added that from his analysis he could not establish whether the child was male or female.

I am minded that there was consistent evidence that W's clothes were found at the scene where the bones were found and according to the Government chemist these clothes had traces of blood of the same group as of the deceased. This find was vitiated by the manner in which the supposed scene of crime was handled. As noted, it was not secured and photographs taken of the state in which the evidence was before a rather over enthusiastic officer collected them in a sack and brought them to the police station. The alleged officer did not testify and therefore it cannot be said with any measure of certainty that the bones and the deceased's apparel were collected from a particular place. It is possible that they could have been collected from a different place.

In the face of these lapses, I am hesitant to conclude that as much as the bones upon which a post-mortem was conducted were that of a human being, it was not proved beyond doubt that they were the remains of LWM. To be more specific, it was not proved to the required standard that the said LWM was murdered as alleged by the state.

If, for a moment, it is assumed that the remains were W's, the next hurdle which the prosecution was not able to surmount is whether the death of the deceased was, in the language of section 203, caused by another person by an unlawful act or omission. The pathologist who testified that his task was to establish the cause of the deceased's death was categorical that he couldn't; he even added that the deceased may have been a prey to animal predators. The conclusion that one can logically make from the pathologist's report is that from the evidence available and, with all these probabilities, it cannot be said, without any shadow of doubt, that the deceased died of a particular cause or that such death was secondary to an unlawful act or omission of another person.

The accused may or may not have had a hand in the deceased's death. Considering the long-standing dispute M and his estranged wife over the custody of their children and circumstances under which M secured the custody of the children from their mother, it is also probable that the latter may have been aware of the circumstances in which her daughter was murdered. It is quite possible that the deceased's death may have been the unforeseen consequences of her efforts to wrest back the custody of her children, and in particular the deceased, from her former husband. It must be remembered that the accused testified on oath that he met W's mother on the same day he had been seen with W at the Shop.

All these preponderances have watered down the circumstantial evidence upon which the prosecution founded its case. While it is settled that this sort of evidence may be a basis of a safe conviction, it must also be appreciated that circumstantial evidence must be narrowly examined before drawing any inference of guilt on the part of the accused. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused person. This point was made in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** where the Court of Appeal for Eastern Africa, quoting **Wills on Circumstantial Evidence**, held as follows:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

And in **Simon Musoke versus Republic (1958) EA 715** this principle was extended when the same court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that: -

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.

As far as the prosecution case against the accused is concerned, it is not possible to state with any measure of certainty that the inculpatory facts are incompatible with the innocence of the accused and, incapable of explanation upon any other reasonable hypothesis than that of his guilt. There are co-existing circumstances that have weakened or outrightly destroyed the inference of guilt.

Inevitably, I come to the conclusion that the state has not proved its case against the accused beyond all reasonable doubt. Accordingly, the accused is acquitted of the offence of murder and he shall be set free forthwith unless he is lawfully held.

Dated, signed and delivered in open court this 29th day of March, 2019

Ngaah Jairus

JUDGE