



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 82 OF 2010

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

PETER THURANIRA MURIUNGI.....ACCUSED

JUDGEMENT

1. The accused person **PETER THURANIRA MURIUNGI** is charged with **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code**.

“The particulars of the offence are that between the 1st day of September 2010 and 8th day of September 2010 at Kabuku Village, Ngecha Location within Kiambu County, murdered Caroline Nyokabi Wambui.”

2. The prosecution called a total of 10 witnesses.
3. The summary of the prosecution case is that the accused visited the home of PW1, the grandmother of the deceased on the afternoon of 1st September, 2010. The accused then walked away with several children including the deceased. The accused was then seen with the deceased near Ngecha forest the same evening. The deceased’s decomposing body went missing that day and was next found dead in Ngecha forest on 8th September 2010 at 5 pm, 7 days later.
4. The accused gave an unsworn statement. He stated that on 1st September 2010 he was in Limuru in a barber shop having a haircut when PW6 and PW7, both children came and greeted him. They asked him for money to buy something to eat and he gave them. They came back and escorted him to go and greet their grandmother (PW1). The accused said that he met PW1, her daughter PW2 and other 5 children and they spoke for 30 minutes after which he left. He said PW1 asked PW 6, PW7 and the other children to escort him to the gate. The accused stated that he bought them sweets at a nearby kiosk. He then went away leaving them behind. He said that on 7th October 2010 he was sitting in a hotel when one Nduta came with police officers who arrested and took him to Tigoni Police Station where he was charged with this offence. He denied the charge.
5. I have carefully considered the evidence adduced by the prosecution and the defence. Mr. Masara for the accused and Ms. Maari learned Prosecution Counsel for the State did not make any submissions at any stage of this trial.
6. The accused faces a charge of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. Murder is defined under **section 203** as follows:

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

7. The prosecution has the burden of proof in this case and should adduce evidence to prove the charge against the accused beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused by some act or omission caused or inflicted injury on the deceased out of which injuries she died. The prosecution must adduce evidence to prove that at the time the accused did the act or omission which led to the injuries causing death to the deceased he had formed the necessary intention to either cause death or grievous harm to the deceased.
8. The intention to cause death or grievous harm is malice aforethought. Under **section 206** of the **Penal Code** the circumstances which constitute malice aforethought are set out 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.”**
9. There was no eye witness to the incident. The prosecution is relying exclusively on circumstantial evidence. Regarding circumstantial evidence the oldest case on the point is **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135**, where the Court held:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

10. In order to test whether the circumstantial evidence adduced by the prosecution meets the legal threshold it must meet the principles set out in the case of **ABANGA alias ONYANGO V. REP C. A. NO.32 of 1990(UR)** where the learned Justices of the Court of Appeal stated 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.”

11. The prosecution relies on the evidence of PW 1, 2, 3, 5, 6 and 7 that the accused visited the area where the deceased lived with her grandmother and other relatives on the 1st of September, 2010. The prosecution case is that the accused was taken to the house of PW1 to see her by PW6 a granddaughter to PW1. PW6 had escorted PW7 to grind maize in the local market center when they met the accused at the barber shop at about 2 pm. The accused used to live at the same plot where PW1 lived much earlier and PW1 and 6 knew him very well. PW7 did not know the accused until 1st September at 2 pm. PW6 and 7 went with the accused to the shop of PW7's mother, PW3.
12. PW1 used to live with her daughter PW4 and with the children of PW4 and her other daughter PW5. The grandchildren were Gakinya, Wanjiru, Mbugua, Ndungu, Nyokabi and Caroline Nyokabi the deceased. PW1 said that in the evening of 1st, she went to buy milk at the shops. On

