REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 38 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

C.A.A.....ACCUSED

R U L I N G

1) The deceased minor, **S.N.W.**, was aged about 3 years in October 2016. She lived at Karagita, Naivasha with her mother **C.N.A.** (**PW6**), a brother in kindergarten **A.F.** (**PW2**), an older cousin/brother aged 10 years **J.O.T.** (**PW3**) and the maternal grandmother **M.A.** (**PW5**). Prior to the 23/10/2016 **PW6** had travelled to Ndabibi in the company of **PW3** to harvest some maize, leaving **PW5** to care for **PW2** and the deceased.

2) On the morning of the said date, a Sunday, **PW5** left home for Zayuni church which is close by the family home. Accompanying **PW5** were the deceased and **PW2**. On arrival, **PW5** entered the church leaving her two minor grandchildren playing outside. It was while they were playing outside, according to **PW2,** that the children were approached by the Subject herein who offered *mandazi* to them. He had a mobile phone too and allegedly persuaded the deceased to accompany him to get more *mandazi*. That was the last time the deceased was seen alive.

3) Despite **PW2** informing his grandmother about the departure of and the subsequent search for the deceased, she could not be found on that date and for next seven days. The local *Nyumba Kumi* (Community Policing group) mobilized by **Moses Wanyeki Nywandaru** (**PW8**) together with members of public combed the village and vicinity of the church to no avail.

4) During the same period, two other young girls had similarly disappeared, causing anxiety in Karagita. Seven days later, on 30/10/2016 while **PW2** and **PW3** walked within Karagita, the former spotted the Subject and informed **PW3** that he was the boy who had taken the deceased away. The Subject was apprehended by members of the public who threatened violence, forcing **PW8** to rush him to the local Police Post. On arrest, the Subject wore a blood-stained shirt and carried a long stick whose tip appeared to be stained with blood.

5) Within hours, the decomposing body of the deceased which was badly mutilated was discovered in a thicket close to Zayuni Church. It was photographed before removal to the mortuary. Body tissue of the deceased and the Subject's blood sample, shirt and stick were retrieved by police. These were escorted to the Government analyst in Kisumu. **Richard Kimutai** (**PW7**) who conducted the analysis.

6) According to the post mortem examination conducted on the body of the deceased by **Dr. Ngulungu** (**PW1**) the body bore multiple and extensive tears in the genitalia including the anal area, bladder and rectum, being evidence of forced penetration with a blunt object. The left limb had been chopped off at mid-forearm. The face bore bruises on the mouth and nose with deformation and loose nasal bridge. The cause of death was determined to be asphyxia due to pressure to the nose and mouth, perineal tears and severed limb.

7) The foregoing is the summary of the prosecution evidence led in support of the charge laid against the Subject on 15th November 2016, namely Murder contrary to Section 203 as read with Section 204 of the Penal Code. The information states that between 23rd and the 30th day of October, 2016 at Karagita Estate in Naivasha Sub-County within Nakuru County, jointly with others not before court, he murdered **S.N.W.** He pleaded not guilty and was represented by Mr. Mburu.

8) The prosecution having closed its case, the court's duty at this point is to establish whether a *prima facie* case has been established by the prosecution to warrant placing the Subject on his defence.

9) In the celebrated case of **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332** at **pages 334** and **335** the Court of Appeal for Eastern Africa defined a *prima facie* case as follows:

> **"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if at the close of the prosecution, the case is merely one "which on full consideration might**

possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight sufficient to put the accused on his defence." A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence…….. <u>It is may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence</u>." (emphasis added).

10) The term *prima facie* case is defined in Black's Law Dictionary Vol. 8 as follows:-

"The establishment of a legally required rebuttable presumption….. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in party's favour.

Similarly *prima facie* evidence is defined as:

"Evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced."

11) I have found a persuasive and useful definition of the term *prima facie* case in the decision of the Federal Court of Malaysia, in **PP -Vs- Mohamed Radzi bin Abu Bakar [2005] 6MLJ 399**, as quoted by **Nyakundi J** in **Repubic -Vs- Alex Mwanzia Mutangili [2017] eKLR**. The relevant passage states:

"(i). [At] the close of prosecution case, subject the evidence led by the prosecution in its totality to a maximum evaluation, carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from evidence if the evidence admits of two or more inferences, then draw the inferences that is most favourable to the Accused.

(ii) Ask yourself the question: if I now call upon the Accused to make his defence and he elects to remain silent, am I prepared to convict him on the evidence now before me? If the answer to that question is YES, a prima facie case has been made out and the defence should be called. If the answer is NO, a prima facie case has not been made out and the Accused should be acquitted.

(iii) ……..;

(iv) ……."

12) With the foregoing in mind, I have carefully scrutinized in its totality the prosecution evidence outlined earlier. In my considered view, there can be no doubt whatsoever that the deceased was lured away from her minders on the morning of 23rd October, 2016 and that her mutilated body was traced one week later. According to the evidence led by the pathologist, **PW1**, the child may have met her death on the same day she vanished.

13) Equally, it is beyond disputing that whoever lured away the deceased, either by himself or with others subjected her to gross sexual molestation, and inflicted upon her severe bodily injuries from which she died. The intention by the molester to cause death is manifest from the facial injuries related by **PW1** to asphyxia as well as the gruesome tears in her genitalia.

14) What has seriously exercised the mind of the court in considering this gory murder is whether the prosecution has established a credible and *prima facie* nexus between the Subject herein and the disappearance and death of the deceased. In other words, has the Subject been credibly identified as the person who led the deceased away to her macabre death?

15) In a bid to answer this question, I have reviewed the evidence by the minor **PW2** and the church leader **R.N.M**. (**PW4**). They allegedly saw the Subject on the material date at the church, and according to **PW2**, the Subject persuaded the deceased to accompany him to get *mandazi*. Neither of these persons however had seen the Subject prior to the fateful date. **PW2's** evidence was of critical importance. However, because **PW2** was a child aged 3 years, Section 124 of the Evidence Act provides that the evidence of such a witness be supported through corroboration. This is true whether or not an identification parade had been conducted in respect of **PW2's** identification of the Subject. See also **Kibangeny Arap Kolil -Vs- Republic [1959] EA 92.** I shall return to that matter later on.

16) Suffice for now to set out the provisions of Section 124 of the Evidence Act here:-

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

PW2 was a kindergarten child at the material time and, in course of his testimony was unable to cite dates connected to the events about which he testified. He was evidently a child of tender years.

17) For her part, **PW4** stated that on the morning of 23rd October, 2016 at 9.00am she spotted the Subject enter the compound where she lived. Believing that he was headed to the Holy Spirit Church in the same compound, **PW4** continued with her chores. She testified that later on she left home for her Zayuni Church. That once more she encountered the Subject at the gate of the Zayuni church. At the time, the Subject was allegedly engaging **PW2** and his sister with a phone that he was showing to the minors. **PW4** went inside the church and only learned later from **PW5** that the minor girl was missing.

18) On 30th October, 2016 **PW4** was summoned by the Subject's arrestors to confirm his identity. She complied. According to **PW4** the Subject wore the same clothes on the two occasions. In court, **PW4** identified the shirt (Exhibit 3). Not only did this witness have no familiarity with the Subject before, but also no proper identification parade was conducted. In **PW4's** evidence, there is no mention of any special feature or mark on the Subject or his clothes that made him stand out when she first saw him at her compound, and later at the Zayuni church. Neither did **PW4** speak to the person stated on both occasions. Besides, **PW4** was inside her church when the Subject allegedly vanished with the deceased.

19) **PW2** and **PW3** testified that on 30/10/2016 they met by chance with the Subject within Karagita, and the former reportedly told the latter:-

> **"Do you see that boy? He took S.N.W. (Deceased) to go buy *mandazi*."**

There was some slight discrepancy as to the place where this chance meeting happened. **PW2** said it happened in church, while **PW3** said it happened as the two boys *"were playing while going to dad's"*. The reference to dad by **PW3** is to his own father and apparent uncle to **PW2**.

20) Be that as it may, it is not unreasonable to conclude **PW2** had by that time been questioned about the identity of the boy who led the deceased away. And further that **PW2** was keeping his eyes open to see if he could by chance find him. It may well be that this was one of the reasons that he and **PW3** left home together on the material date. Equally, there can be no doubt that the disappearance of **S.N.W.** must have caused real anxiety to the young witness. Therein lies the danger that **PW2,** suspicious and under pressure to identify the culprit who took away **S.N.W.** could easily have made a genuine mistake.

21) That is why it was essential in this case, particularly for **PW4** that an identification parade be held. In this case she was the only person who could have given support to **PW2's** testimony. Unfortunately it does seem that in their zeal, genuine as it was, **PW8** and his assistants exposed the Subject to potential witnesses such as **PW4**. In the result, the testimony regarding the identification of the Subject by **PW2** remains uncorroborated by a key witness **PW4** and whose evidence consequently amounts to no more than dock identification.

22) As observed by the Court of Appeal in **Ajode -Vs- Republic [2004]2 KLR 81** mere dock identification evidence has no probative value:-

> *"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade (see case of Gabriel Kamau Njoroge -Vs- Republic [1982 – 88] 1 KAR 1134)."*

23) Thus, there is no credible identification evidence to place the Subject at the *locus quo* on the date when **S.N.W.** disappeared. However, the prosecution also relied on circumstantial evidence in the form of recovered exhibits and forensic analysis thereof. The critical exhibits were the Subject's blood-stained shirt [**Exhibit 3**] and the long blood-stained stick he was in possession of on arrest [**Exhibit 2**]. These items, together with the Subject's blood sample and deceased's tissues were analysed by **PW7**.

24) As contained in his report [**Exhibit 5**] **PW7's** conclusion and opinion was that:-

> **"Based on the above findings (DNA profiling), the DNA profile generated by the blood stains from the shirt item "C" matches the DNA profile of C.A.A. (Accused), whereas that generated by the blood stain from the stick item "D" belongs to an unknown female and has no genetic relationship with either the DNA profile of the deceased's or the Accused."**

25) It is bizarre in my view, that the Subject was on arrest in possession of a stick whose tip was stained with female blood. But that is all there is to the matter; the bloodstain is not related to the deceased. For the purposes of this case, the court cannot require the Subject to explain his possession of the stick, much less his bloodstains as found on his shirt.

26) It is significant in my opinion, that in the material period as detailed by **PW8** and the investigating officer, **PW8**, two other girls of the same age as the deceased had disappeared and been murdered in a similar macabre fashion. Allegedly, the bizarre killings were connected with suspected cult activity among some of the residents in Karagita said to practice witchcraft.

27) That the abductions and subsequent cruel murders of the young girls remain unsolved strikes at the heart of any human being. For the parents of the deceased children the pain and loss must be heartbreaking. However, as offensive, ghastly and cruel as these murders, including the instant one were, this court must be guided by the law in determining whether in this case, the Subject has been shown *prima facie*, to be the culprit.

28) Having carefully analysed the available evidence in this case, I must come to the conclusion that a *prima facie* case has not been established against the Subject; if the court were to find otherwise on the available evidence and proceed to place him on his defence, the court could not convict if he elected, as would be his right, to remain silent. Having so found I must acquit the Subject under Section 302 (1) a) of the Criminal Procedure Code. It is so ordered.

Delivered and signed in Naivasha this 13th day of October, 2017.

In the presence of:-

Miss Kavindu for the DPP

Mr. Mburu for the Subject

Subject – present

CC – Barasa

C. MEOLI

JUGDE