



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 62 OF 2015

THE REPUBLIC.....PROSECUTOR

=VRS=

1. JOSEPH MUMBA.....1ST ACCUSED

2. GITENYI NDURA.....2ND ACCUSED

JUDGEMENT

The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on **2nd August 2008** at Rigena Sub-location in Masaba District within Nyanza Province they murdered **LKM**.

The accused persons pleaded not guilty to the charge. The prosecution then called eight (8) witnesses to prove its case and in their defence the accused persons made unsworn statement. The accused persons were represented by Mr. Sonye Ondari while various Prosecution Counsels conducted the prosecution's case.

Briefly the facts of the case are that on 1st August 2008 LKM, the deceased, who suffered a mental disability (mentally retarded) and who at the time was about 14 to 16 years old returned home from school ([Particulars Withheld] Special School) at about 5pm. She joined her elder sister EN (Pw3) in the main house while their mother NM (Pw2) went into the kitchen to prepare dinner. Shortly afterwards she left the house and went towards the toilet but was not seen again until 3rd August 2008 when her body was found at a river not very far from their home. EN (Pw3) testified that at about 7pm on 1st August 2008 she saw the accused persons who she knew as Gumbo and Mumbo pass near the house that she and the deceased were in. She stated that she saw the two accused persons beckoning the deceased to go to them. She stated that she knew the accused persons prior to that as they used to go to their home for her sister. She contended that although it was 7pm it was not yet dark and she recognized them. She told the court that the 1st accused was Gumbo and the 2nd accused Mumbo. She stated that the deceased told her that she was just going to the gate.

Pw3 also alleges to have identified the accused persons at a parade that had only four members. Pw2 (the deceased's mother) testified that when the deceased took long in returning, she went out to look for her but she did not find her. The deceased did not go back home that night. Nyatichi Nyaboke (Pw5), a sister of the 1st accused, testified that on 2nd August 2008 at about 9am she happened to pass near the window of the 1st accused's house as she was looking for sticks to make a broom and on peeking inside she saw the deceased lying on the 1st accused's bed. She stated that she did not know the deceased before. After that she went to the road and stood there and when the 1st accused saw her he tried to enquire what was wrong. She could not remember how long she remained at the road but she stated that when she decided to go back home to do the dishes, she again went and peeked into the 1st accused's house but this time the deceased was not on the bed. Pw5 testified that she, her sister and their mother lived in one house while the 1st accused lived in that house alone. On 3rd August 2008 at about 7am when information reached her that a girl's body had been found at the river she went there and saw the girl was the one she had seen in her brother's (1st accused) house. It did not take long before she was asked by the police to go and record a statement. When Chief Charles Ekari Mwamba (Pw4) heard that a dead body had been seen in the river he immediately went there. He (Pw4) testified that the body was submerged with the head inside the water. He reported the matter to Keroka Police Station and a vehicle and police officers were dispatched to the river. They removed the body from the river and took it to Gucha Nursing Hospital Mortuary. That body was identified as the deceased herein by her father (Pw1). The court heard that she had no injuries.

The case was assigned to PC David Saitoti (Pw8) who soon instituted investigations which culminated in the arrest of the two accused persons. He took them to superintendent Mwenda Meme (Pw7) then a Chief Inspector who on 3rd September 2008 recorded their confessions following which they were charged with this offence. Pw7 produced the confessions in evidence (Exhibit 2 & 3).

On 10th August 2008 one Dr. Morris Rauta conducted a post mortem on the body of the deceased and came to the conclusion that the cause of death was cardiorespiratory arrest secondary to hypoxia. He noted that the body had been dumped in the river after the death. His other observations were that blood was oozing from the left nostril, skin peeling off on the trunk, neck and upper arm bilaterally, cyanosis of the lips, bluish discoloration (spots) on the lungs bilaterally, and both lungs floating in water. The doctor also noted that the deceased had no bruises in the genitalia. The post mortem report (Exhibit 1) was produced by Dr. Samuel Onchere (Pw9) as his colleague Dr. Rauta had left the hospital.

Both accused elected to make unsworn statements and did not call witnesses. The 1st accused stated that he did not murder LKM. He stated that on the material day he was at home and that the chief arrested him and took him to Keroka Police Station and left him there. After that he was taken to court and he denied the charge and to date he does not know why he was charged.

The 2nd accused stated that before he was arrested he was a driver. He too denied murdering the deceased and stated that on the material day he was at work; that a police officer flagged down the vehicle he was driving and when he stopped the officer entered the vehicle and told him to driver to Keroka Police Station where he locked him up in the cells. He stated that he remained in the cells for 29 days but the vehicle had been released to its owner. Later on he was told that he had been arrested to determine if he was accomplice in this murder and since then he has been in remand. He stated that his application for bond was dismissed and that in any event there was nobody to stand surety for him as only his wife and children are alive.

Mr. Ondari summed up by way of written submissions while the Prosecution Counsel relied on the evidence on record.

I have considered the evidence of the prosecution witnesses, the unsworn statements of the accused persons and Mr. Ondari's submissions carefully. It is my finding that although there is no direct evidence that the accused persons killed the deceased there is overwhelming circumstantial evidence that they killed her. The deceased's parents (Pw1 and Pw2) and her sister Esther (Pw3) all confirmed that as a matter of fact the deceased went home from school on that day. Pw2 stated that she left the deceased in the main house with her elder sister (Pw3). Esther (Pw3) confirmed that she and the deceased were together in the main house. She stated that she saw the accused persons who she knew very well beckon to the deceased who left the house saying she was just going to the road. There is credible evidence that the deceased did not return home that night. Pw3's evidence that the accused persons called the deceased is corroborated by evidence from Nyatichi (Pw5) the 1st accused's sister that she saw the deceased lying on the accused's bed on the morning of 2nd August 2008. She had gone to pick sticks to make a broom when she peeked into the 1st accused's house and saw the deceased. She testified that later she went and peeked again but this time she did not see her. Pw5's evidence confirms Pw3's testimony that she saw the accused person calling the deceased. I am satisfied that Pw3 positively recognized the accused person. The testimonies of Pw3 and Pw5 were cogent and credible. Pw5 is a sister of the 1st accused and had no reason to lie against him. she confirmed that the person whose body she saw at the river is the same person she saw in the house of her brother the 1st accused. I am satisfied that Pw3 and Pw4 are truthful witnesses. The deceased did not go home on 2nd August 2008. Instead she was found dead at the river. The accused persons confessed to Chief Inspector Mwenda Meme (Pw7) that they had killed the deceased.

My predecessor in the case, Sitati J, tested their confessions for admissibility and admitted them in evidence. It is my finding that the confessions are corroborated by the evidence of Pw3 who saw the accused persons calling the deceased and that of Pw5 who on 2nd August saw the deceased lying on the 1st accused's bed only to next see her in the river dead. In the confessions the accused persons give such a vivid description of what transpired that in my view it could not have been a creation of some other person. The 1st accused wanted something from the deceased who he had been assisted to lure to his house by the 2nd accused. When she declined his advances he slapped her and most unfortunately she fell down and died. He could not carry her alone and so he enlisted the help of his cousin the 2nd accused, who was waiting outside. I am satisfied that whereas the 2nd accused did not assault the deceased, he was an accessory to the offence both before and after the fact and that he was properly charged with the offence and is as guilty as the 1st accused who is the principal offender **(See Section 20 (1) (b) of the Penal Code.**

It is not clear how long the accused persons stayed in the police cells before they were charged but my finding is that even if their rights were violated by being kept in the cells for too long, that does not entitle them to an acquittal. Their remedy to the violation, if any, lies in an action for damages. There is no evidence that the deceased had provoked or attacked the 1st accused and my finding therefore is that the accused persons unlawfully killed the deceased. The prosecution did not establish that the accused persons had an intention to kill the deceased and from what the accused persons told the police the 1st accused only slapped her once. The death was not premeditated and accordingly I find the accused persons guilty and convict them for Manslaughter contrary to **Section 202** of the Penal Code as read with **Section 205 of the same Act.**

Signed, dated and delivered in open court this 20th day of December 2018.

E. N. MAINA

JUDGE