



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 14 OF 2015

REPUBLIC

VERSUS

J M B alias M M

JUDGEMENT

1. The accused, J M B alias M M has been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 4th July, 2015 at [particulars withheld] in Magharini Sub-County within Kilifi County he unlawfully murdered N S S. He pleaded not guilty to the charge leading to a full trial in which the prosecution called fourteen witnesses. Upon being placed on his defence, the accused testified as DW1.

2. PW1, K S M, the father of the deceased, N S S, testified that on 3rd July, 2015 he instructed the deceased to take food to him at the farm, about 4.5 kilometres away from home. She arrived at 1.00 p.m. with the food. He then gave her firewood and some vegetables to carry back home. When he arrived home at 5.00 p.m. he noticed that the deceased had not arrived home with the firewood and vegetables. He went to look for her at Redcross area where his wife, PW3 C S M worked. He discovered she had not gone there and they started looking for her.

3. The following day PW1 together with their son PW8 I K K went and reported the incident to the village elder, the late Kadenge Mwango. They then started the search with the village elder and his wife. They were joined by PW6 Justus Papa and the accused. They divided themselves into two groups and after searching for a while PW6 alerted them that they had seen the vegetables. They all converged there and followed what appeared to be signs of disturbed vegetation which led them to the body of the deceased about 100 metres away. Before reaching where the body was the accused commented in Kiswahili that “**kazi ilikuwa hapa**” roughly translating to “**work was done here.**”

4. PW1 went and reported the matter at Adu Police Station. He later recorded a statement with the police. The body was removed to Malindi District Mortuary where he later identified the body to a doctor who conducted post-mortem.

5. PW1 further testified that on 3rd May, 2014 about a year prior to the murder of his daughter the accused had entered into his girls’ house and hid under the bed. The accused was pardoned after he sought forgiveness before the village elders and gave a written apology.

6. Upon cross-examination PW1 indicated that he had not disclosed in his statement to the police the

incident of the accused's invasion of his children's room as he was not present when the incident happened. He confirmed that the accused helped in the search for the deceased but it was PW6 who first saw the vegetables basket and it was Mzee Kadenge Mwangi who first sighted the body. He stated that the place where the accused said "**kazi ilikuwa hapa**" was disturbed. His evidence was that the police took photographs at the scene and that the clothes of the deceased and the basket were not before court.

7. At a later date, PW1 was recalled to identify the exhibits. He identified the lessa as belonging to the deceased. He, however, denied that the skirt shown to him belonged to the deceased saying that it was even different from the one in the photographs that had been taken at the scene. He was stepped down and never called back.

8. PW2 Kenneth Chengo Kazungu was at Adu shopping centre on 5th July, 2015 when he met the accused, his sister's son, who asked him to give him Shs. 2,000 so that he could go and hide as the relatives of the deceased suspected he had killed her. The accused also informed him he was selling his house. PW2 testified that the accused denied being the killer. PW2 then proceeded to Adu Police Station on a different mission and the accused was taken there by PW4 W C M. He was advised by the police to record a statement.

9. On cross-examination, PW2 stated that the Shs. 2,000 was a deposit for the purchase of the house whose price was to be agreed later.

10. PW3 the mother of the deceased told the court that on the material day she returned home at 2.00 p.m. and prepared a meal which the deceased took to her father (PW1). At 5.00 p.m. she realised the deceased had not come home, which was unusual. PW1 also enquired from her about the deceased. She reported the matter to the village elder who told her she had seen the deceased go to the farm but had not seen returning.

11. The evidence of PW3 is that the next day her husband and son went to search for the deceased. She later heard screams and proceeded to the scene. On arrival she saw the body of the deceased which had been dragged to the forest. Whoever killed her had also tied a lessa around her neck so as to give the impression that she had hanged herself. The scene was disturbed.

