



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 10 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSHUA MUJUMBE BUSHANGA.....ACCUSED**

**JUDGMENT**

1. **JOSHUA MUJUMBE BUSHANGA** (“the accused”) has been charged with the offence of murder contrary to *Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya*. The particulars of the offence being that on the 1<sup>st</sup> day of June, 2013 at Nkinyanga location in Igembe Central District within Meru County murdered **PAMELA NTINYARI** (“the deceased”). The prosecution called five witnesses to establish its case.

2. **PW1 Susana Kainda** grandmother of the deceased told the court that on 29<sup>th</sup> May 2013 she recalled that at about 9.00AM she met the accused holding the deceased on one hand and on the other a stick. The accused had tied the deceased’s hands with a rope that the deceased had carried to go fetch food for the goats. The child was crying. She inquired from the accused what she had done and he said that he was going to discipline her.

3. She went on her way but then later went to the deceased’s parents’ home. She found that the deceased was dizzy and whenever she would stand she would fall. She said that it was the accused who hit her. The father of the deceased took her to Kangeta but was later referred to Meru Level 5 Hospital where she died.

4. **PW2 John Ngondwa** stated that on 29<sup>th</sup> May 2013 at around 9. 15PM he was headed to Kangeta where he works when he found the accused had tied the hands of the deceased. In one hand he had miraa and on the other had held a stick. When he asked what was going on the accused told him to mind his business and proceed on to work. He passed and left the deceased with the accused. He did not talk to the deceased who was crying. Later he learnt that the deceased was sick and had been taken to hospital. She was treated and discharged but when her health became worse she was taken back to hospital and she died.

5. **PW3 Dr. Maria Muthoni Mwangi** produced the post-mortem report. She stated that the deceased’s body had multiple bruises on the face, scalp, anterior and posterior of trunk and cervical region of the neck. She had fractured her C3 and C4 vertebrae and there were cervical spinal code injury. It was concluded that the cause of death was cervical spinal cord injury following blunt force trauma.

6. **PW4 John Meme** stated that on 29<sup>th</sup> May 2013 at about 9.00 AM he was herding his goats along the road side when he met the accused holding the deceased who was holding a small bunch of miraa valued at around Kshs. 100/-. The girl was crying and her hands were tied together from the front. He suspected that she had stolen miraa from the grandfather. He continued herding the goats. The following day the girl’s father came to his home and informed him that the girl’s condition had worsened. He asked him to go report to the police. The girl’s father reported the matter to the police and he was told to avail witnesses.

7. **PW5 No. 65301 PC Albanus Kivindu** stated that he was the investigating officer. He recalled that on 1<sup>st</sup> June 2013 at around 12.30 PM **PW1** reported a case of serious assault to the deceased aged 13 years. That on 29<sup>th</sup> May 2013 at about 6.00AM the deceased was sent by her parents to go and look for animal feed from the shamba which neighbored that of the accused. In the process of cutting the grass the accused found her there and tied her hands with the rope and while using a blunt object started to assault her. He hit her on the back of the neck. She made noise and her grandmother rushed to the scene.

8. The grandmother met the accused and deceased and when she asked what was going on the accused told her that the deceased had stolen miraa from his shamba. The accused had tied the miraa on the deceased person tied hands to prove a point. The grandmother rushed back home to inform the deceased’s father and both went back to the shamba but did not find the accused. The minor was speechless and had a stiff neck and her head could not move.

9. They took the deceased to Kangeta hospital and later to Meru Level 5 Hospital where she was admitted from 1<sup>st</sup> June 2013 to 21<sup>st</sup> June 2013. She was later discharged. While at home her condition deteriorated and the parents took her back to hospital. On 29<sup>th</sup> June 2013 the minor passed away. After recording statements he compiled his file but the accused had by then run away. The object was not recovered as the accused escaped with it but it must have been heavy to inflict the kind of injuries suffered.

10. When put on his defence the accused gave a sworn testimony and called one witness. **DW1 Joshua Mujumbe** stated that on 29<sup>th</sup> May 2013 he was alone in the farm from 6.00AM to 2.00PM. That the deceased was in the nearby bordering farm. At around 10.00AM he saw her picking miraa from a neighbor's farm. He went and apprehended and took her to her mother at their home. When he was heading there he met the **PW1** as well as **PW2**. The deceased's mother was alone at home; she picked a stick and cained the deceased asking her why.

11. After he left the deceased with her mother he went home and after 7 days when he was going to church he met the deceased's mother who told him that the deceased had been referred to Meru Level 5 hospital. The accused claimed that on discharge the deceased was instructed not to bath with cold water of which she did and caused her to faint. She was taken to hospital where she was admitted for 3 days and that is when she died. When she died rumors started spreading that he is the one who killed her.

