



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 46 OF 2012

[FORMERLY NYERI HCCR 26 OF 2012]

REPUBLIC.....PROSECUTOR

VERSUS

TABITHA WAITHIRA IRUNGU.....1ST ACCUSED

PHILLIP KAMAU WACHIRA.....2ND ACCUSED

JUDGMENT

1. The deceased, a girl aged seven, was a Standard 1 pupil at Kianjahi Primary School. On 17th July 2012 she disappeared on her way from school. Her body was found on 23rd July 2012 stuffed into a sack and dumped along the Mathioya River.
2. Witnesses told the police that the 1st accused delivered the deceased to some *four men* on 19th July 2012. The men were in a white car; the destination was Kayole, Nairobi. Investigations by the police led to the arrest of the 2nd accused.
3. The Republic brought information to the High Court charging the 1st and 2nd accused with *murder* contrary to section 203 as read with section 204 of the **Penal Code**. The particulars are that on the 23rd July 2012 at Kianjahi village in Murang'a County, they murdered AWC.
4. They both pleaded *not guilty*. The prosecution called *ten* witnesses.
5. PW1 was Peter Chege, the father of the deceased. On 17th July 2012 he was in Kajiado. His wife, Jane Wanjiru informed him that the deceased had disappeared. A search party had gone out to look for her but did not yield results. PW1 travelled to Mathioya village the following day. The search was still going on. He joined the group. Some of the people in the group said that a certain woman had seen the child the previous evening.
6. The woman was the 1st accused. PW1 did not know her or the 2nd accused. She was escorted by a group of people. The mob started to interrogate her. She said she would lead them to where the child was. She took them to a homestead occupied by an old couple. The child was not there and was unknown to the couple.
7. The mob wanted to lynch the 1st accused but was restrained by some police officers who escorted her to Ngutu Police Post and later to Nyakianga Police Station. PW1 testified that on 23rd July 2012 the deceased's body was recovered at Mathioya River. He was not at the scene.
8. PW2 was Mary Chege. On 17th July 2012 she was on her way to Wang'ondu Trading Centre. She said she saw she saw the deceased dressed in her school uniform. It was about 5:00 p.m. She knew the deceased. PW2 greeted her but she did not answer. She said the deceased was walking towards her home which was quite a distance from the trading centre. On the following day, she learnt that the child went missing.
9. PW3 was Josphat Mwangi. He also saw the deceased at about 5:30 p.m. at Wang'ondu Trading Centre. She was standing near the shops in her school uniform. She was carrying a school bag. He asked her what she was doing there. He advised her to go home.
10. Anthony Mwangi (PW4) is a teacher. He testified that on 17th July 2012 at 19:00 hours, the mother of deceased came to his house. She informed him that the deceased did not return home. PW4 confirmed from the class teacher, Mr Kageni (PW5), that the deceased had attended school and left when the classes ended.

11. PW4 said that on 18th July 2012, the mother of the deceased went to the school. The child was still missing. They reported the matter to the Assistant Chief and to the A.P. Camp at Ngutu. They also placed a radio announcement. He said that on 19th July 2012 they mobilized a larger search party. A woman known as Wairimu informed them that the 1st accused had some information on the missing child. The 1st accused was brought to where they were. She said she saw the deceased on 18th July 2012 at about 6:30 p.m. She said the girl was in school uniform and a jacket on top. She had a muffin covering her face. She said the deceased was alone.

12. The 1st accused said she did not tell anyone about the matter. She said that on 19th July 2012 at about noon, she saw the deceased entering a saloon car registration number KAR.....She did not have the other particulars; the car had 4 male occupants. She said one was Mwangi and their destination was Kayole. PW4 said that the 1st accused told them that she gave away the deceased to the four men. She also volunteered Mwangi's mobile number but it was not going through.

13. PW5 was Jimnah Maina. The deceased was his pupil at Kianjahi. On 23rd July 2012 at 6:30 p.m., he was crossing Mathioya River. He met two men, Waweru and Githinji. The two later came to PW5's home and said they had spotted a sack near the river. They decided to go there. On the way they alerted the chief and some other people. They had a torch. They found the body inside the sack.

14. The prosecution dispensed with the evidence of PW6, Stephen Waweru.

15. The next witness was Irene Wangui (PW7). She was in the search party. She said that on 19th July 2012, the 1st accused informed them that she had seen the deceased the previous day near her place. She said that the 1st accused told them that she handed the deceased to people in a white car. Upon cross-examination, she conceded that the deceased was interrogated by an angry mob, but she denied that the accused was beaten.

