



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL CASE (MURDER) NO. 7 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

SKW.....ACCUSED

JUDGMENT

The charge and the evidence

1. The accused is charged with the murder of a five year old child, JMM, on 21st February 2017 at Ngothi Forest in Nyandarua, contrary to **section 203** as read with **section 204** of the **Penal Code**.
2. Having pleaded not guilty, the trial commenced on 27th September, 2017. The accused was represented by Mr Wairegi and the state was represented first by Mr Mutinda then Mr Koima. The prosecution case was made out through 8 witnesses.
3. PW1 DW, the deceased's mother woke up, as usual, at 5.00am, went to the hotel where she worked and came back home to prepare her son and took him to school. After school at 3.00pm, the daughter of her friend Mama wa Mburu – V – would accompany J back home to Mama wa Mburu's house. That day, at 6.00pm Mama wa Mburu came to the hotel and asked where J was.
4. Surprised, because she had assumed all along Mama Wa Mburu had the child, D went to the accused's house searching for her son. She and the accused had been friends since college and she thought her son may be there. She did not find her son or the accused at his house, so she phoned him, but he said he was not with J. She then phoned the accused's mother and got no positive feedback. At 7.30 pm she went to report at the Chief's Camp, and left her contacts and a description of J there.
5. D testified that the next day she reported at Engineer Police station, then returned to Mama wa Mburu's house. Mama wa Mburu told her that her *son* had seen a man with a black hat take J. Having earlier seen the accused in a black hat with the emblem "OBEY" on the front they decided to go to the car wash where they found the accused. Whilst there, the accused gave the child a mean look which made him shake his head. They questioned the accused but got no positive information. When they parted, the child said that the accused was the person who took J away.
6. D, had known the accused, S, because she had had a romantic relationship with him since 2015. She testified that she had been pregnant with his child but when she lost the child he accused her of aborting it. Their relationship then became rocky and they parted in 2016, after which she started living alone. In around November 2016, S started to threaten her. However, he remained friends with J, the deceased, who he would even pick from school and buy things for.
7. When D reported to Engineer Police station, she says she named the accused on the advice of an elder, and though he was summoned to record a statement, he was not found. She testified that on 3/3/2017 the accused called her when her friend T (PW4) was present. She gave T the phone but the accused disconnected and called T on her own phone, asking if the child had been found. D stated that the accused called her again four days later to say that he had warned her she would hurt herself and her family and suffer if she left him. He then said he was sorry for stressing her and that that would be the last time he would call her. Despite the accused saying he would not call her again, he continued to call her on concealed numbers, and asserted that the police had established he was the one calling her.
8. On 23rd March 2017, the CID officer at Engineer called her and took her to Kamacharia and then to Gatukuyu where the accused's mother was arrested. The police called her again on 27th March 2017 and told her to go with the child V, PW2, who had said she saw the man who took the deceased from school. Whilst at Engineer police station, they saw the police leave with a man in a vehicle. When they returned, she learnt that her son's body had been found, and fainted.