12. **DW2 Paul Kainga M'Njogu** testified that the deceased was his neighbor's child. There was a day they were out at a burial about 400metres away in the month of June when they heard screams from the home of the deceased parents'. They rushed there and found that the child had fainted. The mother told them that the child had been in hospital and had been warned not to bath with cold water of which she did. They took the child to hospital where she later died. When the child died the father of the deceased started claiming that it was the accused who killed the child. Two years later the accused was arrested. He does not think that the police failed to get the accused at home for during that period for the accused was at home as he used to see him and sit with him at the canteen. The accused is a good neighbor, leader and he has never known him as a violent man. He does not know what caused the death of the deceased neither does he know what happened on 29<sup>th</sup> May 2013.

13. At the close of defence case written submissions were filed by the defence. The accused submitted that the prosecution has not proved the ingredients of the offence beyond reasonable doubt. He relied on the case of **Republic v Peter Ingoka Khatsimba [2017] eKLR**.

14. Before delving into the issue of whether or not the prosecution has proved its case against the accused person it is instructive to briefly summarize the facts surrounding the case. From the charge sheet the offence was committed on 1<sup>st</sup> of June 2013 and from the Post Mortem form, ExP1 the deceased died on 29<sup>th</sup> June 2013. It is said that the deceased was admitted in hospital and after treatment she was discharged. According to **PW1** the father of the deceased took her to a hospital in Kangeta and they were referred to Meru General Hospital. Both **PW1** and **PW2** said that the incident happened on 29<sup>th</sup> May 2013 when they met the accused with the deceased whose hands had been tied with a rope, allegedly for stealing miraa. The deceased died when she was taken to hospital a 2<sup>nd</sup> time and the doctor who conducted the postmortem on 12<sup>th</sup> July 2013 Dr. Njuguna found the deceased had multiple bruises to the face, skull, anterior and posterior of the trunk and cervical region of the neck and she had also fractured her C3 and C4 vertebrae. It was concluded that the cause of death was cervical spinal code injury following blunt force trauma. In the opinion of the doctor a lot of force must have been applied for the fractures to have occurred.

15. **PW5 PC Albanus Kivindu** investigated the case and said that the accused was only arrested in 2015 as he had gone underground. The mother and father of the deceased who were involved in taking the deceased to hospital did not record statements and did not testify as to the treatment that the deceased received on 2 occasions that she was admitted at the Meru General hospital. The accused and his witness have raised issues to the effect that when he took the deceased to her mother the mother cained her and had the treatment notes been availed it would have established what the prognosis by the doctors was. **PW1** did not see the multiple bruises on the face, the scalp, posterior and anterior trunk of the deceased when she met with the accused person while escorting the child to her mother. **PW2** did not also tell the court that he saw any injuries on the child despite the fact that the child was crying. If the accused had inflicted the cervical spinal code injury in the course of apprehending and escorting the deceased to her parents home would she have been walking on her own? **PW1** and **PW2** said that she was walking on her own.

16. This court's assessment of the evidence on record is that although the prosecution has established the fact of death and the cause of death of the deceased, it has not been established that it is the accused who inflicted the fracture on the deceased person's cervical spinal cord. As observed earlier it could not have been possible for the deceased to walk as evidenced by **PW1** and **PW2** if her cervical spinal cord had been fractured while the accused was escorting her. The failure by the parents of the deceased who are crucial witnesses to testify raises doubts in the mind of this court as to whether the accused person's action caused the death of the deceased. The accused does not deny that he found the deceased stealing miraa and apprehended her and **PW1** and **PW2** confirm that they met him with the deceased whose hands were tied and he was carrying a bunch of miraa which the deceased had stolen.

17. The doubt raised in the mind of the court, the long period taken by the Investigating Officer to charge the accused and unanswered questions that were raised by the failure to call crucial prosecution witnesses (i.e the mother and father of the deceased) makes this court resolve the doubt in favour of the accused persons who is hereby acquitted under section 322 of the Criminal Procedure Code.

**HON A. ONG'INJO**

**JUDGE**

**JUDGEMENT DELIVERED, DATED AND SIGNED THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2019**

**IN THE PRESENCE OF:**

CA:KINOTI

REPUBLIC:-MS Mbithe for state

ACCUSED:- Present in person

Mr Abubakar Advocate for accused.

**Court:** Copy of judgment to be supplied to state.

**HON A. ONG'INJO**

**JUDGE**