



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CRIMINAL CASE NO.30 OF 2017**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**DAVID WANG'ONDU GITHIRU.....ACCUSED**

**J U D G M E N T**

**David Wang'onde Githiru** faces a charge of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the night of 2<sup>nd</sup> and 3<sup>rd</sup> July, 2017 at Kamwenje Village in Nyahururu, Sub County in Laikipia County, murdered Duncan Mwangi Wang'onde.

The accused was certified fit to stand trial and the trial commenced by the prosecution calling a total of 9 witnesses. The prosecution was led by Ms. Rugut.

When called upon to defend himself, the accused made an unsworn defence and did not call any other witness.

PW1 John Wamai Muturi, the Chief of Matwiku Location received a call from Zachary Githinji (PW3) who informed him that a child had died under strange circumstances in the home of Githiru. PW1 in turn called the **OCS** of Kinamba Police Station led the police to the home where they were shown the dead child on the kitchen floor. They noted a swelling round the neck of the child which left a dark mark. A young child who had similar mark round the neck was present but looked confused and could not tell them anything. Photographs were taken of the body. PW1 was aware that PW1's wife had gone away after a disagreement and it is the accused who was taking care of the children. PW1 said that the smaller child of about 4 years also had a dark mark round his neck and was incoherent.

Geoffrey Ng'ang'a Muigai (PW2), a motor cycle rider (boda boda) recalled that on 3/7/2017, about 3.00 a.m. he received a call from Elijah Muya who asked him to go and take a child to hospital but his motor cycle had a problem but Elijah called later and asked PW2 to go and use his motor cycle. He went to the home, found the child held by the aunt, covered by a sheet, eyes closed and there was no heartbeat. They decided to take him to Kinamba Hospital; that the child was tied to Duncan Mwangi's back. They only found a watchman at the hospital because doctors were on strike; that the watchman said the child was dead and the grandmother who lived nearby also came and on observing the child said he was dead. He took the child back home. He observed the child and saw the eyes were swollen. He knew accused as a neighbor.

Zachary Githinji (PW3) is a watchman at Umoja Day Secondary School. His niece had been married to accused was his grandson. He recalled having reported to work on 2/7/2017 at 6.00 p.m. and at 3.00 a.m., he received a call from Wang'onde (accused), who informed him that the child was sick and was being taken to hospital at Kinamba. He asked for the number of the person who had taken the child to hospital so that he would see the child. He called his sister Mary Wangui (PW4) to go to the hospital to check on the child and on reaching there, she informed him that the child was dead. He asked the motor cycle rider to pass by his place of work and they did. He later went to the home where the child was lying in a small house and on observing the body, he noticed a black mark round the neck. He called the chief and told him what had happened. He later attended the postmortem. He said that the accused had married his niece but they had separated.

Mary Wangui Kihaku (PW4) is an aunt to the deceased's mother. She recalled receiving a call from her brother (PW3) at about 4.00 p.m. who told her to proceed to Nditika Hospital to check on Wambui's son. She proceeded there and found the child lying on a bench, unconscious. She observed the child and noticed that he was dead. The next day she went with PW3 to see the child and they saw blackish swelling around the child's neck. They called the chief and police who picked up the body after photographs were taken.

PW5 Duncan Mwangi Githiru, a cousin to the deceased, was asleep in the house on 2/7/2017 about 3.00 a.m. when he was called and informed that the deceased was sick and he was needed to take him to hospital. He accompanied PW2, to Nditika Hospital with the child but they did not get a doctor. He repeated what PW2 told the court that PW4 and PW6 observed the child and said that he was dead. He lived in the same home with the deceased and had last seen him alive on 1/7/2017.

PW6 John Njuguna who works as a watchman at Nditika Health Centre recalled the night of 2/7/2017 when two boys PW2 and 5 took the child there on a motor bike. There was no doctor on duty. He observed and touched the child, found the body cold and the child was dead.

PW7 Chief Inspector Francis Waigwa Giteme was OC Crime at Ng'arua Police station on 3/7/2017. About 3.00 p.m. a chief called and informed him of a child who was suspected to have been murdered; they proceeded to the scene, found the accused. On the body of the child being uncovered, he noticed bruises on the neck which was swollen. The body was removed to the mortuary and on 4/7/2017, the accused was arrested. Postmortem revealed that the child died from strangulation. PW1 found that the accused had another wife but did not take her statement.

PW8 PC Edward Esanya, a scene of crime officer on 6/7/2017, while in company of Ip. Waigwa the investigating officer took photographs of the deceased at the mortuary. The photographs were taken from different views and there was a dark mark round the deceased's neck.

PW9 Dr. Cyrus Ng'ang'a of Nyahururu County Hospital conducted the postmortem on the body of the deceased on 6/7/2017. He found the body to have a lower jaw bruise, bruises and depressed marks on the right ear, the neck was swollen and a circumferential mark round the neck. Upon opening up the body, he found a bone of the trachea had collapsed due to compression, the lungs were blue in colour due to lack of oxygen. The doctor formed the opinion that the cause of death was asphyxia (lack of oxygen) secondary to strangulation that led to cardiopulmonary arrest. From the history, he was of the view that cause of strangulation was a rope or flexible material.

When called upon to defend himself, the accused gave an unsworn statement and stated that on 2/7/2017, that he came back from a school meeting and the boy told him he was feeling pain everywhere; that he looked for people to take him to hospital; that he became worse at night and was taken to hospital at 5.00 a.m. by his nephew (PW3) and PW2 while he was left looking for money but by 6.00 a.m., he was called and informed that the child had died. He got a permit for burial but Zachary Githinji (PW3), an uncle to his wife called him for a meeting but instead found police who arrested him; DW1 said that he had disagreed with his wife 3 months earlier, he informed PW4 and 5 about it and they warned him to leave their daughter alone.

After the close of the defence case, Mr. Kihoro submitted that there was no independent evidence connecting the accused to the offence and that none of the witnesses witnessed the commission of the offence; that PW7, the investigating officer did not carry out any investigations and the whole case turns on suspicion; that the deceased lived with 2 other people and any may have committed the offence. Counsel relied on the decision of *Joan Chebichii Sawe v Republic CRA.2/2002* and *CRC.35/2010 Republic v Stephen Macharia Kinyua* which discussed the circumstances which court will rely on circumstantial evidence alone.

In reply, Ms. Rugut submitted that all the ingredients to prove an offence of murder had been met; that the postmortem revealed that the deceased was strangled; that accused's conduct of trying to escape pointed to his guilt; that it is not accused who took the child to hospital.

The accused faces a charge of murder contrary to section 203 as read with 204 of the Penal Code.

To prove a charge of murder, the prosecution has to prove beyond any reasonable doubt:

- (1) **The death of the deceased;**
- (2) **That the accused caused the death of the deceased through an unlawful act or omission (*actus reus*);**
- (3) **That the accused possessed malice aforethought (intention).**

Nobody knows exactly what time the deceased died. However, by the time he was taken to Nditika Hospital, PW4 and PW6 saw him and confirmed he was dead. The doctor, PW9 found the cause of death to be asphyxia as a result of strangulation. The probable weapon was a rope or flexible material and that explains the clear mark seen round the deceased's neck, in the photographs taken of the deceased. The witnesses.

The death of the deceased and cause of death are not an issue. The only question is how did the deceased meet his death?

This case turns on purely circumstantial evidence. For the court to found a conviction on such evidence, the events leading to the death of the deceased must form a chain so closely knit together without any breakage or interruption.

Justice Ong'udi in *Republic v Stephen Macharia Kinyua CRC.35/2010 (Embu)* relied on the decision in *Ndunya v Republic 2008 KLR 135* where the Court of Appeal stated:

***“Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.”***

In the case *of Abang'a alias Anyango v Republic CRA.32 of 1990*, the Court of Appeal set out three tests which circumstantial evidence has to pass. The court said:

***“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) *These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*

(iii) *The circumstances taken cumulatively should form a complete 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.”*

See also Wambua & 3 others v Republic 2008 KLR 142.

Sawe v Republic (2003) KLR 364.

It is therefore the duty of this court to examine the evidence adduced herein closely to determine whether or not it meets the threshold set in the above cases.

The deceased was living with the accused. There was uncontroverted evidence that the accused had separated with the deceased’s mother about 3 months earlier (PW3 and PW7). Accused did confirm that indeed he had separated with the deceased’s mother. The deceased was therefore under the care of the accused, a fact accused did not deny.

According to PW2, when he was called to take the child to hospital, the body was still hot but the child was not moving or talking. He could not tell whether the child was alive or dead. PW5 who accompanied PW2 to take the child to hospital could not tell whether or not the child was alive at the time they picked him from their home.

In his defence, the accused told the court that he found the deceased at home, sick. However, he did not take him to hospital. It is not until in the night that PW2 and 5 were called to take the child to hospital. As a father under whose care the child was, the court wonders why he did not bother to take the child to hospital if indeed he was sick.

The injuries to the deceased’s neck are very visible to the human eye. The doctor having found that the deceased died from strangulation from a string or a flexible material, I doubt that the deceased hanged himself. There would have been evidence to that effect. Somebody else must have done it. It seems the person who did it tried it on the younger child. PW1 and 4 saw a mark round the neck of the said child. The investigating officer never bothered to follow up with the smaller child to find out how he got the marks round the neck. However, such an act is intentional and planned act.

On examination of the investigation officer PW7, it emerged that accused was living with another woman whom PW7 referred to as a second wife to accused. Again, the investigating officer never bothered to interrogate the said lady or find out if she knew anything about the injuries found on the deceased. And now that there were two adults in that home, the accused and the unknown lady, the question is, who committed the offence between accused or the lady.

In my view, there is strong suspicion that accused murdered his own son and even attempted to do so to the younger one. However, so far, there is neither direct nor circumstantial evidence connecting the accused person to the murder. The prosecution submitted that accused’s conduct points to his guilt when PW7 said that accused tried to run away when police arrested him at PW3’s home. However, PW3 never alluded to accused ever taking to his heels on seeing the police. In my view, the investigating officer did a very shoddy investigation by not interrogating the lady in the home and the small child aged about 6 years.

It is the duty of the prosecution to prove its case beyond any reasonable doubt and the accused has no duty to prove his innocence.

So far, I find that the most likely suspect in the death of the deceased is the accused. However, the court cannot act on suspicion alone to found a conviction. In Sawe v Republic (Supra) the Court of Appeal stated that:

***“Suspicion, however strong, cannot provide basis for inferring guilt which must be proved by evidence beyond reasonable doubt.”***

For the above reason, I find that the prosecution has not proved its case to the required standard. There is still a doubt whether it is only the accused who had the opportunity to commit the offence.

The accused will benefit from the said doubt and he is hereby acquitted under Section 322(1) of the Criminal Procedure Code.

He is released forthwith unless otherwise lawfully held.

**Dated, Signed and Delivered** at NYAHURURU this 24<sup>th</sup> day of October, 2018.

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Mutembei – Court Prosecutor

Mr. Kihoro for accused

Soi – Court assistant