16. The pathologist was Dr. Martin Mwangi. He carried out the post mortem examination at Kiria-ini Mission Hospital on 27th July 2012. He could not ascertain the time of death. There were bruises on the neck, face and inner thighs. The marks on the neck indicated that pressure was applied. There were bruises and blood clots on the vagina; the hymen was broken.

17. He formed the opinion that death resulted from asphyxia due to strangulation and sexual assault. He produced the *Post Mortem Form* as exhibit 1. On cross-examination, he said that he did not carry out a high vaginal swab due to lack of facilities.

18. PW9 was APC Langat. The disappearance of the deceased was reported on 18 July 2012 at 10:00 hours by the mother of the deceased. He organized a search party. The following day, the 1st accused told him that she gave out the child to a man in Kayole. The public wanted to lynch the 1st accused but the chief intervened. He and the chief escorted the 1st accused to Nyakianga Police Station. On cross-examination, he conceded that it is the public who arrested the 1st accused. He also admitted that his statement made no reference to "interrogation" or "Kayole".

19. The last witness was PC Hassan Chimwenje. He said that on 19th July 2012 he received information that the 1st accused had been arrested by the public on suspicion of abducting the deceased. He went there with CPL Barasa and re-arrested the suspect. They later handed her over to the DCIO Murang'a for further investigation.

20. When the 1st accused was placed on her defence, she stated as follows-

On 15/7/2012. I went home in Nyakianga for a funeral. On 17/7/2012 the funeral took place. I was with Florence Wangari. She was called by a neighbor Mwangi and asked whether we were together. I was asked to go to where Mwangi was at a kiosk. Mwangi said the people who were looking for me left. He told me that Mama Kevin had informed people that that I had seen the deceased who was then missing.

It is true that I met Wacera (deceased) on 17/7/2012 when she was leaving school. I knew her. She was in uniform; Kanjahi primary. I did not speak to her. It was at 6:30 p.m. She was alone.

Ten minutes later, (on 19/7/2012) a big group came to question me about it. The group said they were looking for the deceased. The group came and searched my home and called out the name of 'Wacera'. Mary Njeri, my mother in law inquired what was happening.

The group (of about 30) had one AP officer in plain clothes. They asked me to accompany them. We found other people on the road. Some of them wanted to beat me up. Some beat me up. I did not see the child being picked up by a white car. I do not know Mwangi from Kayole.

The chief came. A lady in the group pleaded for me. I was taken to Ngutu Camp and Nyakianga Police Station. I was put in custody there and brought to Murang'a the following day. I have been in custody throughout. On 23/7/2012 I could not have killed deceased. I was in custody...

21. Under cross-examination, she denied killing the accused or handing her over to the four men in a white car. She claimed that she made up the story to save herself from the menacing crowd that had arrested her. She also denied that she knew the 2nd accused. She said she saw him for the first time at Murang'a Police Station.

22. The 2nd accused also denied killing the deceased. He also denied that he knew the 1st accused. He denied ever residing or doing business

in Kayole. He was emphatic that he never set foot in Kianjahi. His testimony went as follows:

I was in Nairobi working as an electrician. I had done so since 2004. In July, 2012 I was living in Mihang'o Utawala. On 20/7/2012, I was called on phone by someone who said he was a police officer. I was in Tassia. I told him I could see him the following day at Tassia. 3 people came in a salon car. They identified themselves as police.

They arrested me and took me to Kayole Police Station. It was about 4.00 p.m. They kept me there at the Occurrence Desk. At 6.00 p.m. I was put in the cells. I was not booked and nor did they say who I was to wait for. On Tuesday 24/7/2012 some police came from Murang'a. That is when I was booked. I accompanied them to Murang'a Police Station. No one had told me why I was arrested. At 22.00 hours I was taken to CID office. Accused 1 was brought there and I was asked whether I knew her. I said no. I did not know her. I was taken to a different room and then to the cells.

On 25/7/2012 I was told I am a suspect in this case. I was charged. On 25/7/2012 I and Tabitha were taken to Nyeri court but we did not appear in court. We were booked at Nyeri police.

On 23/7/2012 I was in cells at Kayole Police Station. I do not know the deceased. I have never visited Kianjahi. I have never lived in Kayole. I have no car KAR saloon. I do not have an 'alias' I am Phillip Kamau Wachira. I did not kill deceased.

