



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 3 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

MOSES KAMAU WANJIRU.....ACCUSED

J U D G M E N T

1. The Accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 17th day of October, 2015 within Nyandarua County, he murdered **K.S.W**. He denied the charge and was represented by Mr. Njuguna.

2. Through nine (9) witnesses the prosecution presented the following case at the trial. The Accused resided at a place near Engineer town. He was known to **E.W. (PW4)** and her children. The Accused and **PW4** also the mother of **K.S.**, the deceased, were involved in a seemingly rocky love relationship in the material period.

3. A few days to the date of the disappearance of the deceased, the Accused had reported to the police at Engineer Police Station that **PW4** owed him some Shs 2,000/=. Thus **PW4** had been summoned to the police station on 17th October, 2015 but though she obeyed the summons, the Accused did not attend. It would appear that on the afternoon of the same day **PW4's** deceased 4 year old son (**K.S**) was playing in the vicinity of the family home near Engineer town, with other children, in particular **J.N.**, a sibling (**PW1**), and **S.M. (PW2)** a neighbour's child.

4. The children were approached by the Accused whom they knew well as a local person. He asked the boys **PW2** and the deceased to come with him to buy some sweets and to hunt for rabbits. Persuaded, the two boys left with the Accused and headed towards the river. **PW1** remained behind. It is the evidence of **PW2** that the Accused led the two boys towards river **Karoroha** and then to some bushy area. He then ordered **PW2** to go back home, allegedly because he did not know how to trap rabbits. **PW2** obliged.

5. By night fall, the family of the deceased commenced a search for him and reported to police. At 6.00pm on the same date, **Simon Nganga Njoroge (PW5)** was informed that the body of a child had been discovered at his shamba by the river, 1 kilometre from Engineer town. **CPL Lekadaa (PW7)** and **IP Bariu (PW9)** were among the first officers to visit the scene. They took photographs and retrieved the body later identified as **K.S.'s** by the river bank.

6. Later on 19th October, 2015 the police recovered a blood stained knife from under a thicket at the scene where the body had been found. The post mortem examination conducted by **Dr. Ngulungu (PW8)** revealed 13 stab wounds to the chest. His conclusion was that death was due to blood loss occasioned by the multiple stabs. Blood samples taken from the body, alongside the knife, were examined by the government analyst **Elizabeth Waithera (PW6)**. The two items were found to have matching DNA.

7. The Accused when placed on his defence made an unsworn statement. To the effect that he was a casual labourer residing at Engineer town. That **PW4** was his lover although the two lived separately. He stated that the **PW4** was unfaithful and often stole money from him to support her excessive drinking habit. On one such occasion on 16th October, 2015 **PW4** allegedly stole Shs 2,000/= from the Accused's house prompting the Accused to report to the local OCS.

8. He had then decided to end the affair. But he discovered on the same day, upon taking a test, that he was HIV positive. Shocked, he travelled to Kipipiri and confided with his relatives. Police traced him there and arrested him. He denied having murdered the deceased asserting that while in custody he had overheard the OCS coaching witnesses. He learned later about the recovery of a knife.

9. There is no dispute that prior to the material date, the Accused and **PW4** were lovers, mostly living separately at Engineer town. **PW4** had children, among them the deceased. There were tensions, it seems, over certain issues between the lovers, and a day or two to the material date the Accused reported to local police that **PW4** owed him some Shs 2,000/=. However on the date he and **PW4** were to attend the police

station, only **PW4** attended. That is the day when the deceased disappeared and was found dead. The cause of death was not in dispute.

10. The court must determine whether, of malice aforethought the Accused inflicted the injuries that led to the death of **K.S.** In this regard, most of the evidence is circumstantial, primarily from the two minors **PW1** and **PW2**. The witness testified that they were playing with the deceased on the day he disappeared. The two witnesses were evidently children of tender years and following *voir dire* examination gave unsworn evidence.

11. **PW1**, a standard one pupil who was evidently older than **PW2**, a preschooler. She stated in her evidence that:-

“.....I know one K. (deceased). He was my friend. We were playing one day with K. and M. M. is a small boy. Younger than me. We were throwing sand at each other. Then a man called Kamau came. He lived near my place, alone. He worked on a lorry as a turn boy on the lorry. He called K. and M. to go with him to be bought sweets by him. I did not go. But both children M. and K. went. I continued playing then went home. The 3 people had gone towards a river which has water. There are many trees nearby. The darkness was starting. It was in the evening. Kamau is the Accused (in dock)”

12. During cross-examination **PW1** reiterated her evidence as to her familiarity with the Accused and the events in question. For his part, **PW2** corroborated the circumstances in which the Accused approached the children, as earlier stated by **PW1**. This witness said he accompanied the Accused along with the deceased.

13. He testified that:

“.....Then one Kamau came. He is an adult. He called me and K. from the children. He asked us to go and capture rabbits. We went to a place past river. The man led us to the river. We crossed river to a place where rabbits are found. It is a forested area. The trees are big. K. was still with me. Then Kamau said I did not know how to trap the rabbits. But I stayed not going away. The man Kamau took out a knife and stabbed K. Then he left running away. I went home but Kamau did not say anything while fleeing. K. was by the forest..... I returned because Kamau said I did not know how to trap rabbits.....”

14. The witness gave a lucid account of the events leading upto the river until he was ordered back by the Accused. I think the veracity of the child's testimony was affirmed, rather than diminished by his quick admission under cross-examination that he did not actually witness the stabbing.

15. Questioned by the defence counsel, he stated:

“.....Yes we went up to the other side of river then Kamau told me to go back so I did not see what happened. Mother was home and I told her I had been in forest. I did not say I had seen the deceased stab. Yes I know K.'s mother. No she did not ask me about K. K.'s mother prepared me to come and say that I saw K. being stabbed. I did not witness the stabbing of K.....”

