REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE (MURDER) NO. 3 OF 2013

REPUBLIC……..…PROSECUTOR

-VERSUS-

KAHINDI CHARO MWARINGA…..…….....ACCUSED

J U D G M E N T

1) The accused **Kahindi Charo Mwaringa** was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on 31st December, 2012 at Kichwa cha Ng'ombe Village, Lango Baya he murdered **Khamisi Kahindi Ziro**. He denied the charge. He was represented by Mr. Ogeto during the trial.

2) The prosecution called six witnesses. The prosecution case was as follows: The accused and his four year old son **K K Z**, now deceased, lived in the same homestead as the accused's parents, namely **Charo Mwaringa** (father, PW2) and **Kadzo Charo Mwaringa** (Mother, PW3). Other relatives residing in the home were (AM) a minor aged 9 years (PW1).

3) On the day the deceased went missing (PW1 talks of 30th December) PW1 was playing with him at the home of their grandfather PW2. At 3.00pm the accused approached the boys and took the deceased away. The duo walked towards the forest.

At 4.00pm the accused returned home alone. When his mother questioned him the accused spoke words to the effect that she would never see the boy again. He did not respond to his father's questions. After a brief search the matter was reported to authorities at Lango Baya. On the next day neighbours gathered at the home and were preparing to take the accused to police when he led them to a shallow grave in the forest.

4) When police were summoned to the scene they opened the grave where the remains of the deceased of the minor were discovered. The scrotum, left lung and heard had been removed from the body. These body parts were later found in a bag inside the accused's house. Also retrieved was a fork jembe allegedly used in the murder.

5) The post mortem examination was conducted in the body by **Dr. Allan Makokha**. The report indicates severe injuries including, slit neck with rear-total decapitation, cut wound, left lung and heart cut off and scrotum completely amputated. Death was due to exsanguination and internal organ injury.

6) In his defence the accused made an unsworn statement. He said that on 1/1/2013 he was sleeping in

his house at noon when his father called him. A crowd had gathered. His father went away to "organize" for his treatment. The crowd trussed him and questioned him about the child. They threatened to "finish" him so he decided to submit to them.

Later they took him to a bush and back to the house. He agreed that a knife and other "stuff" were his. After more beatings he was handed over to police. He stated that he was forced to confess to the offence.

7) There is no dispute regarding the disappearance and gruesome murder of the deceased minor on or about 31st December 2012, and his relationship with the accused. The court must determine whether the accused with malice aforethought inflicted the injuries causing death to the minor.

8) The chief witness for the prosecution was the minor PW1 who though giving unsworn evidence, lucidly narrated the event of the fateful afternoon. That he had the deceased minor were playing when the accused called the deceased to accompany him. The two left walking in the direction of the forest. That was at 3.00pm. About one hour later the accused returned alone. He reported these events to his grandfather PW2 when he came home but when confronted, the accused he did not respond. When the mother (PW3) questioned him the accused reportedly stated:

> **"Don't call K (deceased) again. You will never see him again".**

9) Having reported the matter to the police PW2 involved neighbours. It is the evidence of PW2 that on the next date, the accused who had been restrained the previous evening with ropes led them to where he pointed out the grave. Police then came and removed the body.

10) The evidence of PW1 and PW2 were barely subjected to cross-examination by the defence. One of the villagers who took part in the search is **Bactolus Sammy Kalama** (PW4). He and other neighbours questioned the accused in the morning of 1/1/2013. The witness said that the accused pleaded with them saying "Don't assault me. I will show you". Thereafter the accused led the group to the grave where the mutilated body of the deceased was found. He too confirmed the evidence of PW2 that the internal organs removed from the body of the deceased were later found in the accused's house.

11) The evidence of PW1 received full corroboration from PW2, 3 and 4. The words and conduct of the accused also corroborates the evidence of the minor PW1. According to PW2 the accused told her she would never see her deceased grandson again. There is credible evidence that the accused led neighbours to the spot where the body was buried. The allegation that the accused was beaten to "confess" to the murder was not put to PW4 although he was questioned at length during cross-examination.

12) The defence cross-examination centred on the reasons given by the accused for the gruesome extraction of organs from the minor's body. His subsequent defence that he was forced to make a confession seem to be an afterthought.

13) In **Kipkering Arap Koskei & Another -Vs- R. (1949) 16EACA**, **135** that:-

> **"……..In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**

And as further extended in **Simon Musoke -Vs- Uganda (1958) EA 715,** where the Court of Appeal quoted the decision of the Privy Council in **Teper –Vs- Reginam (2) (1952) AC 480** as follows:-

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."**

14) I am satisfied that the circumstantial evidence in this case makes out a water tight case against the accused. His defence appears unbelievable. The injuries inflicted on the minor were of such a severe and brutal nature that clearly they were intended to cause death.

15) Some disturbing aspects relating to the circumstances of the murder came out in the evidence of PW4. He stated that on his first visit to the home upon learning of the disappearance of the deceased, he noted that the accused was mumbling to himself. The witness said that after recovery of the body, the accused claimed to have received instruction to do what he did.

16) During cross-examination the witness gave further evidence of the conversation with the accused on the matter. The accused allegedly claimed that a pastor had instructed him that the murder of the son would solve his problems.

17) Earlier on, this court having received the evidence of PW1 to 3 had referred the accused for a fresh mental assessment. He was declared fit to stand trial. However considering his bizarre conduct as captured in the prosecution evidence, it seems unlikely that the accused was of sound mind.

18) I think this is an appropriate case to apply the provisions of **Section 166 (1) CPC** which provides:

> **"Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission".**

19) The accused undoubtedly murdered his son, whatever his motivation. It seems from the evidence of PW4 and the bizarre manner in which the murder was committed that the accused was insane at the time he committed the offence. I do therefore make a special finding that the accused is guilty of the offence charged but he was insane at the time he committed it. A report to that effect will be made for the order of the President. Meanwhile the accused will be detained in prison custody.

Written and signed at Naivasha this 29th January, 2015.

C. W. MEOLI

JUDGE

Delivered and signed at Malindi this 25th day of February, 2015

SAID J. CHITEMBWE

JUDGE