9. D later went to the mortuary and saw the body which had been retrieved from a bushy quarry. Subsequently, she identified the body and a post mortem was done in her presence. She had no doubt it was her son from his clothing and she identified six pictures (MFI 10A-F) of her dead child at the scene and during post mortem.
10. She further testified that on the date her son went missing, he wore a black trouser, red sweater and gumboots. She identified his small black gumboots (MFI 1), the (green) marvin hat he wore (MFI 2), red sweater (MFI 3) checked jumper (MFI 4), black trouser (MFI 5), brown socks (MFI 6), white shirt (MFI 7), boxers (MFI 8) and purple T-shirt (MFI 9). The items appeared stained and affected by rot.
11. PW1 further testified that in July 2016 she was housed by a friend and decided to rent her own house. The accused insisted that he should rent a house and that they live together, but she was not for the idea. She eventually rented her own house. When she lost her child in November 2016, the accused alleged she had aborted his child. She knew she had the pregnancy when she left her husband, and so was sure it was not the accused's child. Nevertheless, the accused would visit her at home and at work, and her friends knew him. Their friendship hit the rocks that November and he started to threaten her.
12. Even though their relationship had deteriorated, the accused would often pick the deceased from school. On 20/2/17, the accused came to her house at night. He knocked but she did not open. After the accused identified himself, it was her son, the deceased, who opened the door. The accused took his ID and bank PIN (Equity) and threw them into her house saying that she had given him enough trouble. She put the ID and Pin card on the window. On next day when looking for her son, she gave the ID and Pin card back to the accused. She had not reported anywhere about the threats the accused had issued.
13. In her brief cross examination, PW1 confirmed that when she was told about her son being picked at school, no name was given to her; that her son visited the accused often as the two had a good relationship; that she never made and report of any threats by the accused; that the accused never said he took the deceased away
14. PW2 VW, a pre-unit classmate of the deceased, was taken through a voire dire examination and the court remarked that she was a confident and intelligent child who understands the importance of speaking the truth. As she did not understand the meaning of oath, she gave unsworn testimony. She stated that on the material date she was with M headed home, at 3.00pm. When they got to the gate of the school, there was a man at the gate. He called out: "Mcome with me". M went with him, and they walked down towards a church near the school.
15. V said she saw the man who was wearing black shoes and red colour, a black trouser and a black cap. On getting home she told her mother M had gone with another person. The following day at school, when the teacher asked where M was, she said he had gone with another man. She identified the accused in the dock as the one who left with the deceased, and that she did not know him before to pick M.
16. In cross examination, V said she only saw the accused on that day; that she now knew him to be called S; that she knew his name before, but did not tell her mother; and could not recall that she went to a police station.
17. PW3 JMM, a mason, testified that he is the former husband of PW1 DW, and the father of the deceased. On 21/2/17 he received a call from her saying that their son had disappeared. He asked her to report to the police, and promised to join her the following day.
18. The next day he travelled to Ndunyu Njeru, arrived at 11.00am and escorted D to Engineer Police station. He said he did not know the man called S, who he only saw after the arrest. He helped identify the body of his son, the deceased.
19. PW4 TWW a friend and cousin of D (PW1) testified that D called her on 21/2/2017 about her missing son. The next day she went with to Engineer Police station. Then on Monday, 27th D rang saying the suspect involved in the disappearance of child had been caught. Together they went to Engineer Police Station, and there saw the suspect (S) go out with the police. After a short while they returned and she learned that the body had been recovered and taken to the mortuary. She identified the body of the deceased as she knew him well as her friend's son. Later she recorded a statement. T also stated that the suspect was someone she had seen before, and used to see him at a local garage. She did not know his full names before.
20. In cross examination, T confirmed that she did not see either the accused or deceased on 21st February 2017.
21. Elizabeth Muthoni Waite gave evidence as PW5. She was the deceased's Pre-unit teacher at [Particulars Withheld] Primary School, where she had taught since 2009. She testified that on 21st February, 2017, she went to school in the morning as usual. At around 8.00am she saw Mama D (PW1), who said she had come to school to report that her child JMM had not reported in school that day. She sought to find out from others if anyone had seen J. PW2 VW his classmate said that when they were leaving the day before, after passing the gate, there was someone who called J V said he was like M's uncle.
22. PW5 checked the Class Register and saw that J had attended the previous day. She kept asking the mother whether the deceased had been found, and on 27th march 2017 D told her that M's body had been found.
23. In cross examination, she testified that she had not taken roll call by the time D appeared in school on 22nd February 2017. She reconfirmed that VW (PW2) was the one who told her that M had been picked by a person who said he was his uncle, and they went together. She also stated she did not see the accused taking him.
24. PW6 GWW, is V's mother. She stated that on the material day when she got home she asked her daughter where JM was, as they were friends and used to come home together. V told her that when she and the deceased were leaving school a man called him at the gate saying he was the uncle and they went together.

25. She then went to D, the deceased's mother, who works at a hotel in Ndunyu Njeru, and asked her if she was with J. She replied in the negative. G then told her that V had said that there was a man at the school gate who went with Joseph. D told her to wait until she could get off work, then came to G's house at 7.00pm that day. Together they went to report at North Kinangop AP Police Station, and D was the one who made the report.

