



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL CASE NO. 24 OF 2018**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**NYANEKA JULIUS MWIKWABE alias MWITA.....ACCUSED**

**JUDGMENT**

1. **Nyaneka Julius Mwikwabe alias Mwitwa**, the accused person herein was charged with the murder of a minor one **Boke Chacha** (hereinafter referred to as **'the deceased'**) on diverse dates between 1<sup>st</sup> and 4<sup>th</sup> September 2018 at Kikamiri village, Kuria West Sub-County within Migori County. The accused person denied committing the offence and the case was set for hearing.

2. Seven witnesses testified in support of the information facing the accused person. **PW1** was the mother of the deceased one **CB**. **PW2** was one **MMM**, a friend to **PW1**. A minor son to **PW1** and a brother to the deceased testified as **PW3**. He was **Jacob Ngekere**. **Fred Mwitwa** testified as **PW4** whereas **PW5** was one **Joseph Kihita Nyamohanga**. **Dr. Awinda Victor Omollo** who conducted the post mortem examination on the body of the deceased testified as **PW6** and **No. 4\*\*\*\* Sgt. Samson Kataka** attached at the DCI Kuria West testified as **PW7** and as the investigating officer. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was that on 01/09/2018 **PW1** and **PW2** were on their way walking back home from attending a meeting at their children's Compassion School. **PW1** was accompanied by her two children, the deceased and **PW3** whereas **PW2** was accompanied by her grandson. As they walked towards Ikerege town they saw the accused person behind them riding a bicycle and carrying another person. Shortly before the accused person caught up with the group the other person alighted and branched off the road. The accused person was left alone riding his bicycle and that is when **PW2** requested him to assist the three children by carrying them on the bicycle and drop them at the junction of Kwa Kihirimo where the children were to await for **PW1** and **PW2** who instead continued walking.

4. The accused person picked the three children and rode away. As **PW1** and **PW2** approached the said junction they saw **PW3** and **PW2**'s grandson walking towards them. The deceased was not with them and on enquiry they said that the deceased had refused to alight from the bicycle and the accused person had gone away with her towards the direction of Nyahora village. Bewildered, **PW1** and **PW2** ran towards the direction of the Nyahora village asking whoever they came across whether they had seen the accused person and the deceased. At one place **PW1** was told that a bicycle rider carrying a girl had been seen riding towards the direction of the forest and she pursued them while loudly calling the name of the deceased. **PW1** testified that at one point she called the name of the deceased while inside the forest and the deceased responded but it seemed the deceased had been gagged. All efforts to find and rescue the deceased by the family members and the villagers were futile.

5. On 04/09/2018 at around 06:30pm **PW4** branched off into the forest at Kikamiri village to answer a call of nature and came across a dead body. He ran and reported to the nearby home. The villagers ran to the scene and **PW5** who was a Pastor within the village recognized the body as that of the deceased and called the police. The police in the company of **PW7** visited the scene, interrogated several people and photographed the body and the scene before they retrieved the body to Migori County Referral Hospital Mortuary for preservation and further police action.

6. **PW7** thereafter took conduct of the investigations and recorded witness statements. He also organized for a post mortem examination of the body of the deceased on 07/09/2018 where **PW6** conducted it. **PW6** found the body decomposing with maggots and rigidity all over and opined that the deceased must have died around one week earlier. Externally there was deep cyanosis and a deep ridge around the neck while the tongue was protruding outside the mouth. Internally there was as well deep cyanosis and a deep groove around the neck. There were maggots on the perinium and the hymen was missing. The vagina was torn from the front to the anus which **PW6** described as Grade 4 vaginal tear. **PW6** formed the opinion that the cause of death was asphyxia secondary to strangling. **PW6** filled in a Post Mortem Report and produced it as an exhibit.

7. **PW7** intensified investigations and through a tip off from an uncle to the accused person one **Stephen Gekonde Mwikwabe** (not a

witness) traced the accused person to Serengeti village in Tanzania where the accused person was arrested through the intervention of the Tanzanian police. The accused person was delivered into the Kenyan police and was taken to Kehancha Police Station where he was interrogated by PW7 on 18/09/2018. According to PW7 the accused person admitted committing the offence and stated that he had sold off the bicycle he used in carrying the the deceased and the other two children. On 20/08/2018 PW7 escorted the accused person to Kehancha District Hospital where he was mentally examined and found to be fit to stand trial. PW7 produced the Mental Assessment Report, the photographs and the Certificate as exhibits.