12. Referring to an incident that had taken place one year prior to the murder, she testified that on 4th May, 2014 she instructed her children to lock the door and went to attend a funeral wake nearby. After a short while she came back home with one Mwashe. While talking outside they heard her children scream. It was then that the accused ran out of the house. She later referred the matter to the elders and upon discussion the accused's apology was accepted. Her testimony was that the accused had not done anything at the time the children screamed.

13. During cross-examination, PW3 stated that the body was found about 100 metres from their home and that the home of the accused is about 30 metres from their home. She recounted that none of her neighbours told her that they heard screams on 3rd July, 2015. Further, that the accused had gone to her house on the morning of 4th July, 2015 and asked her who they were looking for and when he gave him the answer he asked why they had not informed him so that he could assist. He then went to search for the deceased. In respect to the 2014 incident she stated that the accused did not sexually molest her children but the village elder had decided that he should be ejected from the village and that is when he pleaded for mercy.

14. The account of PW4 W C M, the younger brother of PW1, was that upon receiving a call informing him of the deceased's death on 4th July, 2017 he immediately travelled home from Malindi. At home he proceeded to the scene about 4 kms away. He found the body already covered with clothes. The body was later taken away to the mortuary.

15. Later in the evening he received information that the accused was in the process of selling his house and household items as some people suspected he was the killer.

16. The following day he received further information that the accused wanted to leave the village secretly and that is when the villagers arrested the accused and escorted him to the police station. Upon cross-examination PW4 admitted that none of the people who informed him about the accused's intention to leave the village recorded a statement with police.

17. PW5 Reverend Raymond Jefa Dyeka, a pastor at a local church, informed the court that on 3rd June, 2014 PW3 summoned him to her house and informed him that the previous night the accused had entered the house with the intention of defiling the deceased. While still there, they were joined by village elders led by Kadii Charo Jefwa. They discussed the matter and sent for the accused. The accused admitted having entered the house with the intention of defiling the deceased. He, however, sought forgiveness in writing which was accepted by the village elders and PW3. PW5 cast aspersions on the character of the accused.

18. Upon cross-examination PW5 stated that PW3 had other daughters, some older and others younger than the deceased. Further, that those daughters were present during the accused's intrusion. Asked why he thought the accused wanted to defile the deceased, he stated that the accused desired her but the deceased did not want him.

19. PW6 Justus Papa stated that on 3rd July, 2015 he learned that the deceased had not returned home from the farm. The next day he went to the home of the deceased and found the first search party had left for the farm in the forest. The accused found him at the home of the deceased and together they proceeded to the forest. At the forest they met the advance search party and upon the suggestion of the accused they split into two groups. He remained with accused.

20. PW6 testified that during the search he saw a basket and called the accused who refused to come and instead told him to call the others so that they could see the basket together. He called the others. Upon arrival they continued with the search and saw disturbed ground. He thought the accused was behind them but he was nowhere to be seen. It was then that the late Kadenge Mwangi spotted the body of the deceased. Her skirt was bloodstained and a lessa was tied around her neck. They screamed and people came but the accused was not near the body. He later recorded a statement with the police. He also later received information that the accused had been arrested.

21. When cross-examined PW6 explained that he assisted with the search but the clothes and basket were not in court though they were in the photographs.

22. PW7 Kadii Charo Jeffa gave an account of the incident of 2014. He stated that on 3rd May, 2014 he was summoned to the home of PW1 by the village elder. There, the deceased narrated to them how the accused had entered their house the previous night. After deliberations they decided to evict the accused from the village. The decision was however not effected as the accused sought forgiveness from the family of the deceased. About a year later the deceased was found dead in a forest.

23. Upon returning home from work on 3rd July, 2015 PW8 I K K was informed by his father (PW1) that his sister (the deceased) had not returned home from the farm. He went to look for her in neighbouring houses where he received information that she had been seen going to the farm. He reported the matter to the village elder the late Kadenge Mwangi who advised him to report the matter to the police which he did. Together with others who included Alloys and Samson they continued looking for her in vain.

24. Early the next morning they resumed the search with his father and PW6. They were joined by the accused who advised them to split into two groups. After about twenty minutes they were called by PW6 who was a member of the other search party. He had found the basket. There was evidence of a struggle which led them to where the body was. The body was spotted by the late Kadenge Mwangi. It is the evidence of PW8 that the deceased was killed.

25. The court found PW9 M A to be a child of tender years and after putting her through *voir dire* examination allowed her to give sworn testimony. Her evidence was that the deceased was her friend.

On 3rd July, 2015 at around 1.00 p.m. she met the deceased carrying a basket. They exchanged salutations and the deceased told her she was taking food to her father in the farm. Shortly after parting ways with the deceased she met the accused who was heading in the same direction as the deceased. The accused who had a blue trouser and a red T-shirt with a stripe across the chest, asked her if she had seen the deceased and she told him she had seen her heading to the farm.

26. The following morning she learned that the deceased had been killed. She went and saw her body which was about one kilometre from where she had met the accused. The deceased had a green shirt and there was blood on her private parts. Upon cross-examination she testified that the accused never told her why she was looking for the deceased.

27. PW10 Biryu Fondo, a boda boda rider met the accused with others on 4th July, 2015 at 7.00 a.m. and they informed him they were going to search for a lady who had disappeared the previous day. He followed them twenty minutes later and found the body had been discovered. PW6 informed him that the accused had showed him the body. The body was on the ground and appeared to have been dragged as the feet had blood. He took photographs and later recorded a statement with the police. His evidence was that the accused was his classmate and he had no grudge against him.

28. George Lawrence Oguda, a Principal Government Chemist based at Mombasa testified as PW11. On 10th July, 2015 he received an exhibit memo form accompanied by labeled exhibits in a plastic bag. The exhibits were a grey skirt wrapped in a white bag, a high vaginal swab sample, pubic hair, a pair of blue jeans in a khaki envelope, a T-shirt in a khaki envelope, a sample of the accused's blood and a sample of the deceased's blood.

29. Upon analysis the grey skirt tested positive for human blood and human semen. It also generated a DNA profile which included the deceased's blood as well as that of the accused. He produced a report dated 8th November, 2016 as an exhibit.

30. PW12 Police Constable Lazarus Mobagi was at the material time stationed at Adu Police Station. His testimony was that on 3rd July, 2015 at about 3.00 p.m. he was riding a lift on a lorry on his way to duty at Sabaki Bridge. It was then that he met the accused who lived near Adu Police Station and sometimes did manual work for him. PW12 testified that while in the lorry the driver received a call from one Zawadi that a jacket had been left in the lorry. PW12 gave the jacket to the accused and told him to take it to Zawadi.

31. When PW12 went to the station the next day he found that a murder had been reported. He visited the scene with the OCS and saw the body inside a forest. There were no weapons. He recalled that he had met the accused about 200 metres from the scene the previous day. He visited the scene in the company of the OCS and the deceased's relatives. His evidence is that pubic hair, the deceased's blood and the accused's blood were collected as samples. He also identified the exhibits collected from the scene.

32. Upon cross-examination, PW12 stated that he met the accused at 3.00 p.m. walking alone while breathing heavily. He also stated that neither the driver nor the loader of the lorry recorded statements. His testimony was that he heard people say the accused had led them to the body.

33. PW13 Police Constable David Irungu, a gazetted scenes of crime officer told the court that in October, 2015 he received a CD containing seven photographs from the OCS Adu Police Station Chief Inspector Beethoven Gachagwa. He processed the photographs showing the body of the deceased and the scene of crime. He produced the photographs and a certificate of photography. When questioned by the defence he confirmed that he did not take photographs but only processed them.