26. On 27th March, 2017, D came to G's house and told her they were required to report at Engineer Police station. On getting there, they were told to wait in the station, and some policemen left the station in a vehicle with a man they had removed from a cell. It was then that V told them that the man was the one she had seen take J from school. After about two hours, the police returned with the man, and G could tell something bad had happened. They went back home without writing a statement.

27. In cross examination, G confirmed that V, her daughter had not written a statement before 27th March, 2017. That V confirmed to her and D that the man the police had gone out with was the one who had taken J from school; that it was D who was with V when she (V) wrote her statement later. In reexamination, she stated that V went to the Police station about a week later to write her statement.

28. PW7, Titus Ngulungu, the Government Pathologist, gave evidence that he performed the post mortem on the body of M on 31st March, 2017. Identification was done by JMM and TW. He stated that the body was that of a child and had a red sweater, black trouser and green marvin cap. The body had soil and maggots and had started decomposing. The report was that it was found in the bush.

29. He testified that the body was partially skeletonized in metamorphic state. The skull had decomposed and flesh had fallen off due to decomposition. The time of death to decomposition was about 2 weeks to 1 month based on the maggots. The back of the head had pieces of scalp and some carcavernous mutilation. The left scalp had bloody lacerations with overlying haematoma measuring 50 x 40mm, and the skull below the haematoma had separated. Internal examination showed most tissues were decomposed and some like lungs were not present. The digestive system and heart were all missing, probably taken by carnivores. On the head there was fracture in keeping with trauma to head.

30. He determined that the cause of death was blunt force trauma, but the examination was limited by absence of other tissue. He produced the post mortem report as Exhibit 12 dated 31st March, 2017. He also took some pictures of the post mortem to describe what he had examined, and they were marked MFI 10A – F, which the investigating officer later produced as Exhibit 10A-F.

31. Detective Duncan Odhiambo, the DCIO Nyandarua South, gave evidence as PW8 the Investigating Officer. He stated that he received a report on 22nd February, 2017, from DW, PW1, about her missing son, who was taken from school when he was with his friends. The police circulated a missing person signal dated 24th February 2017.

32. He stated that D had also reported that she had received telephone calls from the abductor. The police then went to abductor's home and found it closed, and they tried to make every effort to find the abductor. On 24th March, 2017, the police received a report that the abductor had relocated to Muranga. They went there but didn't find the alleged abductor. Eventually they arrested the abductor's grandmother and locked her up at Kinangop police station for harbouring a criminal. The following day, he received a report from Thika that the abductor had been arrested and taken to Kiamwangi Police station, and they made arrangements for him to be brought to Kinangop on 25th March, 2017 for further interrogation.

33. PW8 further testified that on interrogation, the abductor on his own volition took the police to the scene of crime at Ngóthi Forest on 27th March, 2017, seven kilometres from Kinangop Police station. There they found the deceased's body covered with twigs as shown in the photographs exhibited as Exhibit 10, which he produced PW8 also produced Exhibits 1-9 and 14 and 15, being clothes of the deceased and a string and stone found at the scene. He also produced as Exhibits 16 and 17, respectively, a miscellaneous application for the detention of the accused and a Sketch Plan of the scene of crime. PW8 took all the relevant exhibits to a scene of crime expert for production of evidential certificates as Exhibits 18 and 19 and thereafter charged the accused.

34. In cross examination, PW8 admitted: that he did not produce any telephone records showing the abductor's communication with the deceased's mother; that he did not have the accused's mother arrested to smoke out the accused; that there was no record of a confession from the accused; that the reports to police did not give a description of the alleged abductor; that they did not do an identification parade, and that the string and stone were not taken for forensic analysis.

35. The accused gave unsworn evidence and did not call any witnesses. He said he and D had lived together as husband and wife for two years since 2015; that she had a child – the deceased – who they lived with; that they had a good relationship until they separated in November, 2016; that on the material day he went to load a lorry with timber at Kaheho forest as he is a lorry driver; that in the evening at about 6.00pm he took the lorry to a garage at Ndunyu Njeru where D found him and asked him if he had seen the deceased; that thereafter he went on a safari to Mombasa with the lorry.

36. He stated that he called D several times to enquire if she had found the boy; that he never told her he had taken the deceased; that he called his mother to ask her to assist D find the boy; that whilst in Mombasa he got work to transport some goods to Malaba and went for several trips; that on 24th March he got work to transport goods to Kiambu and was arrested at Kiambu on 25th March, 2017 and taken to Kiamwangi Police station where he was accused of taking the boy, but was not questioned until the following day, a Sunday .

37. The following Monday he was handcuffed and put into a police Land Cruiser. Outside, he saw DW and VW (PW2 and PW3). He was taken to Ngóthi Forest where he was asked if he knew the deceased. When they got out of the Land Cruiser they went to place where the body was. The askaris led the way and asked whose body it was and he said it was the boy's and that he knew him. The police then requested him to take a picture with the deceased body. The body was then taken and put into the vehicle and they drove back to police station.

38. He denied knowing how the deceased's body got into the forest, or that he was involved in the death in any way as he was at work on 21st February 2017. He also denied picking the deceased from school.

Analysis of the evidence

39. I have carefully analysed the evidence availed and the submissions of the parties.

40. The issues that arise are: whether it was the accused who murdered the deceased and if so, whether he did so with malice aforethought. Thus the question of the identity of the murderer will be central to the issue.

41. The offence of murder is defined by **section 203** of the **Penal Code, Cap 63, Laws of Kenya** as follows:

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

42. To prove a murder charge, the prosecution must tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. Actus reus, that is that the death of the victim actually occurred. This is not a contested fact in this case;
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. That the unlawful act or omission was actuated by malice aforethought.

43. Malice aforethought is established under **section 206** of the **Penal Code**, where there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or
- 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; or
- c. Intent to commit a felony; or
- d. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

44. As earlier stated, the two main issues in this case are whether the *actus reus* was caused by the accused, and whether, if the answer is in the affirmative, he had the requisite *mens rea* (malice aforethought.)

45. An analysis of the prosecution evidence follows.

Who picked up the deceased from school?

46. The prosecution's case was that the accused picked up the deceased from school and that he then went on to commit the murder. PW2 VW, the deceased's pre-unit classmate, was the last person to see the deceased alive, and is therefore a most critical witness. Being a minor, she underwent a *voire dire* examination and gave unsworn testimony. She did not state her age, but must be in the same age range with the five year old deceased. The court found her to be an intelligent child who understands the importance of speaking the truth, and that she was straight forward and maintained positive demeanour.

47. In her testimony, V said that she and the deceased were leaving school at 3.00 in the afternoon of 21st February, 2017. When they reached the gate a man called the deceased and the two went together. She proceeded home. The man, she said, wore black shoes, black cap and black trousers. She identified the colour as similar to that on the Kenyan flag in court.

48. On reaching home, when asked by her mother PW6, where the deceased was as they always came home together, she said he had **“gone with another person”**. Further she said:

“I did not know him (the accused) before to pick M (the deceased) I saw him on that date”

She then identified the man who left with the deceased as the accused in the dock.

49. In cross examination, V further testified:

“I only saw the accused one day. I know now he is called S. I knew his name before but did not tell my mother. I do not recall that I went to a police station. I did see the man who took Mwangi”

50. From the above evidence, there was no identification of the accused except that done in the dock. V said she only saw the accused one

day, and now knew he was called S. She also said she knew the accused's name before but did not tell her mother. From the foregoing, it cannot be stated with certainty, and it is not clear from the record which I have keenly perused, whether V did or did not have personal knowledge of the accused prior to the incident. Although in the prosecutor's submissions he asserts that V referred to the accused as the deceased's uncle, there is no evidence on record to show the fact that she knew him as an uncle to the deceased.

51. The investigating officer, Duncan Odhiambo (PW8), testified that he received a report of the disappearance of the deceased from PW1 DW, the deceased's mother. And how did he know of the identity of the suspect? In his evidence he stated:

“From the report of the other children, they were able to describe the person who took the child”

However, detective Odhiambo did not indicate who the other children he referred to in his evidence were, nor is there any evidence on record that statements or information was taken from such children and what the content of that information was. If there were ***“other children”*** that ***“were able to describe the person who took the child”*** as he stated, their evidence was not availed to the court.