8. At the close of the prosecution's case, the accused person was placed on his defence and opted to give sworn testimony. The accused person denied committing the offence and raised an *alibi* that he was in Tanzania on the alleged day and that he has never been to Kenya until he was arrested over this case. He stated that his uncle Stephen who led the police to arrest him has a home in Tanzania and another home in Kenya and that there is a longstanding land dispute between the said Stephen and the accused person in Tanzania and that is why Stephen is out to fix him. The accused person prayed for an acquittal.

9. At the close of the defence case the matter was left for this judgment.

10. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether or not the accused person is guilty of the information of murder.

11. As the accused person is charged with an information of murder, the prosecution must prove the following three ingredients: -

**(a) Proof of the fact and the cause of death of the deceased;**

**(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;**

**(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.**

12. I will deal with the ingredients separately.

**(i) Proof of the fact and the cause of death of the deceased:**

13. There is no doubt that the deceased died. All the witnesses so confirmed. As to the cause of death, PW6 took this Court through the Post Mortem Form which he prepared after conducting the examination. He found that the cause death was asyphyxia secondary to strangling. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

**(ii) Whether the death of the deceased was the direct consequence of any unlawful act or omission on the part of the accused person:**

14. The accused person denied causing the death of the deceased. He raised an *alibi* defense and contends that his uncle is out to fix him to settle a land dispute at their home in Tanzania. PW1, PW2 and PW3 are the eye-witnesses. They all stated that they had never met the accused person before the day the children were given a lift. PW1 and PW2 shifted blame as to who said she knew the accused person and that the children were safe with the accused person. They both agreed that the accused person came from behind them and did not stop to talk to them. That, PW2 asked the accused person to assist the children as he passed them and even when he agreed the children ran and climbed the bicycle as the accused person rode slowly. PW3 was a minor aged 5 years old and stated that he recognized the accused person in Court as the one who gave them a lift.

15. I note that the children were given a lift during the day. Given that PW1, PW2 and PW3 met the accused person for the first time in the circumstances described hereinabove, this Court is to ascertain whether the aspect of identification was handled correctly in light of the settled law. In such circumstances a Court is under a legal duty to weigh the evidence of the witnesses with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence on identification. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under: -

***It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

16. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

***... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent***

***identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

17. By placing the circumstances under which the assailant was alleged identified on one hand and the law on the other hand it comes out clearly that the prosecution ought to have treated the aspect of identification more carefully. This was a case which required the conduct of identification parades since dock identification is unreliable and carries very little probative value in such cases.

18. Another aspect which came to the fore was how the police knew that the assailant was the accused person. According to PW7 the accused person worked as a herdsman at a home of **Catherine Matinde** (not a witness) in Nyahora village within Ikerege Location and his uncle one Stephen Gekondo Mwikwabe lived in Kehancha town. It is the uncle who led the police to Tanzania where the accused person was arrested. The said Stephen Gekondo Mwikwabe was not called to testify on his role in the case and no explanation was given. Did the prosecution fear that the testimony of Stephen was likely to be adverse to its case? Catherine Matinde was also not called to testify. Again PW7 stated that he ascertained that the accused person had been living in Kenya since 2000 and that he attended Komamanga Primary School. Again there was no such evidence tendered. Weighing the prosecution's evidence on whether the defense of *alibi* is holding and in view of the foregone, I find and hold that the defense raises serious reasonable doubts on the prosecution's case.

19. There is also the allegation by PW7 that the accused person confessed to committing the offence. If that is the case one again wonders why PW7 did not organize for a proper confession to be taken in accordance with the law. The allegation of confession therefore has no legal leg to stand on and is hereby rejected.

20. The foregone analysis renders the second ingredient not proved. For avoidance of doubt, the prosecution failed to prove that the death of the deceased was caused by the accused person herein.

21. Consequently, there is no need to deal with the third ingredient. The charge of murder against the accused person is hence not proved and the accused person is hereby found **NOT GUILTY** of the murder of **Boke Chacha**. The accused person is set at liberty forthwith unless otherwise lawfully held.

22. Those are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 26<sup>th</sup> day of July 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Muniko** Counsel for the Accused person.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant