



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO. 16 OF 2013

REPUBLICPROSECUTION

VERSUS

A C HACCUSED

JUDGMENT

BACKGROUND

1. The accused herein **A C H** is facing a charge of murder contrary to Section 203 and 204 of the Penal Code.

The particulars thereof are that on the 16th day of July, 2013 in Bungoma East District within Bungoma County he murdered **PNM**.

2. The accused pleaded not guilty to the charge and the same went to full trial. The prosecution called 9 witnesses.

Prosecution's case

3. The prosecution's case is that on the 16th July, 2013 the deceased a child aged 2 ½ years was given 5/- by an uncle and she left to go to a shop 7 metres away from their home to buy a mandazi. The shop she went to was being manned by the accused. The deceased mother had gone to a posho mill when the deceased having been given money by an uncle left for the shop. On returning the mother did not find her. Efforts to look for her were futile until much later when neighbors and the village elder were involved.
4. The accused led the village elder at about 9 p.m to a maize plantation where the body of the deceased was found. At the point the accused overpowered the village elder and ran away only to be arrested in Malaba.
5. The evidence of the prosecution may be summarized as follows;

PW1 MNM

- At about 5.00 p.m she left for the posho mill leaving her husband and her 5 children at home. she returned an hour later and did not find PW her younger child nor her husband at home. She learnt from the other children that her husband's brother DK had given the missing child kshs. 5/- to buy a mandazi and the child had left for the shop. She sent her son B to look for the child in vain. She went to the shop herself and was informed like B that the child had been there earlier and was told there were no mandazi and she left. She returned home found her husband had returned

and informed him of the missing child and he too went to the shop and was given the same information. She enquired from neighbours in vain. She learnt from the village elder's husband that he had seen a group of children and he mentioned Mwogo Simiyu. The witness went to the said Simiyu who said he had seen Allan (accused) in the company of P at about 6.00 p.m along the road on his way to buy vegetables. A search was mounted by the villagers. The accused was questioned once more at which point the accused father slapped his son who turned hostile and at this juncture the village elder moved the accused aside, talked to him and the accused led the elder into a plantation. Shortly they heard the village elder scream. They rushed to the place and found the child's legs wide apart, her panty torn, and bleeding profusely. She had been injured in the genitals.

6. **PW2 MW** – father to the deceased,

He recalled that at about 6 p.m. on 16th July, 2013 he was home herding his cattle. His cousin DK who lives in Nairobi came and the said cousin gave his daughter P kshs. 5/- to buy a mandazi. P left for the shops. He also thereafter left to visit his mother who lives 100m away. He returned at around 6.30 p.m and found his daughter had not returned. He went to the shop manned by the accused and the accused told him that the child had been there but left on failing to get mandazi. They continued to search the enquiries led them to Mwogo Simiyu who told them that he had seen the accused with the child by the road side. He went back to the accused who denied having seen the child. They reported the matter to the village elder who questioned Allan, took him aside and at about 9 p.m the accused led the village elder into a sugar plantation and after which they heard the village elder scream, the accused fled. They found the child's genital and mouth bleeding. Later the police came and collected the body.

7. **PW3 Carolyn Wangila Makokha** – village elder of Makuma. She recalled that on 16.7.2013 at about 6.30, PW2 informed him that his child had gone missing. Later at about 7.30 p.m PW2 returned not having found the child and she mobilized a search party. At 9.30 PW1 and one Mwogo Simiyu informed her that the child had been seen in the company of the accused. They went to the home of the accused and questioned him at length. Members of the public became agitated with the accused and decided to take him aside. She asked him to cooperate and the accused then offered to show her where the child was. He took her through the sugar plantation and to where the child was lying dead. She got hold of the accused who overpowered her and ran, at which point she raised an alarm. He screamed attracting the others. She further stated that P had injuries on her genitals and was bleeding from the said injuries and the nose, ants had already begun crawling all over her body and her legs were wide apart.
8. **PW4 NS** – a minor aged 16. He recalled that on 16th of July 2013 at around 6.00 p.m, he met the accused in the company of the deceased by the road side. On his way back he did not find them. He had gone to buy vegetables. When the child's mother inquired he told her that he had earlier met the two.
9. **PW5 Mark Barasa Wafula** – he recalled that on 16.7.2013 at around 6.00 she saw the deceased pass by going to the market, a short while later he saw **PW4** pass by later at 8.00 p.m the deceased mother came asking for the child and he informed her that he had seen the deceased pass by and a short while later he saw later PW4 pass. He was in the search party, he suggested they ask PW4, PW4 informed them that he had seen the accused standing with the deceased near the sugar cane plantation. They questioned the accused who denied and at this point the accused's father slapped the accused saying he had himself seen the child. The village elder took accused aside and moved with him away while the others stood along the roadside. Then they heard the elder scream, they rushed to where she was and found the body of the deceased lying on the ground and Allan gone.
10. **PW6 Stephen Wafula Karakoli** - a member of community policing recalled that on 16.7.13 at about 6.30 p.m he received information from the village elder of a missing child.

He joined in the search they had been told the child went to buy a mandazi at the shop of one Naftali Wafula. They went to Naftali's house and questioned the accused who was manning the shop. The accused said the child had been to the shop and had left. PW4 told them that he had

seen the accused with the deceased between 4 & 5 p.m. The crowd became agitated and the village elder took the accused aside, they walked away and next they heard the village elder scream, they ran to where she was.

11. **PW7 KB** -a minor aged 8 years. She recalled that on 16.7.16 as she went to fetch water, she saw the accused standing with the deceased by the road side.

12. **PW8 Dr. Wambani Mutoro** -of Webuye District Hospital produced the post mortem report on behalf of his colleague Dr. Owino who was not able to attend court due to exigencies of work. He knew his colleagues handwriting. (There was no objection from the defence).

- ***The post mortem report was for one PN Wafula which was conducted on 19.7.2013. The body was of a female child of not more than 5 years height 2ft 10”.***
- ***The Body was embalmed. It had extensive damage on head and chest caused by insects.***
- ***No fracture or any other external fracture***
- ***No haemorrhage.***
- ***Urinary system – indicated bruising on external genitalia and insect bites.***
- ***Internal skull – there was bleeding and bruising on the oral surface.***
- ***The doctor’s opinion – cause of death was due to cardio respiratory failure due to head injury.***

13. **PW9 Inspector Robert Oloo Otieno** - previously of Webuye police station. He recalled that on 17.7.2013 he received a report of murder at Makuma from OCS John Munywoki and together with other officers they visited the scene. He was assigned to investigate the matter. The body of the deceased was lying at Webuye Mortuary. He recorded statements of witnesses. He learnt that on 16.7.13 the deceased was seen in the company of the accused and the child did not return home. Accused later pin pointed to the village elder where the child was and when the village elder screamed the accused ran away. They searched for the accused. They learnt that his mother lived in Malaba and they sent a signal to Malaba and around 19th or 20th July, 2013 the accused was arrested. On interrogating the accused, the accused informed him that he was talking to the child when PW4 and 5 saw him. Later he defiled the child he had held her mouth and nose in the process but he had left her alive in the plantation.

14. At the close of the prosecution’s case the court found that the accused had a case to answer and he was placed on his defence. He gave an unsworn statement as follows;

DW1 A C H – he is 15 years old and is aware of the charge facing him. He recalled that on the material day at 4 p.m the deceased went to his uncle’s shop where he was moving to buy a mandazi. There was no mandazi and the deceased left. Later at about 7 p.m as they were having supper a neighbor’s child came calling, so did the deceased mother both asking if they had seen the deceased. They informed both that the deceased had been at the shop earlier and left. They later joined in the search. A group questioned him as they alleged he was the person last seen with the deceased, they were harsh and wanted to beat him at which point the village elder took him aside and questioned him. She held his hand and walked with him 20/30 m when he heard her scream, and she told him to disappear as his life was in danger. He does not know why she screamed. He did not see the body of the deceased. He ran away and spent the night in a school and the next morning he went to Malaba where his mother stays. His parents do not live together.

15. In a criminal matter such as the case before the court the onus of proving the case is squarely on the prosecution. In the land mark House of Lords case of **Woolmington Vs. Director of Public Prosecution [1935] A.C. 462** it was stated by Vincent Sankey L.C.

“Through the web of the English law one Golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as the defence of insanity and subject also to any statutory exception No matter what the charge or where the trial. The principle that the prosecution must prove the guilt of the prisoner is part of the common Law of England and no attempt to whistle it down can be entertained.”

The above principle has overtime been adopted by the court's in our country and remains the law.

16. Having laid down the above principle I must now turn to Section 203 and 206 of the Penal Code to establish if the ingredients of murder i.e *actus reus* and *mens rea* have been established.
17. No doubt as stated by the defence no-one witnessed the accused defile or murder the deceased.

The prosecution has relied on circumstantial evidence. And submits that it brought forth circumstantial evidence that irresistibly points to the accused herein as the perpetrator of the offence. In his evidence PW4 stated that on the 16th of July, 2013 at about 6.00 p.m as he went to the market he saw the accused with Mama Nancy's (PW1) little girl on returning from the market he did not see them. PW5 also stated that at about 6.00 p.m on 16.7.13 he saw the deceased pass by his house in a short while he saw Nicholas Mwogo pass.

PW7 recalled that on 16.7.2013 as he went to fetch water he saw the accused standing by the road side in the company of the deceased.

The above witnesses all state that they saw the accused with the deceased indeed this is the last time the deceased was seen alive.

18. The prosecution did not stop at the above evidence but went ahead to adduce evidence to the effect that the actions of the accused irresistible point a finger at him as the culprit.

PW3 the village elder who was in the search team and having received information that the accused was last seen with the child took the accused person aside from the crowd that was agitated, and talked to him, he said to her he was scared. She urged him to cooperate and she would protect him, through the sugar plantation, he took her in circles but showed her where the child was. She got hold of the accused as she raised an alarm, he over powered her and ran away.

PW9 – he informed the court that the accused having ran away from scene of crime, they searched for him and having learnt that his mother stays in Malaba they sent a signal and that is where he was arrested. In cross examination he told the court that the accused admitted to him having defiled the child but said he left her alive.

The post stated;

Cause of death was cardio respiratory failure due to head injury and indeed there was indication that the child had been defiled.

19. In **Mohamed & 3 others vs. R 2 1 KLR** Osiemo J, stated

“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable reference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be and such as to exclude every hypothesis but the one proposed to be proved.

- In **Mwangi & another vs. Republic (2004) 2 KLR 32** the Court of Appeal held as follows,

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other hypothesis except the hypothesis that the accused is guilty of the charge.”

20. The facts of death have been proved by various witnesses including PW8 the doctor. There is evidence that the accused was last seen with the deceased, he took PW3 to where the body of the

deceased was, he ran away immediately thereafter, and he owned up to PW9 the investigating officer that he defiled the deceased. The post mortem report showed that the deceased had a head injury which was the cause of her death. The above chain of events is so complete. The inference which is so irresistible is that the accused took the deceased to the maize plantation defiled her and in the process caused the head injury to the poor soul causing her death.

21. Consequently I find that the prosecution proved its case beyond all reasonable doubt. I find the accused guilty of the offence of murder as charged and convict him accordingly.

DATED at Bungoma this 19th day of May, 2016

ALI-ARONI

JUDGE.