52. Further, the detective said that D had told him that:

“...she had received telephone calls from the abductor.”

The detective consequently acted on that information, and stated that:

We went to the abductor's home [but] it was closed. We tried to make every effort to find the abductor.”

It appears that the detective took the word of PW1, D, as fact when she reported the incident, and followed the investigative trail on the basis of D' alleged information. However, there is no indication from the record that he recorded a statement from V. On her part, V testified that she did not recollect being at a police station.

53. At what point was the connection made between the fact of the deceased going missing and the accused being responsible for his disappearance?

54. D, the deceased's mother, testified that she first got to know that her son was missing when V's mother GW(PW 6) came to her workplace at a hotel at 6.00pm on 21st February, 2017, and asked her where her son was. V's mother, she said, told her she :

“...had been told child picked by his father. I went with a small child and went searching in a house I thought he might have gone. That was SK (accused) a friend of mine.... I did not find accused or my son”

55. Since V's mother had told D that V had said the man who took the deceased had a black hat, and she (D) had earlier seen the accused in a black hat, she went with GW and V to look for the accused at a car-wash. There they found the accused, and, according to D, the accused gave the child a mean look. On leaving, she stated, the child said that was the person who took the deceased away.

56. Had V been familiar with the accused, one would naturally and reasonably have expected her to tell her mother that the deceased had been taken by Uncle J or Baba J or something along those lines. That did not happen. In cross examination, D clearly stated that no name of the person who picked her son was given by either GW or by V. It was D who later appears to have connected the accused to the incident based on her suspicion that since she had separated from the accused, he had a motive for punishing her. Further, she noted that since the time her son's body was found, the accused never contacted her.

57. Detective Odhiambo confirmed that theory by repeatedly referring to the accused as *“the abductor”* in his evidence. In addition PW 5 – Elizabeth Waite – V's and the deceased's teacher - said that on 22nd February, 2017, V had told her that the person who went with the deceased had said he was his uncle or was like his uncle. However, V herself did not give such evidence. Thus, it does not add up that the accused would have said to the deceased he was an uncle because the deceased and accused already knew one another very well. As such, there would have been no need for the accused to make such an introductory statement to the deceased. Instead one would have expected that the deceased would, without introduction, have run up to the accused the moment he saw him.

58. This is borne out by the evidence of the deceased's mother that not only had she and the accused been lovers from 2015 up to November 2016, but that her friends knew him, and more so that the accused was extremely well known to the deceased. D stated that:

“Even though our relationship had deteriorated, the accused would often pick J from school

S (accused) was a good friend of my son. He even would go look for him because accused would buy him sweet things. My son loved him.”

59. The abduction theory by the prosecution was that the accused picked the deceased from school and took him to Ngothi Forest seven kilometres away where he killed him. The evidence supporting this theory is alleged to be based on the descriptions of the suspect available to Detective Odhiambo who testified that the report of the other children described the suspect, and from telephone conversations between the accused and the deceased's mother, D, which she reported to the detective.

60. In cross examination, detective Odhiambo stated that :

“The report (by the deceased’s mother in the Occurrence Book) does not give a description of the alleged abductor”

In the absence of a description of the accused in the report by the deceased’s mother, and the report by the other children not having been availed ad tested in court through the evidentiary process, there was no concrete basis for the detective to determine that the accused was the abductor.

61. The accused’s complaints concerning the failure of Detective Odhiambo to produce any phone records is neither here nor there because the accused in his unsworn evidence admitted that he called D several times enquiring about the deceased. He however denied ever saying he had taken the deceased.

62. The defence pointed out that in the cases of **Wamunga v R (1989) KLR 424** and also in **Ogeto v R (2004) KLR 19**, the Court of Appeal held that there is need to test with the greatest care the evidence of identification or recognition of a single witness. In the **Ogeto case**, the Court stated:

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further the court has to bear in mind that it is possible for a witness to be honest but to be mistaken”

63. In this case, the identification evidence of V is further weakened by the fact that, not only did she not remember going to a police station, but her mother, G, testified that V’s first visit to Engineer police station was on 27th March, 2017. G stated that:

“V did not write a statement before that date....

