



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL CASE NO. 9 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**L M N.....ACCUSED**

**JUDGMENT**

1. On 11<sup>th</sup> February 2010, the body of a nine year old girl, R N (hereafter *the deceased*), was discovered in an abandoned house. It had been stuffed into a white sack. The deceased was a step-daughter of L M N, the accused. According to E M, an elder brother of the deceased, the accused had picked up a blue wooden stool; and, hit the deceased on the head.
2. The State brought information to the High Court charging the accused for murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on 11<sup>th</sup> February 2010 in Uasin Gishu District of the Rift Valley Province, he murdered R N.
3. The accused pleaded *not guilty*. The trial opened before Azangalala J (as he then was). On 28<sup>th</sup> May 2013 the accused elected to start the case *de novo*. The prosecution called *nine* witnesses. Two of the prosecution witnesses were inadvertently styled as PW3. I will refer to Dorcas Nyambura Kihara as PW3; and, to Dr. Benson Macharia as PW3 "A".
4. S M (PW1) was the mother of the deceased. At the material time, she was married to the accused. She has since remarried. Her marriage to the accused did not yield any offspring. She came into the marriage with two children, E M (PW4) and R N, the deceased. R was aged nine at the time of her death. On 11<sup>th</sup> February 2010, PW1 had breakfast with the two children and the accused. She said her husband was the first to leave. The children then left for school at [particulars withheld]. PW1 then left for Nairobi.
5. She returned the same day at about 9:00 p.m. The accused was asleep but her son (PW4) was awake in the sitting room. She enquired about the whereabouts of the deceased. PW4 replied that R was lost. He said that they did not attend school in the afternoon; and, that R went back home to fetch her sweater but never returned. When she sought an answer from the accused, he went mum.
6. PW1 started a search for R. She was accompanied by PW4, the accused and a neighbor, PW3. They had a torch. They found the body of the deceased at about 9:30 p.m. PW1 saw a white sack at a corner of an abandoned house. She lit a match. When she went closer, she saw a leg sticking out. She opened the sack and confirmed it was the body of the deceased. She screamed. She said that the accused did not offer any help. Some neighbours responded and took her back to her house. Police officers later came

and took the body to the mortuary. PW1 said that her son (PW4) told her that the accused hit the deceased with a stool.

7. On cross-examination, she conceded that the accused had good relations with both children. He used to pay for their lunch at a local hotel. She said he would never beat up the kids. She is the one who used to discipline them. She testified that her son was normal but had a problem capturing dates or time. She could not recall PW4 saying that the accused put the body into a sack.

8. PW8, Margaret Wairimu, was running a hotel in the neighbourhood. She confirmed that at 8:00 a.m. on 11<sup>th</sup> February 2010, the accused paid Kshs 40 for his children's lunch and left. The children had lunch there on the material day. She learnt the following day that R had died.

9. PW2 was Dorcas Mbugua. She is a neighbor of the accused. On the material day, at about 10:00 a.m., she found the deceased outside her gate playing with another child. Both were dressed in school attire. The deceased told her that she had been chased away from school. PW8 asked her go and change her school uniform; and, to wait for her mother. At about 8:00 p.m., she saw the accused entering his compound. She later saw PW1, PW4 and the accused pass outside her gate. She then heard PW1 say "R, R" and then scream. She went there. She said the body had a bruise on the head and neck. On cross-examination, she said that she did not know whether PW1 used to beat up her children. In her statement to the police she had said that she used to.

10. PW4, E M, was 17 years at the time he gave evidence. He was thus about 14 years at the material time. Purely out of an abundance of caution, I carried out a detailed *voire dire* examination. I formed the distinct impression that he was intelligent; and, that he understood the perils of telling lies. He gave sworn testimony.

11. On the material date he said he was at home with the accused, the deceased and his mother. He said it was about 7:00 p.m. He said the accused picked up a blue wooden stool (exhibit 2) and hit the deceased on the head. The deceased's body went limp. The accused went outside, fetched a sack; and, stuffed her body into it. He said he did not follow the accused when he removed the body from the house.

12. PW4 said that his mother (PW1) was present during the incident. She was cooking and said nothing. He said when the accused returned home earlier, he was annoyed that PW4 and the deceased were not in school. He started beating them up using a black and blue pipe; and, some sticks (exhibits 3 and 4).

13. PW4 said that the accused said he was not the one who killed the deceased but a "chokoraa". He later joined the accused and PW1 in the search. They found the body in a "chokoraa's" house inside the sack. Upon cross-examination, he said his mother and the accused would beat them up occasionally. He said his mother continued to cook despite R's death. In further answer, he said that the stool was inside the house; and, that he saw the accused hit the deceased with it.

14. An autopsy was carried out by Dr. Benson Macharia (PW3 "A") at Moi Teaching and Referral Hospital on 16<sup>th</sup> February 2010. The body was identified by PW3, PW5, PW6 and PW7. The pathologist found a large bruise measuring 10x8cm on left cheek; and, another measuring 12x9 on the right side of the head. There were also bruises on the anterior aspect of the neck. There was bleeding in the brain cavity. In his opinion the death was caused by intra cranial bleeding due to head injury from a blunt force trauma. He produced the postmortem report (exhibit 1).

15. PW9 was Corporal Samson Owaga. He was the investigating officer. He took the statements from the witnesses. Upon cross-examination, he stated that he was directed by Office of the Director of Public Prosecutions to charge the accused with murder. There were four suspects including the mother of the deceased. The mother was held in custody for some time. The two other suspects were not arrested. He said that E M (PW4) was the eye witness. He conceded that the statement made by PW4 did not mention the hose pipe and sticks (exhibits 3 and 4).

16. That marked the close of the prosecution case. The accused was placed on his defence on 12<sup>th</sup>

November 2015. He elected to give sworn evidence. He also called one witness. The accused continued to protest his innocence. He said the following-

*“On 11.2.2010 I prepared the kids to go to school. I went to work. I used to sell cigarettes. I was a hawker. I left home at 7.00 a.m. On the way I passed by a restaurant to pay for my kids’ lunch. I returned home at 3.00 p.m. There was no one. I went to town to my friend Mwangi. That must have been at 4.00 p.m. I stayed there until 6.00 p.m. Mwangi escorted me to the stage. I went home.*

*“I found no one. Soon thereafter, my wife came in with E M. I asked her where R was. We went to look for R at her aunties. My wife was behind me. E told me to wait for my wife. I saw my wife light a match stick further down the road. I went there. She was screaming. R's body was there.*

*“I asked her why she had gone directly to where the body was if she did not know about it. I called the police. The police came. The police spoke to my wife and E. I remained where R's body was. I took the body to the mortuary. I returned home.*

*“On 12<sup>th</sup> February 2010 I wrote a statement. The investigating Officer took me and my wife to the house. I was then detained at the Police Station. My wife was later brought to the cell. The police had asked me for Kshs 30,000. I refused to yield. I wrote another statement. I was charged on 27.2.2010. My wife was also in custody for 126 days.*

*“I do not know who killed R. I did not kill her. I did not hit her with a pipe or stool. It is my wife who used to discipline them. I used to take care of the kids for their food and clothes. At 7.00 p.m. on the material day I was at Mwangi's. It is my wife who discovered the body.”*

17. DW2, James Mwangi, testified that on 11<sup>th</sup> February 2010 he first met the accused at 12.00 p.m; and, later at 6.00 p.m. It was at Nakumatt in Eldoret Town where he ran a business. He said the accused was his friend and would occasionally pass by his business. On the material day, he escorted the accused to Munyaka bus stage at about 7.00 p.m. or 7.30 p.m. They had some soup before they parted ways. That marked the close of the defence case.

18. I have considered the evidence. I have also considered the written submissions by the Republic filed on 21<sup>st</sup> March 2016; and, those by the defence filed on 10<sup>th</sup> March 2016.

19. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*.

20. Malice aforethought is the *mens rea* or the *intention* to kill another person. Section 206 of the Penal Code defines it as follows;

*“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -*

*(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

21. There is no doubt that R N died as a result of intra cranial bleeding due to head injury from a blunt force trauma. The pathologist found a large bruise measuring 10x8cm on left cheek; and, another measuring 12x9 on the right side of the head. There were also bruises on the anterior aspect of the neck. That is consistent with an attack by a wooden stool as narrated by PW4. The key question then is whether the accused, *of malice aforethought*, killed the deceased.

22. The only *eye witness* to the homicide was E M (PW4). He was fourteen years at the time of the incident. I said earlier that he impressed me as intelligent. However, his mother conceded that the boy had *difficulties* remembering *dates* and *time*. PW4 said that on the material date he was at home with the accused, the deceased and *his mother*. He said it was about 7:00 *p.m.* He said the accused picked up a blue wooden stool (exhibit 2) and hit the deceased on the head. The deceased's body went limp. The accused went outside, fetched a sack and stuffed her body into it. PW4 said that he did not follow the accused when he removed the body from the house. He said his mother (PW1) was *present* during the incident. She continued cooking and did not react at all.

23. I find it extremely strange that the *mother* of the deceased would behave that way under such circumstances. I am also perturbed that the accused was comfortably *asleep* when his young daughter was missing. But suspicions alone cannot found a charge of murder. The version of events narrated by PW4 terribly *contradicts* the evidence of his mother (PW1). She said she returned to her house at about 9:00 *p.m.* The accused was asleep but her son (PW4) was awake in the sitting room. She enquired about the whereabouts of the deceased. PW4 replied that R was *lost*.

24. It is not lost on me that PW1 was a suspect and was held in custody for nearly 126 *days*. It transpired at the hearing that she was a tough disciplinarian who would beat up the kids; sometimes with a whip; at other times with her bare hands. She seems to have gone directly to where the body of the deceased was found. She lit a match, identified the body and started screaming. It is perfectly possible that she did that intuitively; but it is also entirely possible that she was less than candid. The place where the body was found was an abandoned house inhabited by homeless urchins. PW4 called it the *chokoraa's* house. He said the accused told him that a *chokoraa* killed R.

25. It is evident that PW1 was *not* present when the deceased was attacked. The accused and DW2 confirmed that the accused left Eldoret Town, Munyaka bus stage, well after 7:00 *p.m.* PW2, Dorcas Warigia, testified that she saw the accused entering his compound at about 8:00 *p.m.* The evidence of PW1, PW2, the accused and DW2 punctures the credibility of PW4.

26. The evidence at the trial indicated that the accused had a cordial relationship with his step children. He would buy them lunch daily at the local hotel. That was confirmed by PW8 who said that on the morning of 11<sup>th</sup> February 2016, the accused paid Kshs 40 for his children's lunch. The children had their lunch at the hotel on the material day. The accused may have been annoyed that the children missed school, but there is no direct evidence that he beat them up with the hose pipe or sticks. In the statement to the police, PW4 did *not* mention about being beaten by the accused with the hose pipe and sticks (exhibits 3 and 4).

27. PW4 said that after the accused hit the deceased with a stool, he (accused) went outside, fetched a sack and stuffed her body into it. He said he did not follow the accused when he removed the body from the house. However, when his mother returned to the house, PW4 told her that that R was *lost*. He said that they did not attend school in the afternoon; and, that R went back home for her sweater but did not return. Again, the two versions of events make the evidence of PW4 *unreliable*.

28. I am alive that PW4 was giving his testimony *more* than *three* years later; and, that he was only *fourteen* at the time of the murder. His recollection of events may have been blurred. But this is a murder trial; and, a lot hinged on the veracity of his eye witness account. Paraphrased, the freedom or death of the accused hangs on the word of PW4. Equally, justice for the deceased and her family depends largely on

the evidence of PW4. The accused has protested his innocence. He raised an *alibi* supported by his witness DW2. From the timelines in the evidence of the accused, PW8 and DW2 the accused was *not* at home at 7:00 p.m. or thereabouts when PW4 said the accused hit the deceased with a blue wooden stool.

29. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to me to weigh it against the evidence tendered by the prosecution. See Wang'ombe v Republic [1976-80] KLR 1683, Karanja v Republic [1983] KLR 501.

30. The legal burden of proof lay throughout with the prosecution. See Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332, Abdalla Bin Wendo and another v Republic (1953) EACA 166, Kaingu Kasomo v Republic, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). The *direct* evidence of PW4 has been shaken. On the other hand, the *circumstantial* evidence of PW1, PW2 and PW3 "A" does *not* point *irresistibly* and *exclusively* to the culpability of the accused. In R v Kipkering arap Koske & another 16 EACA 135 (1949) the court held-

*"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"*

31. The accused may have lied; he might have held some cards close to his chest; or, he might have concealed some vital information. Quite apart from his denials under oath, he was entitled under our Constitution and the Criminal Procedure Code to remain mute. See Republic v Henry Kiplimo, High Court, Eldoret, Criminal Case 43 of 2006 [2015] eKLR. There are manifest gaps in the evidence that leave some *doubt* whether the accused is the *one* who assaulted the deceased with a wooden stool leading to her death. The accused had *no* obligation to fill in the gaps for the prosecution. The point is that he was presumed *innocent*.

32. From my analysis of *all* the evidence, the prosecution failed to *prove* beyond reasonable doubt that the accused, *of malice aforethought caused the death of R N by an unlawful act*. It must follow as a corollary, that the accused is *not* culpable of *murder*. I accordingly enter a finding of *not guilty*. The accused is hereby *acquitted*.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 21<sup>st</sup> day of April 2016.**

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Accused.

Mr. Kenei for Mrs. Orina for the accused.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court clerk.