34. Chief Inspector Beethoven Gachagwa, the OCS Adu Police Station who is the investigating officer testified as PW14. His evidence was that on 4th July, 2015 at about 7.30 a.m. he received a report from PW1 and a village elder that the body of the deceased had been found. He proceeded to the scene where

he saw a lessa tied to the neck of the deceased. She had a grey skirt but no underwear. He took photographs at the scene and removed the body to the mortuary at Malindi. He also attended post-mortem and took samples.

35. On 5th July, 2017 members of the public took the accused to the police station and informed him that he was preparing to flee from the area. He rearrested the accused and later conducted a search of his house where he recovered the clothes he was alleged to having been wearing on the day the deceased went missing. On 10th July, 2015 he took to the government analyst the clothes of the deceased and the accused together with their blood samples. He also drew a sketch plan of the scene. He formed the opinion that the accused murdered the deceased and had him charged. The witness produced various items as exhibits.

36. When questioned by the defence counsel, PW14 stated that nobody saw the accused committing the crime. He stated that the accused told him he wanted to leave the area as he was suspected of committing the murder. PW14 told the court that he took the photographs using a digital camera and later gave the scenes of crime personnel the memory card. He stated that he was unaware if the accused's clothes matched the deceased's samples. His evidence was that someone had called the lorry driver requesting that the jacket be given to someone.

37. PW14 admitted that the sketch plan was undated and unsigned but he confirmed that he was the one who prepared it. He clarified that he did not indicate in his statement that the accused had tried to defile the deceased in 2014. He concluded by telling the court that he had recorded a statement from Kadenge Mwango who passed away before testifying and that the witness had told him he was the first to see the body of the deceased.

38. The accused testified in his defence as DW1. He stated that on 4th July, 2015 he was at home when PW6 went and told him that a neighbour's child had not returned home since being sent the previous day to take food to her father. He headed to the neighbour's home to find out more and joined the family in the search. When they arrived in the farm they searched for about one and a half hours before they heard somebody scream ahead of them. They went to the source of the screams where Mzee Kadenge showed them the body. People who included police officers came to the scene and the body was later removed to the mortuary. The next day at around 9.00 a.m. he was stopped by one Mzee Alfred Kasiwa who told him to stop failure to which he would be stoned. He was arrested and escorted to the police station where upon interrogation he denied knowledge of the circumstances leading to the deceased's death. He was nevertheless charged for the murder of the deceased.

39. In a criminal trial, except where an accused claims insanity or the law provides otherwise, the duty to prove an accused's guilt remains the responsibility of the prosecution throughout the trial. The standard of prove is one of beyond reasonable doubt.

40. In the case at hand, nobody saw the accused kill the deceased. The prosecution adduced circumstantial evidence.

41. The duty of this court is therefore to consider whether or not the inculpatory facts placed before the court by the prosecution are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. As was stated in **Musoke v R. [1958] EA 715**, before drawing an inference of an accused's guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

42. The Court of Appeal in **Abanga alias Onyango v R., Criminal Appeal No. 32 of 1990 (UR)** expounded on the principles applicable to circumstantial evidence thus:

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

(iii) the circumstances taken cumulatively, should form a 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.”

43. In light of the evidence that was adduced in this case, I get it that the prosecution wants me to draw inference as to the accused's guilt from the DNA analysis, alleged attempted defilement of the deceased in 2014 and the sighting of the accused not far from the scene on the date the deceased is presumed to have been murdered.

44. Although PW9 gave sworn testimony, it was observed that she was a child of tender years hence the need for the *voir dire* test. This court therefore needs to warn itself of the dangers of solely relying on the evidence of such a witness. This warning is in line with the decision in **Kibangeny Arap Kolil v R. (1959) EA 92** where it was stated that:

“But even where the evidence of a child of tender years is sworn (or affirmed) then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it if uncorroborated, without warning itself and the assessors (if any) of the danger of so doing.”