- the road outside the gate to the plot where she lived, PW1 saw the accused talking to her grandchildren and other children from the neighbourhood including Wanja, Wanjeri, Mbugua, Tracy, Ndungu and Nyokabi the deceased.
13. PW1 said that she did not know what the exact time it was when she left for the shops but she said it was way before dark. She returned to the house at 7pm and that is when she realized the deceased was not home.
 14. The other evidence the prosecution is relying on is that of PW2. Her evidence was that at about 6:50 pm on 1st, she was in her farm when she heard people talking behind her. She looked to see the deceased whom she knew very well as a child living with her grandmother in the neighbourhood. PW2 also saw a man who was squatting facing the deceased and away from her. The man was wearing a red sweater and a cap. PW2 said that he heard the man asking the deceased whether she could deceive her father. The two were on a pathway between PW2's land and the Ngecha forest. She left them there as she went back to her house. PW2 said that the deceased body was found dead in that same forest.
 15. PW3 was aunt to the deceased. She was in her shop selling on the fateful day of 1st September 2010 at 4 pm when the accused went there with her daughter Hilda Wanjeri PW6 and her niece Wanja PW7 and bought sweets. The significance of PW3's evidence was to corroborate the evidence of PW6 and 7 that indeed the two were with the accused when the accused bought sweets at her shop, and that they walked away together. PW3's evidence was also significant as she described what the accused was wearing that evening, that is a red cap and a pull neck sweater that was red in colour. That description corroborates the evidence of PW2 regarding the colours of the clothing of the man she saw in the company of the deceased on the evening of 1st. That evidence also corroborates the evidence of PW6 and 7 as to the colours of the accused cap and sweater.
 16. PW6 and 7 in their evidence testified that the accused asked them to escort him to the home of their grandmother, PW1 so that he could greet her. PW7 branched to her home as PW6 walked on with the accused to PW1's home. PW6 testified that PW1 was not at home at the time she and the accused arrived there.
 17. PW5 daughter of PW1 and aunt to the deceased was at her mother PW1's place on 1st September 2010 when PW6 arrived with the accused. She confirms that indeed the accused visited their home at 5 pm on the day in question in company of her nieces PW6. She was seated on a chair outside the main door of the house when the accused came. PW5 exchanged greetings with the accused. PW5 said she did not know the accused person and was seeing him for the first time that day. The evidence of PW5 is significant as she described the colours of the clothing the accused was wearing that day as a red cap and a red sweater. PW5 also corroborated the evidence of PW1 that the accused went away from their home with several children from their plot who had been playing outside the house.
 18. PW5 said the accused gave the children sweets before he went away with them a few minutes to six o'clock. The children included Virginia Wanjiru, George Ndungu, John Gakinya and Nyokabi the deceased. The children returned later at 6.30 pm without the deceased.
 19. PW6 testified that she was with the accused outside the grandmother's house, on the road. Also with her were other children including the deceased. She said that PW7 joined her there. Both PW6 and 7 testified that at around 6pm the accused asked the deceased to go with him so that he could buy her sweets and that the deceased obliged and walked away with him. The deceased did not come back by dark and PW6 informed her grandmother that the deceased had gone away with the deceased and had not returned.
 20. I have considered the evidence of the prosecution and find that there is ample evidence to establish that the accused visited the home of PW1 where the deceased and other relatives lived. PW1, 3 and 5 were not present and did not see the accused leave with the deceased. PW6 and 7 were with the accused and the deceased when the accused asked the deceased to go with him. They saw them walk away together.
 21. I have noted that PW6 was 17 years when she testified in 2015, about five years after the incident. She was therefore 12 years when she witnesses the incident. PW7 was 16 years when she testified and therefore 10 years when she witnessed the incident. The question arising is what the probative

- value of their evidence is given their ages at the time of incident.
22. The two witnesses were children and PW7 in particular was a child of tender years. Her evidence required corroboration for the reason of her age. In addition PW7 did not know the accused before the incident. An ID parade should have been conducted for her to identify the accused. That was not done. PW7's evidence was unreliable in the circumstances. That said I must add that hers was not the only evidence in this case. Regarding identification I am guided by the court of appeal case of **Gabriel Njoroge vs. Republic (1982-88) 1 KAR** where it was held:

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade.

