



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO.34 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

TIRUS MWANGI NJOROGE.....ACCUSED

JUDGEMENT

Introduction

Tirus Mwangi Njoroge, (the accused) is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of this charge are that on the 20th day of February 2013 at (particulars withheld) Githunguri District within Kiambu County he murdered F.W.N. The accused, represented by Mr. Ochako advocate, denied committing this offence. This necessitated the full trial during which the prosecution called a total of eleven (11) witnesses to support its case. The accused called three witnesses in his defence.

Background

The accused was brought to court on 6th March 2013 but the plea was not taken until 25th March 2013. The trial did not commence until 12th June 2014. My predecessor, Honourable Lady Justice Florence Muchemi took evidence of three witnesses before she was transferred. I took over the proceedings on 12th November 2014 and after the defence opted to continue the trial without recalling the witnesses who had testified before Justice Muchemi, I took evidence of the remaining eight witnesses and the accused's defence.

Prosecution case

The prosecution case is that on 20th February 2013 little F. W. N, the deceased, then aged 5 years left home at (place not disclosed) and went to school at (location not disclosed). She was a pupil at that school in class 1. Her mother R. W. W, PW1, expected her daughter home later that day about 3.00pm because this is the time the little girl normally arrived home from school each day. The girl did not get home that day. She had left school with her two schoolmates, J (not a witness) and C. W. W, PW4. The deceased took the path towards their home leaving J and PW4 walking further on towards their home. She did not reach home.

At about 5.00pm PW1 worried that her daughter was late in getting home started looking for her in the neighbourhood, asking around whether anyone had seen her daughter. She enlisted the help of her mother in law and sister in law M. W. W, PW5 in looking for the deceased. By 10.00pm that day the search was unsuccessful. On the following day, 21st February 2013 they went to the school and informed the head

teacher. The head teacher asked the other Class 1 pupils whether they had seen the deceased. Some of them said they had walked home with her the previous day. The head teacher advised PW1 to report the matter to the police which she did at Ikinu Police Post. They were referred to Githunguri Police Station. The body of the deceased was found on the same day 21st February 2013 half buried in the soil.

The circumstances surrounding the discovery of the body were narrated by Peter Njoroge Mwangi, PW3. He told the court that he went to the farm of his aunt one Beatrice Njeri to collect cow feed. PW3 found Beatrice and the accused weeding on the farm. Beatrice Njeri directed PW3 to another section of the farm where they had cut grass and maize stalks the previous day and told him to collect cow feed from there. PW3 went to the directed portion of the farm and discovered the body of a little girl. He called Beatrice to see what he had found. Both of them went towards the road to look for help leaving the accused still weeding. It is not clear what happened after this but the accused was arrested by a crowd of people and later rescued from the hostile crowd by the police who took him to Githunguri Police Station. He was later charged with this offence.

Defence case

The accused testified under oath. He narrated how he spent 20th February 2013 helping his grandmother to weed on her farm and how later that evening he was sent to the market by his mother to buy vegetables. He narrated how on 21st February 2013 he again joined his grandmother to continue weeding and that around 11.30am they left the farm and went to his grandmother's home. He narrated that while seated outside his grandmother's house a group of people went there and forced him to accompany them without explaining where they were going; that the people were beating him asking him what had he done; that he denied having done anything; that police rescued him from the hostile crowd and took him to the police station where he was charged with this offence.

Analysis and determination

The prosecution bears the onus of proving a murder trial. The threshold to be met is proof beyond reasonable doubt. The prosecution must prove:

- i. That death of the deceased occurred.
- ii. That the death resulted from an unlawful action or omission of the accused before the court.
- iii. That at the time of causing that death the accused had formed the intention to cause the death or grievous harm.

Among the 11 prosecution witnesses who testified none of them witnessed the death of the deceased. PW1 is the mother. She went looking for the deceased after she failed to return home from school on 20th February 2013. PW2 is a neighbour of PW1. He is Bernard Mbugua. His evidence is in regard to a young man he found standing near the road on 13th February 2013 at 5.30am as he took milk to the dairy. He did not bother about the person until later on his way back when he met his daughter T. G (not a witness) crying. She told him that Titus/Tirus had chased her. PW2 was directed to the home of this person and found him. He identified him as the accused. The prosecution did not explain the purpose of the evidence of PW2. In my view this evidence is perhaps aimed at establishing the character of the accused. I however found no connection between this evidence and the circumstances surrounding deceased's death. I would be failing in my duty as an administrator of justice if I were to find that because the accused is alleged to have chased PW2's daughter he must have been the one who attacked and killed the deceased. I have no evidence to prove this.

PW3 is Peter Njoroge Mwangi. PW3 is also testified as DW2. This requires explanation. This case was heard by Justice Muchemi who took evidence of three witnesses. The three include PW3. When I took over this case PW3 became defence witness in the trial within trial and again defence witness in the defence. He is the father of the accused. The prosecution did not object to PW3's giving evidence for the defence when he had already testified for the prosecution. This also escaped the attention of the court because the proceedings had not been typed. During the writing of this judgement, I have had the time to

keenly read the evidence and I discovered this mistake. The law does not allow a witness to testify for both the prosecution and the defence in the same trial. PW3's evidence for the defence has not been considered by this court. On the other hand, his evidence as PW3 does not assist the prosecution much save for the issue of discovering the body of the deceased. He was a hostile witness and his evidence was aimed at shielding his son from blame. He termed the case against his son as a frame-up against him.

PW4, left school with deceased but did not know what happened to the deceased after they parted ways; PW5 helped in the search of the deceased; PW6 Lawrence Kinyua is the Government Analyst. He examined the high vaginal swab taken from the deceased and found no presence of semen, spermatozoa or blood. He also examined the blood sample from the accused. His evidence does not assist the prosecution case. PW7 IP Johnson Mburu Kuria is the scenes of crime officer who took photographs of the scene; PW8 Dr. Njau Mungai examined the body of the deceased and confirmed that the deceased died as a result of asphyxia due to strangulation. The doctor also observed bruises on the deceased's genitals.

CIP Boniface Kipkemboi, PW9, was among the officers who rescued the accused from the hostile mob; PW10 CIP Agutu took a confession from the accused and PW11 SGT Samuel Otieno is the Investigating Officer. He told the court that he could not get an eye witness.

I have given all the evidence due consideration. The accused is a neighbour to the deceased. Evidence places him in the vicinity of the scene. He was weeding with his grandmother on the 20th February 2013 when the deceased failed to get home from school. He was assisting his grandmother in weeding on 21st February 2013 when the body of the deceased was found in his grandmother's farm. The body was found half buried in the soil at the place where the two had been weeding on 20th February 2013.

This is the circumstantial evidence on which the prosecution case rests. There is no other evidence connecting the accused with the offence other than this circumstantial evidence and his confession to the police. I will turn on that confession in due course.

For the court to convict an accused person relying on circumstantial evidence the circumstances leading to the death of the deceased must be so clear that there can be no other explanation other than the explanation that the accused is the one who committed the offence to the exclusion of anyone else. In my view the circumstantial evidence against the accused does not pass the test laid down in **Rex v. Kipkering Arap Koske [1949]16 EACA 135** and **Simoni Musoke v. R. [1958] EA 715**, in that the evidence did not exclude co-existing circumstances which would weaken or destroy the inference of guilt, and also did not irresistibly point to the accused as having committed the offence he is accused of.

I now turn to accused's confession. I have considered his confessionary statement which was allowed in evidence after conducting a trial within trial. The statement of confession therefore forms part of the evidence of the prosecution. The statement, recorded in Kiswahili, reads as follows:

“Mimi kwa kweli nilimua W. Siwezi kujua ni nini iliniingia. Kweli nilifanya makosa mbaya. Nilikutana na W. kwa barabara. Nilimshika mkono na nikampeleka kwa shamba na nikamua. Ni hayo tu.”

This can be translated loosely as follows:

“It is true I killed W. I do not know what caused me to do this. I admit I did something very bad. I met W. at the road and held her hand and took her to the shamba and killed her. That is all.”

The accused has repudiated this statement. Any statement given as a confession by an accused person requires corroboration if it is repudiated or retracted. In **Tuwamoi v. Uganda [1967] E. A 91** the Court of Appeal for East African stated as follows as regards conviction based on confessionary statement:-

“We would summarise the position thus – a trial court should accept any confession which

has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true” (emphasis added).

I have stated above that the circumstantial evidence relied on by the prosecution has its limitations and therefore it is not acceptable to this court. The confession by the accused requires corroboration that is not supplied by the discredited circumstantial evidence. It does not offer material independent evidence capable of corroborating the confession.

All in all, little F. W. N will not get justice. Her family too will not get justice. The investigating officer or officers failed the victim and her family. This court in deciding this case must act according to the law. Law is technical and what may appear to the family of the victim, or to a lay person for that matter, may not be what the law expects this court to rely on. Evidence shows that the accused was arrested by the members of public, probably his neighbours. This crowd of people was hostile to him to an extent that the police had to rescue him lest he be lynched. Surely it could not have been difficult to find the people who arrested him to testify as to what informed their decision to arrest the accused! Again the investigating officer ought to have collected evidence capable of bearing positive results after being subjected to forensic examination.

In conclusion, while this court finds that the unlawful death of F. W. N has been proved beyond reasonable doubt, the perpetrator has not been proved to be the accused. It would be against the law if this court were to find the accused guilty on the evidence presented to court. It is weak evidence that cannot be relied on. The confession required corroborative evidence which has not been offered. For this reason I have no choice but to follow the law and acquit the accused person. Consequently, I hereby acquit Tirus Mwangi Njoroge of the charge of murder. If he is the one who committed this offence, I leave him to his conscience and his God since I do not have the required evidence to find him guilty. He is free to go home unless for any lawful reason he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 21st April 2016

S. N. MUTUKU

JUDGE

In the presence of:

Ms E. Macharia for the prosecution

Mr. Ochako for the accused person

Mr. Tirus Mwangi, the accused person

Mr. Daniel Ngumbi, court clerk