Kiago, the accused, was brought out from the cell. He was handcuffed. He was alone with the policemen, who were dressed in uniform.V spoke and said that that was the man”

64. This incident obtained after the police had called D and asked her to go to the station and bring along V. By then V’s statement had not been taken. She saw the accused in handcuffs. It must have made an impression on her. She allegedly told her mother that that was the man. The police went away with the accused and returned soon thereafter, with the news that the deceased’s body had been found. According to G in cross examination, V again went later to the police station, taken by D, the deceased’s mother. She then recorded a statement. Her mother did not find out what V recorded.

65. It appears to me that the recording of the statement by V after witnessing the handcuffed accused, and the accused’s return to the police station with an announcement that the accused had taken the police to the murder scene was intended to influence V to harmonise her evidence with the occurrences she had just witnessed.

66. Overall, therefore, I have difficulties accepting the prosecution’s assertion that there is sufficient basis for determining that the person who picked up the deceased from school was clearly identified beyond reasonable doubt as the accused.

The murder and malice aforethought

67. There was no witness testimony availed as to how the murder actually occurred. The investigating officer’s evidence and the photographic exhibits availed show that the deceased’s body was found dumped in the forest wrapped in a blanket. The Government pathologist stated the cause of death to be due to blunt force trauma to the head. He based this conclusion on the laceration measuring 50x40mm with overlying haematoma appearing on the deceased’s left scalp.

68. The defence argued that the accused would not have had time to commit the offence and return to the garage by 6.00pm on the material day, if he had taken the deceased at 3.00pm as alleged. However, the sketch plan of the incident area produced by Detective Odhiambo, shows that from Engineer town to Ndunyu Njeru is only about 7 kilometres and another 400 metres to Ngothi Forest. Thus, from a purely practical point of view it was possible for the accused to pick the deceased from school at 3.00pm, commit the offence, and have time to return to the car wash in Engineer in the 2-3 hours before 6.00pm.

69. The other evidence availed linking the accused to the murder is that of Detective Odhiambo. He testified that the accused was arrested on 25th March, 2017; that during interrogation the accused voluntarily admitted the crime, and that on 27th March 2017, he took the police to the scene of crime where the body was found.

70. The detective had early in the investigation taken the stance that the accused was the abductor. By 24th March 2017, Detective Odhiambo said, he:

“...received a report that abductor had relocated to Muranga, Kiereini. We went there with other officers. The house he had moved into was his grandfather’s”

71. Not finding the accused there, he said, they went on to Thika, Gatukuyu:

“where abductor’s mother stayed. On reaching Gatukuyu, we met his mother. She was not ready to tell us where abductor was and we knew she was hiding him. We arrested the mother and ... locked her up for harbouring a criminal”

72. By the time the detective was arresting the accused's mother on 24th March, 2017, he was sure the accused was the criminal they were looking for. He however did not indicate on what evidence he came to this conclusion.

73. Thus, when Detective Odhiambo arrested the accused on 25th March, 2017, and being convinced in his mind that he was the murderer, he appears to have forgotten proper protocols for identification and confession. He said that the accused voluntarily confessed to the crime, but there is no evidence of such confession or admission. He further said that the accused took them to the scene of crime. The defence however argued that the accused was merely arrested and led to a scene where the body was found.

74. In cross examination, Detective Odhiambo stated the reason he came to the conclusion that the accused was the criminal they were looking for:

“I concluded the accused was the one who abducted the child and PW2 identified accused positively”

75. Detective Odhiambo further admitted that no identification parade was done; that V, PW2 came to the police station more than four times, but that those attendances at the station by PW2 were not recorded; and that despite all these attendances his laxity in recording and ensuring proper identification was due to the fact that he felt:

“V was a minor and it was not right to expose her”

76. At the point when the accused allegedly admitted the crime, the proper course for the police was to extract a formal confession. Detective Odhiambo's testimony was to the effect that:

On 27th March, 2017 as we interrogated the abductor, he on his own volition, took us to where the child's body was.

We booked the incident on 0/21/27th March 2017 (21/27/3/2017). We went to the scene with OCPD, DCIO, OCS and the other officers. Abductor took us to a forest which was about 7 kilometres from Kinangop Police Station called Ng'othi Forest. On reaching the forest, we found the child's body, and it was covered with twigs as shown in Exhibit MFI 10.

77. The question niggling in my mind is whether that so-called voluntary act of the accused in taking the police to the scene of crime could be defined as a confession? **Section 25** of the **Evidence Act** defines a confession as follows:

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

78. It seems to me from the provisions in the Evidence Act that a confession is broadly defined. The word incorporates a multiplicity of means by which one can communicate an inference of guilt, whether in words or conduct or by other means, which tends to signal the accused's responsibility or blameworthiness for something for which he is accused. It could be by way of a nod of the head in response to a question, or a verbal statement expressing guilt. It could be actions alone or actions coupled with words from which a reasonable person would understand and conclude that the accused person is in fact readily admitting guilt.

79. In this case, detective Odhiambo who was the investigation officer was pressed on cross examination to state whether the accused gave a confession. He denied that there was a confession. Instead, he insisted that all the accused did was to avail information; to voluntarily offer to take the police to the scene of then crime. He stated that confessions are not admissible in police stations, and that there was a difference between a confession and giving information.

80. Whatever it may be called, there is no doubt from the evidence of detective Odhiambo that whilst he was conducting oral interrogation concerning his involvement in the so-called abduction, the accused somehow allegedly communicated his knowledge of the scene of crime. The Investigating officer allegedly understood what he was communicating; that, having been arrested as an abductor, he was now asserting and admitting he knew the scene where the abducted body was. In so many or few words, this, to me, is nothing but a confession.

81. **Section 25A** of the **Evidence Act** prohibits confessions or admissions by an accused if they tend to prove the accused's guilt. The provision, which amended section 25, is as follows:

25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

82. The rules envisaged under **section 25(2)** above are known as the Evidence (**Out of Court Confessions**) **Rules, 2009**. Under Rule 4 of these Rules the rights of an accused are specified. This Rule requires the recording officer to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; is

informed of his right to have legal representation of his own choice among others. Rule 4 (3) requires the recording officer to ask the accused person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded. Additionally, Rule 7 of the Confessions Rules require the accused to be informed of the option to record his own statement in his preferred language or to have it recorded for him, and Rule 5 makes it a requirement to administer a caution before recording the accused's admission or confession.

83. There is no evidence that any of the above provisions as to admissions and confessions was followed.

84. The Confessions Rules are designed to give protection to an accused person in respect of their right to a fair hearing which includes the right not to say anything or to incriminate themselves. This is in consonance with **Article 50(2)(l)** of the Constitution which provides that:

“Every accused person has the right to a fair hearing which includes the right –

(l) To refuse to give self-incriminating evidence”

85. In his unsworn statement, the accused said that he was arrested and taken to the police station in Kiambu. The following day he was taken to Kinangop Police station in handcuffs and was then taken to Ngothi Forest, asked if he knew the deceased. They then all got out of the police vehicle and led to the deceased's body which was on the ground, and he was made to take a picture with the body.

86. In my view, it was improper for the police to try and extract an admission from the accused without following the proper procedures outlined under **section 25A** of the Evidence Act and the Out of Court Confessions Rules. Such an attempt flies in the face of the constitutional rights of the accused and the courts will not sanction that type of conduct.

Disposition

87. Accordingly, I am unable to accept the evidence of detective Odhiambo concerning the inculpatory evidence allegedly given to him by the accused. By that evidence he would be deemed in law to have incriminated himself by allegedly informing detective Odhiambo of the scene of the crime where the deceased's body was found.

88. I also earlier found that there was no proof beyond reasonable doubt that the accused took the child from school.

89. In conclusion, and for all the above reasons I find that the prosecution has not proved the elements of the offence of murder against the accused, and I find him not guilty. The accused shall be set at liberty unless otherwise lawfully held.

90. Orders accordingly.

Dated and Delivered at Naivasha this 30th Day of September, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Maingi for the State
2. Wairegi for the Accused
3. SK Wangari - present

Court Clerk - Quinter Ogutu