A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

23. PW6 knew the accused before. In addition, PW5, 3 and PW1 all who knew the accused before, saw the accused in the company of PW6 and 7. The evidence of PW6 being that of a child received sufficient corroboration from these witnesses that the accused had been in her company, and that of other children including the deceased. The evidence of PW6 that it was the accused who walked away with the deceased after promising to buy her sweets is reliable and cogent.
24. Apart from that evidence is the evidence of PW2 who also saw the deceased in the company of a man. The description she gave of the man and the way he was dressed matched the description of the accused as given by PW1, 3 and 5 in terms of accused age, and the colours of the cap and sweater he was wearing.
25. I bore in mind the fact that PW2 did not know the accused before and the fact that it was few minutes to 7pm. However, PW1 saw accused, deceased, PW6, 7 and other children together before 7pm the same evening. PW5 also saw PW6, accused and deceased walking away to the road outside their home at around 6pm. I find that the accused was the only adult, and the only man in the children's company that day. Considering the entire evidence in its totality I have no doubt in my mind that it was the accused who walked away with the deceased just before 7 pm on the 1st of September, 2010. The prosecution has established beyond any reasonable doubt that the deceased was last seen alive in the company of the accused. The evidence of PW2 clearly establishes that the body of the deceased was found not far from where PW2 saw both of them on the evening of 1st, when the deceased was last seen alive.
26. The evidence adduced by the prosecution through PW1, 2, 3, 5 and 6 places the accused at the scene of the incident and also the one who took the deceased away when alive from her home area. PW2 evidence places accused and the deceased within the same forest where the deceased body was later found. The accused has the burden to explain either how he parted ways with the deceased, or explain how the deceased met her death. That evidence places upon the accused a statutory burden to discharge a rebuttable presumption as spelt out under **sections 111(1) and 119** of the **Evidence Act**. These sections stipulate 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 prosecuting, 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.”

“119. 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.”

27. The accused in his unsworn defence does not deny having visited the home of PW1 and agrees not only that the children including PW6, 7, deceased and others escorted him outside the gate to PW1's home as directed by PW1. What he said was that after he bought sweets for the children, he walked away alone after bidding them goodbye.
28. I have considered the accused defence and in effect his denial that he went away with the deceased. I find that his defence was an obvious lie. It does not create any doubt in the prosecution evidence against him.
29. As stated earlier the case against the accused was based purely on circumstantial evidence. In order to test the strength of the circumstantial evidence adduced by the prosecution, it must meet the threshold of the principles set in the court of appeal case of **ABANGA**, supra.
30. I am well guided. I find that the prosecution evidence has cogently and firmly established the circumstances from which the inference of guilt is sought to be drawn, that the circumstances established are of definite tendency unerringly pointing towards guilt of the accused and that taken cumulatively, forms 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. I find that the accused walked away with the deceased and a week later her decomposing body was found. The accused defence in the circumstances does not shake the prosecution case against him.
31. I have considered the evidence of PW10 Dr. Peter Muriuki Ndegwa who performed a post mortem on the deceased body on 14th September 2010. He observed that the body was slightly decomposed externally but internally it was more severely decomposed and that as a consequence he did not ascertain the cause of death. His report was P. Exh. 1. The doctor said that the court should determine the cause of death from the circumstances and the evidence of the case.
32. I have considered the entire evidence before me and find that the accused lured the deceased from her home with the promise of buying sweets for her. She was later found dead inside a forest next to the pathway where PW2 saw the accused squatting as he spoke to the deceased. Even though the doctor could not determine the cause of death due to the degree of decomposition of the body, I have no doubt that the accused was responsible for her death and that he caused that death.
33. I am aware that there was no evidence of motive, evidence of any grudge, ill will or reason to cause harm to the deceased. However, absence of evidence of motive does not negate or affect the evidence on record in this case. I find that taking the deceased away from her home and causing her to disappear, and in addition denying he ever walked away with her is evidence of ill will and motive to cause grievous harm to the deceased. I find that not only has the accused failed to rebut the statutory rebuttable presumption against him created under **sections 111(1) and 119 of the Evidence Act**; but that the circumstantial evidence by the prosecution irresistibly points to the accused guilt beyond any reasonable doubt.
34. Having carefully considered the entire evidence adduced in this case I have come to the conclusion that the prosecution has proved the charge against the accused of **murder** contrary to **section 203 of the Penal Code**, beyond any reasonable doubt. Under **section 322 of the Criminal Procedure Code** I find the accused guilty of murder as charged and convict him accordingly.

DATED AT NAIROBI THIS 23RD DAY OF JUNE, 2016

LESIIT, J

JUDGE