16. Despite his young age, **PW2** was in my view a candid witness of truth and if, as it seems, he was under pressure to testify to have witnessed the stabbing he clearly disowned witnessing such event. Nothing turns on the brief strain of his veracity. The rest of the evidence by **PW2** however remained unchallenged, as was **PW1's**. Both children testified that the Accused approached them in a day time. He was known to them.

17. It would appear that **PW4** learned upon returning home from the police station, that **K.** had left the homestead in the company of the Accused. She said that when she and others spoke to **PW2**, he led them to the scene where the Accused had earlier led the children. This evidence is independent corroboration of the testimony by **PW2**, even if the latter said he did not speak to **K.'s** mother. Because, **PW2** said he told his own mother on returning home that he had been to the forest.

18. In any event, there were several adults inquiring into the disappearance of the deceased, and of necessity included the mother to **PW2**, **PW4** herself and the deceased's grandmother **M.W. (PW3)**. It is not clear how far the scene of recovery of the deceased's body was from the home of the deceased, but according to the owner of the land at the scene (**PW5**) it was 1 kilometre from Engineer town, a forested area by a river with a steep embankment. There is evidence that the body itself was at the valley below the steep embankment.

19. According to **PW5**, the body was in a steep place within a bushy area below which is a river. This description matches that given by **PW1**, **PW2** and by the police officer **PW7** who recovered the knife in the same vicinity two days later. The scene photographs produced at the trial (Exhibit 5) confirm the features of the scene consistently with the oral evidence of **PW2** and **PW5**. The body of the deceased lay in bushy area.

20. Moreover, the blood stained knife recovered at that very scene (Exhibit 3) when compared with the sample of blood taken from the deceased was found to match. The defence attempted to poke holes in the sequence of the handling of the blood samples by **PW7** but the witness gave a reasonable account, which is supported by the exhibit memo form completed in respect of the tested items (Exhibit 2); and in part by the evidence by **Dr. Ngulungu (PW8)** as regards the sampling of blood from the deceased.

21. Thus, I have no difficulty in finding that, the deceased was lured to the scene where he was murdered. As to the identity of the person last seen with the deceased, both **PW1** and **PW2** were admittedly known to the Accused. The material incident occurred during day time. The Accused had a sour love relationship with the mother of the deceased. He confirmed that a tiff arose between the two on 16th October 2015 because, he claimed **PW4** had stolen his money. He confirmed that he had reported to police with the aim of ending the relationship but did not deny the evidence by **PW4** and **PW7** that the two had been ordered to visit the station on 17th October, 2015 but that only **PW4**

appeared.

22. According to the Accused, having made the report, he also took a test which indicated that he was HIV positive. Obviously, if the theft of his money made him unhappy, the latter news if true, should have made him a bitter man. However, I find the sequence of events regarding the test rather contrived. Besides, no evidence of the test was given at the trial. Perhaps this allegation was crafted to explain the Accused's failure to follow up the theft claims against the mother of the deceased.

23. All in all, the Accused's description of **PW4** as a thief, an unfaithful and almost alcoholic person shows the level of personal animus he bore against the witness. It seems also from **PW4**'s account the affair between the two was tumultuous and ended quickly. It may well be as suggested by the Accused that the loss of money by the Accused was the last straw in the relationship.

24. In the case of **Libambula -V- Republic (2003) KLR 683** the Court of Appeal considered the significance of motive in a case where the evidence against an Accused person is primarily circumstantial by stating that:

“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person.

Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime. (emphasis added)

25. Similarly in this case, it is my considered view that the soured relations between **PW4** and the Accused comprises a strong motive for revenge against **PW4**. Indeed, it is possible that the Accused may have feared, perhaps with reasons, that due to the infidelity of **PW4**, he had contracted HIV and was determined to punish **PW4** for that.

26. His disappearance to a place called Kipipiri from the local village at Engineer where he evidently lived, on the date of the offence and subsequently is not coincidental but shows guilty conduct rather than shock. Because, in my opinion, if the Accused had any reason for believing he had been infected with HIV, that must have been earlier than 17th October, 2015.

27. His denial to have murdered **K**. is therefore not believable in light of all the considered circumstances and the evidence by key witnesses. The deceased's injuries are telling. His chest had 13 stab wounds and he bled to death, hours after he had been lured from the safety of his home by the Accused, being the last time the deceased was seen alive.

28. In reviewing the prosecution evidence which is primarily circumstantial, this court has considered the principles enunciated in **Kipkering Arap Koskei -Vs- Republic [1949] 16EACA 135** as follows:-

“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

29. In **Simon Musoke -Vs- Uganda (1958) EA 715** quoting from the case of **Teper -Vs- Republic [1952] 2 ALLER 447**, the same court added the further principle that:

“It is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

30. The Accused's failure to attend the police station on 17th October, 2015 while being a complainant aware of the requirement for his personal presence gave him opportunity, with **PW4** absent, to take her son away. He executed a well-hatched plot, to lure the 4 year old son of **PW4** to the river **Karoroha** where he killed him by stabbing him several times. This and the circumstances of the stabbing reveals malice aforethought on the part of the Accused.

31. It is my considered view that the Accused's defence has been displaced by the evidence arrayed against him, and cannot stand. He is guilty of the murder of the deceased and I find the charge against him proven beyond any reasonable doubt. Accordingly, I will enter a conviction against the Accused for the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

Delivered and signed at Naivasha, this 16th day of March, 2018.

In the presence of:-

For the DPP

For the Accused

Accused

C/C -

C. MEOLI

JUDGE