23. Learned counsel for the accused, Mr. Kirubi, filed final submissions 8th October 2019.

24. Section 203 of the **Penal Code** provides that:

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

25. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

26. *Malice aforethought* is the *mens rea* or the *intention* to kill another person. Section 206 of the **Penal Code** defines it as follows;

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 any 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 bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an 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.

27. The *death* of the deceased was proved. The *cause of death* was also proved: It was as a result of *asphyxia* due to strangulation and sexual assault I accordingly find that the death was *unlawful*.

28. I will commence with the case against the 2nd accused. He was emphatic that his name is *Phillip Kamau Wachira* and that he has never been known as "Mwangi". The person implicated by the 1st accused is known as *Mwangi*.

The 1st and 2nd accused are strangers. The 2nd accused has never had a saloon car registration number KAR.

29. There is no direct or indirect evidence by any of the ten witnesses confirming that the 2nd accused is the same as *Mwangi* who abducted the deceased on 18th or 19th July 2012. There is equally no evidence that the 2nd accused resided or worked in Kayole. He was in fact arrested in another area known as Mihango, Utawala. Even the investigating officer (PW9) could not explain why the 2nd accused was charged.

30. The *burden of proof* fell squarely upon the shoulders of the prosecution. See **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332. I find that there is a dearth of evidence that the 2nd accused either acting alone or in concert with the 1st accused; and, of *malice aforethought* killed the deceased.

31. I *acquit* the 2nd accused.

32. I will now focus on the evidence against the 1st accused. None of the ten witnesses saw the 1st accused kill the deceased. But there is very

strong circumstantial evidence. In *R v Kipkering arap Koske & another* 16 EACA 135 (1949) the court held-

In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt

33. There are four incriminating pieces of evidence that point to the guilt of the 1st accused. Firstly, she was the *last person* to be seen with the deceased on 17th July 2012 at about 6:30 p.m. The deceased was alone. She was dressed in her school uniform and wearing a muffin. The 1st accused knew the deceased and admitted that the deceased used to visit her home. The deceased's home was half a kilometer away.

34. PW2 had seen the deceased earlier at about 5:00 p.m. PW3 also saw the deceased at about 5:30 p.m. near the shops at Wang'ondia Shopping Centre. He advised her to go home. Despite seeing the deceased at 6:30 p.m., the 1st accused *withheld* the information.

35. Secondly, she was heard by a number of witnesses including PW4, PW7 and PW9 saying that she *delivered* the deceased to four men on 19th July 2012 at about noon. The men were in a saloon car registration number KAR and were heading to Kayole. Although she did not have the full particulars of the registration number, she gave PW4 the mobile number of one of them, Mwangi.

36. Thirdly, the 1st accused in her *defence* admitted meeting the deceased on 17th July 2012 at 6:30 p.m. She however said that she did not speak to her. She explained that because she feared for her life, she told the search party that she had delivered the deceased to the four men. It makes little sense because by saying that she and the accomplices had abducted the child, she would have incensed the crowd even more. She also had something to hide: Why for example did she mislead PW1 and the search party that the deceased was in the homestead of an old couple? I studied her demeanour closely. She was hesitant in answering questions during her cross-examination. I got the distinct impression that she was not truthful.

37. Fourthly, the 1st accused had the opportunity and the clear plan to deliver the deceased to one Mwangi or the three men to be trafficked to an undisclosed location. The deceased was later murdered and the body dumped along Mathioya River.

38. I agree that the *Information* states that the deceased was murdered on 23rd July 2012. On that date, the 1st accused was in police custody. But she had acted in concert with the persons who abducted the deceased and killed her. The 1st accused plotted with Mwangi or other accomplices to harm the deceased. Her conduct caused the death of the deceased.

39. The entire defence by the 1st accused is completely hollow and unbelievable. I have reached the conclusion that the entire corpus of *circumstantial* evidence points *irresistibly* and *exclusively* to the guilt of the 1st accused. The chain of events is *complete*. There is *no* hypothesis that exonerates her.

40. The prosecution has *proved* the charge against the 1st accused *beyond reasonable doubt*. The upshot is that the 1st accused, *of malice aforethought* caused the death of Alice Wachera Chege by an unlawful act.

41. I accordingly enter a finding of *guilty* against the 1st accused and *convict* her accordingly. For the reasons given earlier, the 2nd accused is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 29th day of October 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The 1st and 2nd accused.

Mr. Kirubi for the accused.

Mr. Mutinda for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.