



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO.25 OF 2009

REPUBLIC.....PROSECUTOR

- V E R S U S -

VINCENT GIKUNDA MWIGUA.....ACCUSED

J U D G M E N T

By the information dated 10/3/2009, **Vincent Gikunda Mwigua (the accused)** was charged with the offence of murder *contrary to section 203 as read with Section 204 of the Penal Code*.

The particulars of the charge are that on 15/2/2009 at Inkothine Sub-location Igoki Location, murdered Jeff Gitonga Gikunda (the deceased).

The prosecution which was led by learned counsel Ms. Muriithi and Mr. Mulochi called a total of five witnesses while the defence that was led by learned counsel Ms. Nelima, only called the accused.

PW1 Alice Nkirote Muriithi testified that on 15/2/2009, the accused, her former husband, sent her a message that she should take the child to him so that he could buy him clothes. The child was called JG. She took the child accompanied by her friend Lilian Kanyua. She did not find accused at his home and they proceeded to the home of Joseph Gichunge (PW2), a brother of accused. They found accused with the brother Joseph (PW2) shelling maize. They joined in helping to shell maize till 3.00 p.m. when she asked accused why he called her; that accused asked her to leave the child with him or else he would kill her. She left the child with accused and went back home. Next day, she decided to go back for the child, proceeded to PW2's home, found the wife who told her that accused left with the child at 11.00 p.m. claiming to be returning the child to PW1. Since PW1 had not seen accused and the child, she went to report to the Sub Area. Next day, together with the sub area, they went to see accused but accused was not at PW2's home as he was said to have gone to look for fodder. Since the child was not home, she called her parents and they went to accused's home and learnt that he had gone to report at Nkubu Police Station that he had returned the child to PW1. PW1 went to report to the police station that the child was not taken back to her; that accused was arrested and he took police where he had dumped child in 2 sacks in a pit latrine PW1 and PW2 were present when the body of the deceased was recovered.

Joseph Gichunge Mugwira (PW2) is a brother to the accused. He recalled the 15/2/2009, when at his home with the accused shelling maize, Alice (PW1) arrived with another lady he did not know with a child. He was aware that accused had been married to PW1 but they had separated; that accused and PW1 talked well as they worked and he left them for a while and on returning found PW1 had left and the other lady was still there but she also left and the child was left behind with accused; that accused said that it seemed PW1 had brought the child to him but that he would take the child back to her. PW2 did not know the child but learnt that it belonged to accused and PW1; that about 5.30 p.m. accused left with the child claiming to be going to Alice's home and did not come back because he had his own rented house. Next day, PW2 left for work; that accused used to work for him and would arrive at his house when he had already left for work. In the evening, he met accused going to his residence and when he asked if he had found PW1, accused confirmed that he had and had left the child with the mother.

On Tuesday evening, accused told him that PW1 was looking for the child and that he had reported at Nkubu Police Station that the child was missing. On Saturday, when accused informed him that he was required at the police station and he later learned that accused was arrested. Next day, when in church, he was called back home, found police officers with accused who was informed him that accused had shown where he had thrown the child. He went with police officers and a crowd to an abandoned pit latrine where they saw a sack in the pit. The sack was removed and inside was the body of the child. He identified the child he had seen with PW1. PW1 also identified the body of the child.

PW3 CPL Nelson Marwa Kibera then of Nkubu Police Station was the investigating officer in this case. He recalled that on 17/2/2009, accused went to the station to report that his son had gone missing and later about 5,30 p.m., PW1 reported that the child had gone missing while at accused person's home; PW3 began to investigate the whereabouts of the child and interrogated accused and PW1 separately. On 21/2/2009, after further interrogation, he placed accused in cells as a suspect of murder. After further investigation offered to go and show where the body of the child was in a pit latrine and the body was recovered on 22/2/2009 wrapped in a sack.

Postmortem was carried out on the body of the deceased by Dr. Macharia and the report was produced in court by Dr. Maria Mwangi (DW4). Dr. Macharia found the body to be partially decomposed, a light noose round the neck; that there were multiple fractures to the parietal bones, fracture of the cervical C1, 2 & 3 and he formed an opinion that the cause of death was a head and cervical spinal injuries and strangulation.

PW5 is Doctor Isaac Macharia who performed the post mortem said that the cloth round the neck was a noose and he concluded that there was strangulation because of the noose and fractured spine at C 1, 2 & 3.

