



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 46 OF 2009

BETWEEN

REPUBLIC PROSECUTOR

AND

EZEKIEL OBIERO MANGWANAACCUSED

JUDGMENT

1. **EZEKIEL OBIERO MANGWANA** (“the accused”) was charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on 30th November 2009 at Uhui Sub-location, South Ugenya Location in Ugenya District within the then Nyanza Province, he murdered **JACKLINE AUMA ARUNGA**. The accused pleaded not guilty and the trial commenced before Karanja J., who was transferred before he could complete the trial. The matter continued before Chemitei J., and I took over the matter and completed it. The case against the accused was based on circumstantial evidence and was supported by 10 witnesses. The accused elected to give an unsworn statement in his defence.

2. On the evening of 30th November 2009 at about 6.00pm, the 6-year-old deceased, her brother, Andrew Keah Joseph (PW 6) and his sisters, Mercy Atieno (PW 7) and Loise were at home when their mother sent the girls to the posho mill. PW 7 testified that while on the way, the deceased told them that she wanted to go back home. When they returned home without the deceased, their parents started looking for her frantically.

3. The deceased’s father, Joshua Arunga Keya (PW 2), testified when the other children arrived without the deceased at about 7.00pm, he and his wife started looking for her. He went to report the matter to the village elder, Peter Omuhunjai (PW 3). PW 3 confirmed that PW 2 came to see him at about 8.00pm. He told him to report the matter to the Assistant Chief on the next day but to keep searching for the deceased in the meantime.

4. On the next day, PW 2 reported to the Assistant Chief, Uhui Sub-location, Wycliffe Thomas Ochieng (PW 3), that his daughter was missing. By the time PW 3 received the report, he had already been informed by PW 1. PW 3 recalled that he had also started receiving information that the accused was the last person to be seen with the deceased.

5. One of the people who heard that the deceased was being looked for was Lutta Wycliffe Muyekho (PW 4) who recalled on the evening of 30th November 2009, at around 6.00pm, as he was going to Musanda market, he saw a girl, whom he knew by appearance only as she was from the village, following the accused whom he knew as Omondi. He gave this information to the deceased’s mother when she came to

inquire in the morning.

6. Also on the same evening, Alice Caroline Adhiambo (PW 5), recalled that she met the accused, whom she knew as Omondi, walking with a child as she was going home. She greeted the accused but he did not respond. She knew the girl was from the village and when the deceased's mother came to her place looking for the deceased, she informed her mother that she had seen her with the accused. She also testified that on the next day, she met the deceased's mother and they went with her to look for the accused. They found him at PW 2's homestead and he asked them whether they had found the child. PW 1 also testified that he found the accused at PW 2's homestead. When PW 1 questioned him, the accused told him that it was the deceased who was following him. He apprehended the accused and handed him over to PW 3. PW 2 confirmed that dress shown to her and recovered near the river is the one the deceased was wearing when she saw with the accused.

7. PW 2's brother, William Ochango Keya (PW 8), recalled that PW 2 came to see him on the morning of 1st December 2009 about his lost daughter. Thereafter, he went, together with other villagers including PW 6, to that banks of River Firatsi to look for the deceased. He testified that the river was not far from the deceased home and when they started searching, they saw footsteps in mud near the river and in a bush, they found faeces, a cap and dress. PW 8 stated that he knew that the cap belonged to the accused as he was a neighbour. After finding the cap and dress, they called the police who came but on that day, they did not find the deceased's body.

8. The investigating officer, Corporal Moses Tali (PW 9) testified that on 30th November 2009, he was at Sigomere Police Post when he received the accused who had been brought by PW 3 on the allegation that he was the last person seen with the deceased who had gone missing. Together with other police officers and members of the public, he went back to the village and searched for the deceased but without success. As they were searching for the deceased along River Firatsi within Uhui Sub-location, they recovered a black cap which members of the public identified as belonging to the accused.

9. Although some people volunteered to dive into the river to look for the deceased's body, they did not find her. They also recovered underpants and a dress which the deceased's parents confirmed belonged to the deceased. On 10th December 2009, the deceased's body was found floating in the river about 20 metres from where the items of clothing had been recovered. PW 9 organised for the body to be taken to Siaya District Mortuary for a post mortem to be done.

