REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 39 OF 2008

REPUBLIC.....PROSECUTOR

-VERSUS-

ROBERT NYAMBURA NJUI.....1ST ACCUSED

PURITY NYAMBURA KANG'ETHE.....2ND ACCUSED

JUDGMENT

I am the 6th Judge, after Kasango LJ, Makhandia J (as he then was) Sergon J, Wakiaga J and Mativo J in the 10-year life of this murder case. Among them, my predecessors heard 10 witnesses for the prosecution. I heard the defence case for the 2nd accused, the 1st accused having absconded as soon as the case for the prosecution was closed before Mativo J and finding of case to answer, with the direction that the two be put on their defence.

This depressing state of affairs set out in Iria village Muchungucha sublocation, Murang'a district in the family of B I and J W. B and J had been living together as husband and wife two years before the incident. When he married her J had two children of her own, I N and S W. They got H W. At the time of the incident that led to this case the children were aged 5, 2 ½ years and 6months respectively. The 1st accused person Robert Mwangi Njui was a step brother to B. His wife was the second accused Purity Nyambura Kang'ethe. Robert had just come from prison for some undisclosed offence. He did not have good relations with his stepbrother or step mother, despite the fact that their homes were in the same compound only a few metres from each other.

What began as an apparent simple family misunderstanding was to lead to the following tragic events.

On the 15th of June 2008, J was coming from the shopping centre when she found Ian playing inside a trench alone, on the roadside. She reprimanded him for having left his younger siblings on their own as he was supposed to watch over them when not in school. They both left for home.

Little did she know that this would lead to a great quarrel. Upon reaching home, they met her brother in law the 1st accused person outside his and he house asked, harshly, why she had turned the child back yet he had sent him on an errand. She told him she did not know that he had sent the child on an errand because the child had not told her so. He then, harshly demanded his money back from I. He moved to where they were seated and lifted S while holding a panga which he bahnged on the ground. He then ordered the two children out of his compound which right next to hers. Her mother in law heard all this. The children just ran off to their house.

J was unhappy with all these happenings and when her husband B came home around 2:00pm she reported the same.

They decided to report the matter to the chief's office.

The person acting as the chief was PW7 no. 81057991 AP Sgt Peter Ndung'u. he told them to come back on the following Monday. He gave them a summons for the Robert.

On the 19th June 2008, a Thursday, they met in Sgt Ndung'u 's office J, B, Robert, Purity, and the mother to B and step mother to Robert.

The dispute revolved around the children. Robert was offended that he could not send the children. He complained that J had turned back I while he was on his errand. His view was that if he could not send them on any errands then they should never step on to his compound. Sgt Ndung'u advised that it was difficult to confine the children to the compound as the homes were all in one compound, about five metres apart. After discussions the matter was resolved with an agreement that Robert would not send the children again, and he would not stop them from moving around the home freely.

The parties went home about 3:00pm. J and her husband had some work to ferry some timber from her mother in law's shamba to that of one Beatrice Wanjiku. To do so they had to pass through Robert's shamba. As they did so she could hear him telling her mother in law that she J would no longer be allowed to pass through his shamba. Just then he saw her and told the mother that there she was passing through his shamba. He had a panga.

He followed her to her compound and warned her not to pass through his shamba. That he would poison her children, and deal with her if she did so.

After that and her husbanded completed their timber ferrying work. He left for the shopping centre while she went to get I and S at the gate. She left H sleeping at home. S was outside the house. She found I at the gate and told him to go play in their own compound. Robert found her there. He still had a panga which he pointed at her, telling her that she was 'very hot' but if she ever crossed his boundary he would deal with her. After a while she noticed I was not where she had left him. She went looking for him at her mother-in –law's place. Her mother in law was not there so she went to the neighbor's at the road. The child was not there. She decided to go back home. To her consternation the other two children were also missing. She now went looking for her mother in law whom she found and who told her that she had not seen the children. She went towards the shopping centre and met her husband. She told him what had happened and they both proceeded to the police post where they found AP SgT Ndung'u and reported to him.