When called upon to defend himself, accused said that he had been employed by his brother PW2 Gichunge and was at work at his home on 9/2/2009 when, Alice PW1 went there with Kanyua and a child; that the ladies left the child behind and they had not discussed about her leaving the child; that PW1 wanted money; that at 5.30 p.m., he took the child to the home of PW1's father where he found PW1, Kanyua and 3 men who were taking alcohol; that PW1 was selling liquor and he asked why she left the child and she said she wanted money and he told her to wait for a week but she left the child with accused. On Tuesday, the sub area went and informed him that PW1 had informed him that she had found the child dead. He went with the sub area to his home but did not find PW1; that they went up to PW1's home but found nobody and decided to report at Nkubu Police Station on 11/2/2009; that he had been informed that the child was dead. He checked with police station next day but nothing had been done and he reported to assistant chief Nkubu. He went with the Chief to Nkubu Police Station on Tuesday but PW1 was not found; that later, together with Assistant Chief, they traced PW1 at Nkubu Market, they proceeded to the police station where he was arrested. On 15/2/2009, it was alleged that he is the one who killed the child; that PW1 and the other lady who had been with her came and all of them went in a vehicle to the coffee farm where they flashed a torch in a latrine and found the child's body.

The accused faces a charge of murder contrary to section 203 of the Penal Code. To found a conviction, the onus rests on the prosecution to prove beyond reasonable doubt the following:

- (1) The death and cause of death of the deceased;**
- (2) That the death was caused through the unlawful act or omission of the accused;**
- (3) That the accused had malice aforethought.**

Nobody witnessed the murder. However the deceased's body was found wrapped in a sack and thrown in a latrine. Upon examination by Doctor Macharia (PW5) the body was found to be partially decomposed, had a light noose round the neck and multiple fractures of the parietal bones, fracture of C1, C2 & C3 with spinal injury at the said level and the Doctor was of the view that the cause of death was head and cervical injuries and strangulation. There is no doubt that somebody caused the death of the deceased and deliberately tried to conceal it by packing the body in a sack and throwing it in a latrine.

From the evidence of PW1 & PW2 and as admitted by accused, PW1 left the deceased with the accused on 15/2/2009 at PW2's home. According to PW2, the deceased left with the child later at about 5.30 p.m. claiming to be taking it to PW1's home. That is the last the deceased was seen alive. The question is whether indeed accused took the child to PW1's home or not.

PW1 was categorical that she left the child with the accused but decided to go back for the child next day only to find the child missing.

PW3 the investigating officer told the court that on 17/2/2009, it is the accused who first reported at station that the child had gone missing only for PW1 to come later to make same report. If indeed accused had taken the child to PW1's home, the question is, how he was able to know that the child was missing and make a report before PW1 did? Further to the above, PW2 told the court and which evidence was corroborated by PW1 & 4, that it is accused who agreed to show where the body of the child was. In fact in his cross examination, accused did admit that he went to show where the child's body was. Accused's own brother PW2 was called and informed by the police that accused was willing to show where deceased's body was and he accompanied the police and PW5 to the pit latrine where the deceased's body was retrieved.

This evidence was never challenged and I believe that PW 1, 2 & 3 were truthful witnesses. In his defence, accused alleged to have left the child with PW1, Kanyua and 3 other men who he did not know. No explanation was given why Kanyua was not called as a witness because she was mentioned by PW1, 2 and even accused. However, accused had not alleged during cross examination of PW1 that he took the child to her home and found her with Kanyua. He raised that defence as an afterthought in his defence. After carefully examining the evidence on record, I am satisfied that it is the accused who led the police, PW1 & 2 to where the body of the deceased was found, in a pit latrine. It is accused who was last seen with the deceased alive. He therefore had a duty imposed under section 111 and 119 of the Evidence Act, to explain where or when he parted with the deceased. The said section provide as follows:

“Section 111

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

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(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity”

Section 119

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”

In my view, the accused did not discharge the onus placed on him by the above sections to explain when he parted with the deceased because his explanation that he left the deceased with PW1 is not believable. I am satisfied that the accused is the one who inflicted the injuries on the deceased and threw his body in a pit latrine.

Whether malice aforethought was proved; the deceased was aged about 2½ years. The body was found with a fracture to his head and the spine as a result of strangulation. Strangulation is a deliberate act meant to take life out of a person. Malice aforethought is further fortified by the act of placing the body in a sack and throwing it in a pit latrine. It confirms that the accused had the intention to end the deceased’s life and conceal it forever.

I find that the prosecution has proved its case beyond reasonable doubt. I find accused guilty as charged and I convict him accordingly.

Dated and Signed at NYAHURURU this 7th day of FEBRUARY, 2018.

.....

R.P.V. Wendoh

JUDGE

Delivered by A. MABEYA (J) at MERU this 21st, day of March, 2018.