10. Dr Collins Odinga (PW 10) produced the post mortem report on the deceased's body on behalf of the Dr Esiaba under the provisions of **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Dr Esiaba conducted the post-mortem on 14th December 2009. At the time the body was decomposing and the skin was peeling off, the significant finding is that there was a fracture of the right parietal bone of the skull. As a result, he certified that the cause of death was a head injury inflicted by a blunt object.

11. The accused denied that he had committed murdered the deceased when he was put on his defence. In his unsworn statement, he told the court that on the morning of 1st December 2009, he was going home in the morning after working in a jaggery the whole night. He went home, had breakfast and decided to go back to work. On his way he met a village elder and some youths, he had seen earlier while going home. This time elder confronted him and took him to the Assistant Chief who then took him to Sigomere Police Post. He stayed there for 2 days and then he was taken to Ukwala Police Station. He claimed that he was beaten by police officers and told to confess that he had murdered the deceased.

12. To prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the prosecution must prove the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

13. As regards the first ingredient, the evidence is clear that the deceased did not die from natural causes. He body was recovered 9 days after she had disappeared and with a fractured skull. I have no doubt that

she died as a result of a head injury inflicted by a blunt object as confirmed by the post mortem conducted by Dr Esiaba.

14. On the issue as to whether the accused is the person who committed act that led to the deceased's death, the prosecution case is grounded on circumstantial as no one saw the accused murder the deceased. The principle applicable in considering this kind of evidence was articulated by the Court of Appeal in ***Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)***, where the Court observed that:

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.

15. In order to establish the accused's culpability, the prosecution relied on the fact that the accused, who was a well-known person in the village, was the last person seen with the deceased before she disappeared after she left PW 7 and her other sister on the way to the posho mill. Within the space of about one hour, the accused was seen with the deceased by PW 4 and PW 5 and when the other children returned home, the deceased was missing and despite a frantic search by the parents on that night and in the morning, the deceased could not be found. Furthermore, on the morning after the deceased disappearance, the accused made a statement to PW 1 that the deceased was following him the previous evening.

16. Since the evidence exclusively points to the accused as the last person to be seen with the deceased, he shoulders the evidential burden to provide a reasonable explanation what happened to the 6 year old child he was seen with before she disappeared. **Section 111(1)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which casts the evidential burden on the accused, in certain instances, provides as follows:

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

17. Where the accused fails to offer any reasonable explanation as to how the deceased came to be found dead in the river a few days later, the court is entitled to presume certain facts under **section 119** of the ***Evidence Act*** which states as follows:

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

18. The accused unsworn statement is nothing more than an account of his arrest. He said nothing of the fact that two credible witnesses saw him with the deceased on the evening before she disappeared. He also told PW 1 that the deceased was following him the evening before. In addition, before the deceased's body was recovered, the accused's cap and deceased's dress were found at the river bank near his home.

The cap, produced in evidence, was identified PW 2 and PW 8 as one belonging to the accused. The dress was identified as that of the deceased by PW 2 and was the one PW 5 had seen her wearing on the evening before she disappeared. The accused cap and the deceased's dress also points to the fact that the accused and deceased were together at the river bank. In his defence, the accused did not say anything about his cap let alone the dress. Although I did not hear the witnesses, there was no suggestion in cross-examination, that they were motivated by any ill-will or grudge against the accused and the tenor of their evidence was fairly consistent as to what they saw and observed on the evening of the deceased's disappearance.

19. The sum of all this evidence is that on the evening of the 30th November 2009, the accused lured the deceased to follow him and while he was with her, he was seen by PW 4 and PW 5. He took her to the banks of River Firatsi where he removed her clothes proceeded to assaulted her. He hit her on the head thus fracturing her skull and dumped her body in the river. In the course of his dastardly act, he also left his cap behind. Thereafter and in order to cover his tracks, he appeared at the deceased's parents homestead pretending he was concerned for the deceased but he was arrested due to very strong suspicion against him. All this evidence taken together points to one person and one person only as the perpetrator of the felonious act and that person is the accused.

20. The act luring a young innocent girl to the river bank and assaulting her on the head and thereafter throwing her into the river is neither an accidental nor innocent act. It is a deliberate act intended to cause grievous harm if not death. There is no doubt that the accused's actions were clothed with malice aforethought within the meaning of **section 209(a)** of the *Penal Code*.

21. I therefore find the accused, **EZEKIEL OBIERO MANGWANA**, guilty of the murder of **JACKLINE AUMA ARUNGA** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 20th day of November 2017.

D.S. MAJANJA

JUDGE

Ms Yogo, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.