He told them to go search within the home first. They went home and enlisted the help of nearby neighbours, Beatrice Wanjiku, Mama Waithera and others. They searched in vain and at 6:30pm went back to the police post, with many more members of the public. Robert was one of them. AP Sgt Ndu'ng'u locked him up because he was a major suspect, and his life could be in danger. Members of the public were also baying for the blood of his wife Purity. After the search was called off around 3:00am, AP Sgt Ndungu escorted them to Murang'a Police Station.

The report was booked at the police station.

Purity was released by the Police and Robert detained at the Police station on 20th June 2008.

In the meantime the search for the children continued.According to AP Sgt Ndung'u and Asst. Supt of police PW8 no. 231353, who was the OCS Muran'a at the material time, Purity was re arrested by members of the public who threatened to lynch her if she did not tell them where the children were. It was then that she led them to River Kayawe where the body of S was first found tied with a piece of cloth and a stone. The following day the body of H was found some 40 or so metres from where the body of S was found.

PW10 Dr. Raphael Gachini produced the postmortem reports by Dr. Ndiangui. The postmortems were conducted at Murang'a District Hospital on the 1st July 2008.

He formed the opinion that each child had died of asphyxia due to drowning.

The key suspects were Robert and his wife Purity.

They were presented to the psychiatrist PW3 Dr. Mburu M.J who confirmed they were fit to stand trial. He produced their mental examination reports as PEX 1 and 2 respectively.

They were charged on the 2nd July 2008 and on the 29th September 2008, they took plea on the two counts of Murder c/s 203 as read with 204 of the Penal Code. It was alleged that on the 19th Day of June 2008 at Iria village in Maragi sub location Mbiri Loacation Kiharu Division Murang'a district in Central province they jointly murdered S W I and H W I.

Each of them pleaded not guilty to each of the counts. The trial started on the 5th November 2008.

B I PW3 told the court that his step brother was the suspect because of what transpired at home on the day the children disappeared. He and his wife J said they heard from people who they could not name that it was the 2nd accused Purity who had directed the search Party to the river where the bodies were found.

PW4 Gideon Mbuthia Ngugi was in the search party on the 20th and 21st June 2008. He confirmed that the villagers wanted to lynch the 2nd accused and she volunteered to take them where the 'deceased children's bodies were hidden'. He said that she was spared when she told the OCS she was ready to cooperate, and show where 'she had thrown the bodies'. When all this was happening the 1st Accused was not there.

PW5 Joseph Mwangi Gitimbi was also in the search party. According to him, the 2nd accused told them where the bodies of the children were. That the river where they were found was not far from the accused person's homea as it passes through the 1st accused's land. He knew as a neighbour that there was a long standing dispute between the two step brothers.

PW9 Francis Wagachiri a brother to B and a step brother to the 1st accused also helped in searching for the bodies. He said the 1st accused was the suspect because he had threatened to do something harmful to the children.

PW6 no. 78031 PC Maxwell Otieno was instructed by the OCS PW8 C.I.P Bosire on 20th June 2008 to visit Muchungucha AP Camp where a crowd wanted to lynch the 2nd accused because they suspected her of murdering two minors. That upon arrival she led them to the place where she had dumped the two minors. That evening they recovered the body of S W aged 2 ½ years tied with a piece of cloth together with a piece of stone.

When they returned to the scene the following day they found the body of the 6month old baby having been recovered just 4m from where the 1st one had been found.

His view was that there was no way the two children could have walked to the river by themselves.

PW7 AP Sgt Kinyua also testified that the 2nd accused, to save herself from lynching, told the members of the public she would point out where the bodies were. That she told them she is the one who had carried the bigger child to the place where she was thrown.

PW8's testimony was that he responded to one APC Kinyua'a distress call on the 20th June 2008. That members of the public had surrounded the camp and wanted to lynch the 2nd accused who was held there. That the 2nd accused "opened up and told the public that her husband had told her that they had thrown the children at the river where they normally bathe". He PW8 the accompanied PC Otieno APC Kinyua and members of the public, where the 2nd accused person repeated the same information and they went to the river where one body was retrieved, and the other body was retrieved the following day.

According to him, the 2nd accused told him that it was her husband who had told her where he had thrown the children. That the she had just recently married the 1st accused person.

In cross examination he told the court he could not tell how the two children met their death but he was certain they had not taken themselves to the river.

In her defence the 2nd accused denied any knowledge of the murder. She told the court that on 19th June 2008 her boyfriend Robert rang her that he had been accused at the Asst. Chief's office and requested her to meet him at Muchungucha police post. She went there and found that the case related to land. She even heard witnesses say that the 1st accused did not want his brother's children on his land. They also discussed the case over the children. She did not participate.

When they left, she went to her home and later went to Robert's home about 5:00pm where she found him with his step mother. She was there when Jane went asking whether the mother in law had seen the children. J then went to the shopping centre. She came back later with her husband B and they all began looking for the children. They were joined by neighbours. They all searched in vain. They later went to the police post together with the 1st accused, the parents to the children and other neighbours. Robert was locked up. She too was locked up and taken to Murang'a police station on 20th June 2008. She was however released. She went home and joined the search party. It was while there that she heard screams people saying that the children had been found. When she went there, the members of the public got hold of her and insisted that she should be charged. They put her in the police motor vehicle together with the child's body. The following day the police said that the other body had been found. She was held in custody for 13days and charged with this offence.

In cross examination she said she knew the children and their parents and had no grudge with the parents. She said Robert had never threatened the children in her presence.

She denied showing the police or members of the public where the bodies were. She denied living with Robert but that she used to go to his home and they were friends.

She did not call any witness.

Both the defence and the prosecution filed written submissions.

The only issue for determination is whether the prosecution has proved its case beyond a reasonable doubt against the accused persons to warrant a conviction.

The 1st accused made a disappearing Act after 1st March 2006 when the court determined he had a case to answer and set a date for defence hearing. The defence counsel did not address the issue as to the fate of his case. The prosecution urged the court to find both the accused persons guilty. No authorities were cited or any provisions of the law to support those positions.

Before determining the guilt or otherwise of the accused persons I found it necessary to determine whether I could rightly proceed to determine the fate of the 1st accused without having heard his defence.

Section 206 of the CPC deals with such eventualities by providing for the non-appearance of parties after adjournment

> *(1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.*
>
> *(2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.*
>
> *(3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.*

(4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.

The charge facing the accused persons is a felony. As indicated herein above he absconded from the jurisdiction of the court after the case was adjourned for defence hearing. I heard the defence of the 2nd accused in his absence and he never showed up to tender his defence.

Article 50 of the Constitution provides for the right to a fair hearing. At sub article (2) (f) it provides for the right of the accused person *to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*

In the Court of Appeal case of **Daniel Karuma alias Njaluo v Republic [2015] eKLR,** the appellant was charged with robbery with violence c/s 296 (1) of the Penal Code. During the trial before the Chief Magistrate Thika Law Courts the appellant caused such a ruckus in court during the trail that the court was forced to try the appellant in his absence pursuant to section 77(2) of the repealed Constitution which provided as follows;

"77. (1) if a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2)…….. and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

He was found guilty, convicted and sentenced. He appealed to the high court, which upheld his conviction and sentence. He then went to the court of appeal on the grounds inter alia that the trial had grossly violated his right to a fair trial.

The court of appeal agreed with the trial magistrate and the high court that there was no miscarriage of justice when the appellant was tried in his absence, and convicted without his giving his defence. I quote from the Judgment;

16. The judgment of the trial court at pages 95 and 96 reveal the agony the court had to go through, and having to write a judgment without the accused person giving a defence…. In light of the circumstances and the behavior of the appellant during the trial, was there a miscarriage of justice because the appellant's defence was not heard in court? To that question the trial magistrate had this to say in her judgment: -

'The accused person was accorded the right to defend himself as provided under the Constitution. But he conducted himself in such a manner that the court was compelled to exclude him from the proceedings…No constitutional right is absolute hence the provisions of section 77(2) of the Constitution. I have drawn an analogy between the circumstances of this case and a situation where an accused elects under section 211 of the Criminal Procedure Code to say nothing in his defence. That is a right but the burden to prove the case beyond reasonable doubt still remains with the prosecution. Equally an accused who so conducts himself in such a manner as to be excluded from the proceedings under section 77(2) of the Constitution must be derived (sic) to have made a constructive choice to abstain and cannot hope to suspend the proceedings indefinitely as the accused herein hope to do….'

17. After careful consideration of the circumstances and section 77(2) of the said Constitution, we are in agreement with the trial court that the appellant could not continue to participate in these proceedings, and that the trial court acted right in resorting to the said section 77(2) of the Constitution. We therefore dismiss the submission by the state counsel that there was a miscarriage of justice."

[16] Given the above exposition, we cannot fault the conclusion of the judges of the High Court that the conduct of the appellant was disruptive and made it impossible for the trial court to conduct the proceedings. The appellant's right to be present during the trial was dependent on his conducting himself in a manner consistent with the sobriety of the trial. That being the position the appellant compromised his right to be present during the trial by failing to treat the trial proceedings with the reverence and seriousness that it deserved. He cannot therefore be allowed to leverage on an outcome brought about by his own misconduct to vilify the proceedings of the trial court

In this case the 1st accused person opted not to be present during the defence hearing and not to present himself to participate in the trial after the court found he had a case to answer. I adopt the position taken by the trial magistrate in the above case and upheld by the two superior courts; the 1st accused herein can be treated like the accused person who upon being put on his defence opts not to give any evidence or call any witnesses. He cannot turn around and say that his right to fair trial has been violated yet he was given the opportunity.

The provisions of section 206(1) however appear to draw a boundary between the person charged with a misdemeanor and that one charged with a felony, and allow the *in absentia* trial and conviction of the former and not the latter. While writing this judgment, I found it untenable that that provision seemed to say that a case facing a person charged with a felony, who was not kept out of the court due to misbehavior, but absconded during the trial, could not come to an end, as the only thing the court could do was issue a warrant of arrest, and wait for the date he or she would be arrested. These are the words of section 206(4)

If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.

This not only amounts to discrimination of persons facing criminal trials and the victims thereof, contributes to backlog and more importantly violates the rights of the family of the victim to have closure especially in cases of murder, like this one.

Paths are made by walking. I found that this path had been walked by this court (S. Mutuku J) in **Republic v Galma Abagaro Shano [2017] eKLR** , while dealing with an abscondee accused person in a murder trial. The judge was of the view that whether an accused person is charged with a misdemeanor or a felony, both are equal before the law and Article 50 of the Constitution does not make a difference. By attempting to do so, she found s. 206(1) of the CPC to be in conflict with Article 50(2) (f) of the Constitution. She rendered herself thus;

> *This court has in a detailed manner determined and ruled that this trial would proceed in the absence of the accused who has waived his right to a fair trial in regard to being present during the trial by absconding and removing himself from the jurisdiction of this court. This court has in its ruling delivered on 24th of April 2017 addressed the provisions of Section 206 of the Criminal Procedure Code and Article 50 (2) (f) of the Penal Code. Article 50 (2) (f) provides that:* ***"Every accused person has the right to a fair trial, which includes the right to be present when being tried unless the conduct of the accused person makes it impossible for the fair trial to proceed."*** *This court took the view that Section 206 (1) of the Criminal Procedure Code is inconsistent with Article 50 (2) (f) of the Constitution in so far as it allows the court to proceed with the hearing of a case against an accused person who fails to turn up in court in cases where the accused is charged with a misdemeanor and not a felony. My view is that the Constitution of Kenya, being the supreme law of the land does not differentiate the offences be they felonies or misdemeanors. Under the Constitution, every person has a right to a fair trial, which includes the right to be present when being tried unless the conduct of the accused person makes it impossible for the fair trial to proceed. My understanding of this provision is that all the persons who appear before the court charged with either felonies or misdemeanors enjoy equal right to a fair trial which includes the right to be present when being tried unless their conduct makes it impossible for the court to continue with the trial. It was my view that where an accused person, irrespective of the charge he/she is facing, absconds, then he has waived his/her right to be present when being tried and the court therefore can proceed to hear and conclude the trial in his/her absence and even convict and sentence him. This court determined that it would consider the evidence of the prosecution, in the absence of the accused, and decide whether it proved beyond reasonable doubt that the accused caused the unlawful death of the deceased and that in so causing that death the accused had malice aforethought.*

I take the same view with regard to the 1st accused in this case considering that he took off immediately the court determined that he had a case to answer. I will consider the evidence by the prosecution, whose responsibility it is to prove the case against the accused persons beyond reasonable doubt.

The defence concentrated its submission on the 2nd accused and the legal requirement for the prosecution to prove a common intention between the accused persons.

They relied on s. 21 of the Penal Code and the case of ***Njoroge v R(1983) KLR at page 204*** , and the case of ***R v Tabulayerika (1943) EACA 51*** that the prosecution failed to prove any common intent between the two accused persons.

It was also argued for the 2nd accused person that the whole evidence was circumstantial and nobody saw the 2nd commit the offence, nobody suggested any motive on her part.

The state submitted that,

> *"In conclusion, the evidence on record clearly shows that the 1st accused person had the motive for murdering the two deceased children as the children disappeared on the same day they came from the chief to solve the issues between PW1 and the 1st accused person…"*

With regard to the 2nd accused person the state submitted,

> *"… the 2nd accused person involvement was to the extent that she assisted the police by directing them to River Kayahwe as was confessed to her by her the 1st accused person… in conclusion, the evidence on record clearly shows that the 1st accused had the motive for murdering the two children as the children disappeared the same day they came from the chief to solve issues between the PW1 and the 1st accused person. In regards to the 2nd accused it appears that she corroborated with the 1st accused to murder the deceased children".*

I have carefully considered the evidence before me and the submissions by both sides.

Section 203 of the Penal code defines the offence of murder as where;

> *Any person who of malice aforethought causes death of another person by an unlawful act or omission...*

Section 204 provides for punishment for the offence of murder;

> *Any person convicted of murder shall be sentenced to death.*

Section 21 of the Penal Code provides for 'Joint offenders in prosecution of common purpose'

> *When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence*

Section 206 of the Penal Code cap 63 provides that

> *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) .....*

The prosecution was expected to prove beyond a reasonable doubt that the two accused persons formed a common intention to commit the heinous act of killing the two children.

The prosecution was also expected to establish that the ingredients of murder.

- Malice aforethought
- Unlawful acts or omissions on the part of the two accused persons
- The causing of the deaths of the two children.

With regard to the issue of common intent I found help in the case of **Republic v Mohammed Dadi Kokane & & 7 others [2014] eKLR (M. Odero J)** where the judge dealt with a similar issue in the case where several persons were jointly charged with murder demonstrates what amounts to common intent.

The victims herein were aged 2 ½ years and 6 months. It is evident that they could not have taken themselves to the river as it was far from home, and the 6month old could not have possibly crawled all the way.

It is also evident that when the parties came from the chief's office the 1st accused was still angry and was issuing warnings to J through his step mother. He was also able to see J and B working ferrying fire wood from the step mother's shamba to the of a nearby home. He was the one who could tell that the children were on their own as both their mother and father were away, giving him the opportunity to do whatever he wanted.

The evidence on record clearly shows that the person who exhibited both physically and verbally any intention to do harm to the children was their step uncle, the 1st accused person. He was angered by what he considered to be disrespect by the sister in law, J, whom he believed had stopped her son Ian from running his errand. He had uttered threatening words to her while brandishing s panga, he had acted aggressively towards S when he picked her while holding a panga, he had threatened to poison the children, he had warned the mother that the children should not step in his compound which was a few metres from hers, he brandished a panga while he threatened their mother in the presence of witnesses that if she passed through his compound he would deal with her,actions which were scaring enough to warrant the mother and father of the children to report to the local administration for assistance. Even at the reconciliation he had repeated the same warnings.

The evidence also shows that after the 'hearing and determination of the case' by PW7 AP Sgt Ndung'u the 1st accused was angered by the outcome, which was his being warned not to send the children again, and not to restrain them from coming to his compound. This in addition to his long standing dispute with his step brother, B I PW3 the father of the children could have given him a reason to harm the children. He clearly had a motive, and the state of mind to commit the offence. Nowhere in all this is the 2nd accused person involved. There was not a single piece of evidence that the 2nd accused person shared any of these hatreds, bad feelings or bad blood with the 1st accused person, or at any one time exchanged any words or did anything that would point to the fact that she shared the same state of mind with the 1st accused. In fact it would appear that all these issues were emanating from the family disputes to which the 2nd accused was not a party.

With regard to her, it was all suspicion by members of the public who were engaged in the search party. There is no evidence from J the mother of the children that Purity would have any reason to harm her children. There was no evidence from B or his brother PW9 that they had any reason to involve Purity in the death of the two children.

Everyone from the search party who testified about her alleged confession saying that she told the members of the public, under threat of lynching, in the presence of police officers, either that she knew where the bodies were or was involved in the murders.No specific person took responsibility to her telling him or her that had taken part in the murders. In any event without a confession that evidence is inadmissible as provided for under section 25A of the Evidence Act Cap 80 Laws of Kenya provides that confessions are generally inadmissible, and specifically that;

> *(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 Inspector of Police, and a third party of the person's choice.*

No such effort was made by PW8 a chief inspector of police by then to get the 2nd accused to make her confession, if at all, in the proper manner.

It was the evidence of several prosecution witnesses including the police officers that the 2nd accused had agreed to cooperate to save herself. Clearly whatever she is alleged to have said or done in those circumstances is inadmissible against her by dint of section 25A and 26 of the Evidence Act.

The law is clear on confessions. PW8 knew what he ought to have done the moment the 2nd accused allegedly began to incriminate herself. No statement under inquiry or confession was taken from her and all that evidence about her confession is inadmissible.

It is depressing that two innocent lives were snuffed out just like that for some un explained reasons. The key suspect, the person who threatened to do them harm made a disappearing act when the matter was pending defence hearing. It is not known where he went to or why he disappeared. What runs through the case for the prosecution is that he was their man.

Regarding the 2nd accused the prosecution was expected to link her to the charge. Throughout the case, her connection with the murder founded on several disconnected allegations that she confessed to having been told by her husband where he had thrown the babies, that she actually participated by carrying the older child to the place here the bodies were thrown, that she volunteered under threat of lynching to show here the bodies were.

That kind of evidence cannot form the basis of a conviction especially where the accused person clearly denied the offence and gave a defence that was not challenged by the prosecution.

There is sufficient doubt that the 2nd accused person did not participate in the murder of the two babies.

The case for the prosecution is based purely on circumstantial evidence as none of the witnesses saw the 1st accused person commit the offence. However, as I have demonstrated above the facts are such that there is no other inference I could draw except the guilt of the 1st accused person.

There are numerous authorities on this issue which have settled the same. The court of appeal in **ERICK ODHIAMBO OKUMU V REPUBLIC [2015] EKLR** reiterated this position by citing its decision in **ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990** where it had pointed out that;

> *"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."*

However, the court also pointed out that before a court could draw that inference of guilt it would have to satisfy itself of there being no other co-existing circumstances, which would weaken or destroy the inference of guilt. In DHALAY SINGH V. REPUBLIC, CR. APP. NO. 10 of 1997 reiterated this principle as follows:

> *"For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."*

I did not find any other co-existing circumstances that could have weakened the case for the prosecution to challenge the inference of guilt on the part of the 1st accused person.

Hence, from the evidence before me, I find that;

1. The two children herein met their deaths through unlawful means.

2. The prosecution failed to establish any common intent between the 1st and 2nd accused persons

3. The prosecution failed to prove the that the 2nd accused person participated in the murder of the two children. I make a finding of not guilty and acquit her accordingly

4. The deaths were caused by the 1st accused person who had the intent, and the opportunity to do so and it is against him I make a finding of guilt for the two murders and convict him accordingly under section 203 as read with 204 of the Penal Code.

5. That the sentence will follow any mitigation or records by counsel, and the filing of a victim impact statement vide s, 329B of the CPC by the Sub County Probation Officer of the area where the victims' family comes from. To this end the DR to ensure the order is extracted and served accordingly.

6. With regards to the 1st accused person's bond, the surety to forfeit the security of Ksh 500,000 to the state upon which he will be discharged of his obligations. The warrant of arrest against him remains in force. The surety for the 2nd accused is equally discharged

Dated delivered and signed this 23rd Day of January 2018 at Nyeri.

TERESIA M MATHEKA

JUDGE