45. Having so warned myself about the dangers inherent in relying solely on the evidence of PW9, I will proceed to consider her evidence. She told the court that on the material day she first met the deceased who told her she was taking food to her father. After they parted ways she thereafter met the accused near a church. The accused enquired if she had seen the deceased. PW9 told him that she had met the deceased going to the farm. This witness stated she had no grudge against the accused. The accused never offered a rebuttal against this evidence. There is nothing on record to make me doubt the evidence of PW9.

46. The evidence of PW9 was supported by that of PW12 who stated that he met the accused a few hours later about 200 metres from the place that the deceased's body was later found. Again this evidence was not rebutted by the accused. There is nothing on record to make me question the truthfulness of this witness. Both PW9 and PW12 knew the accused very well before that day.

47. The evidence of PW9 and PW12 was boosted by the evidence of PW11. His evidence was clear that an examination of the deceased's skirt generated a mixed DNA profile showing elements from the blood samples taken from the deceased and the accused. This evidence squarely places the accused at the scene of the alleged crime. It confirms that the accused had an opportunity to commit the crime. The expert evidence was also not in any way challenged by the accused.

48. The incident that happened in 2014 cannot lend much credence to the prosecution case. Even though some of the prosecution witnesses tried to use that incident as evidence of the accused's obsession with the deceased, the evidence clearly shows there were many girls where the accused was hiding.

49. I would also not put any weight on PW6's testimony on the behavior of the accused on the day the body of the deceased was found. The evidence of PW6 is clear that he is the one who first saw the basket and the late Kadenge is the one who found the body of the deceased. The claim by some of the witnesses, including PW10 and PW12 that the accused is the one who led the search party to the discovery of the body is therefore unfounded. PW10 and PW12 were not present when the body was found.

50. There was also the evidence that the accused wanted to flee the village. Whereas it is indeed clear that the accused was preparing to escape from the village, his action is not evidence of guilt. He told those he met that he had been fingered as the killer and he wanted to flee for his life.

51. Nevertheless, I find that the circumstantial evidence adduced in this case confirm that the accused met the deceased on the date of her death. The question is whether he is guilty of murder as charged.

52. In **Republic v Mohammed Dadi Kokane & 7 others [2014] eKLR**, M. Odero, J highlighted the ingredients of a charge of murder thus:

“The offence of murder is defined as follows by section 203 of the Penal Code:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. They are:

1. The fact of the death of the deceased.

2. The cause of such death.

3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

4. Proof that said unlawful act or omission was committed with malice aforethought.”

53. There is no doubt from the evidence adduced by the prosecution that the deceased died and was buried. The evidence that was adduced confirmed that the cadaver of the deceased was found in a forest, retrieved and placed in a mortuary before being interred. In fact the evidence on record established that post-mortem was performed on the body of the deceased.

54. However, no evidence was placed on record to establish the cause of the death of the deceased. Post-mortem was indeed carried out on the body of the deceased but the report was never produced as evidence. This oversight is fatal to the prosecution case. In the circumstances of this case, it is only the doctor who could have said what exactly killed the deceased. Witnesses saw blood on the private parts of the deceased and even the photographs adduced confirmed this fact. There was no allegation of any external injury on the body of the deceased. As stated in the cited case, it is necessary for the prosecution to establish the cause of death.

55. Maybe if the deceased had multiple cuts on her body or the body was decapitated one could say the cause of death speaks for itself. In the instant case, without the evidence of an expert, one cannot attribute the deceased's death to a human hand. It is not enough for the prosecution in a murder case to establish that the victim died. It ought to go ahead to show that the death was not caused by natural causes but the hand of the person accused of causing the death. This court cannot speculate as to what may have caused the demise of the deceased. The prosecution has failed to prove the ingredients of the charge of murder.

56. In the circumstances of this case, I find the charge against the accused unproved to the required standard. In line with the law, the benefit of doubt goes to the accused. He is acquitted of the charge facing him and set free unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 13th day of October, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT