



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 53 OF 2008**

**REPUBLIC ..... PROSECUTOR**

**V E R S U S**

**SAMUEL MURIUNGI KINYUA ..... RESPONDENT**

**JUDGMENT**

By an information dated 21/8/2008, Samuel Muriungi Kinyua (Accused) was charged with the offence of murder contrary to Section 203 as read with Section 204 of the PC. Particulars of the charge are that on 17/8/2007, at Menwe Village, Igoki Location, Imenti South District, murdered T G M. Accused denied the offence and the case proceeded to full hearing. The prosecution called a total of 5 witnesses. The accused was called upon to defend himself after close of prosecution case and he testified on oath. He did not call any witness.

PW1 Agnes Nkabu, is the grandmother of the Accused. She recalled that on 17/8/2008, she had come from church about 2.00 p.m. and was at her home when the accused went and asked her for food but she had not cooked. When he did not find any food, he left and she also left for a neighbour's home but before she reached there, accused followed her and told her to go back home because he had found the child, unresponsive. She went back home, he brought out the child from his father's house and she noticed that the child was dead but told him to take the child to the doctor. Although she first denied seeing any injuries on the child, in cross examination, she said that the child had bruises on the neck.

PW2 Florence Gakii, testified that on 17/8/2008, T G (the deceased) who was, about 2½ years old, went to her home about 8.00 a.m. as he usually did, he played with other children. PW2 said the child's mother had been sent away by the father (Accused); that about noon, Accused came and took the deceased away. PW2 said the accused looked drunk and was carrying a *panga*. After about 20 minutes, she again saw accused going to her uncle's house alone where he stayed for a while and left. She heard noises at 5.00 p.m. and on going near, found accused, saw PW1 and the deceased who was lying on the grass; that accused said the deceased was sick and PW1 told him to take the child to hospital. PW2 observed the child's body, noticed black marks on the neck and she questioned accused if he had strangled the child. She went to call her uncle but when returning she saw accused running away. He was chased, caught and brought back to the home where the Sub Area (PW5) found him and took him to police.

PW3 Joy Kainyu, recalled that on 17/8/2008, she was going to the posho mill with Mary Kathure when they took a short cut through the home of accused when they heard a child crying saying that '**father do not do that to me**'. They thought that the father was removing jiggers from the child and they went their way. On her way back home, she passed by the same home and that accused went where they

were asking for PW1. Later when leaving, Agnes (PW1) told them that the accused was asking her to check on the child. PW3 was present when accused brought out the child from the house, placed the child on the grass and she noticed that the child was dead; that a crowd of people gathered and accused ran off but was chased and caught.

The post mortem was done by Dr. Macharia but the form produced in court by Dr. Wanjiru (PW4). The Doctor found that the deceased was about 2½ years old and had bruises and deformity around the neck. Internally, there was fractured laryngeal cartilage and fracture of CI, 2 and 3 and spinal cord injury at same levels. The Doctor opined that the cause of death was pulmonary arrest secondary to hand strangulation.

PW5 Justus Kaburu, is the Sub Area in Menwe Village. He was called by a person called Osama and informed that the accused had killed his child and was given a tin with medicine which accused allegedly wanted to take. Accused ran off on seeing people, and he helped in the chase, arrested him and handed him over to the Administration Police post.

When called upon to defend himself, accused testified on oath that he had separated with the mother of the deceased; that the child was able to talk though not well. He said that his father had left for town on that day and at home, he was with his brother aged 15 years and the son. He left to go and shop at Kithurine and returned home at 5.00 p.m. On returning home, he found the child sleeping in his father's house and noticed that he was not well. He went to call his grandmother (PW1) and he showed her the child and she told him to take the child to hospital and that another neighbor passed by and said the child was dead. He went to get money, from where he used to keep it in a tin which originally had pesticide; that Githinji (Osama) came and snatched it from him. They alleged that he knew how the child died. They arrested him. He heard for the first time while in court that the child was strangled. He denied strangling the child because he loved the child and denied ever beating the child as alleged by PW2. He said that PW1, 2 and 3 framed him because he said that the child used to visit their homes. He said David was at home with the child.

After the close of the defence case Mr. Kiogora, Counsel for the accused submitted that the evidence against accused is circumstantial and that the owner of the house, accused's father was never called as a witness yet the child was found in his house.

In reply Mr. Mulochi, Counsel for the State submitted that circumstantial evidence is not of lesser value than direct evidence; that PW1, 2 and 3 said accused was living with the child and that when the villagers arrived after the death, accused ran away; that accused attempted to take poison which points to his guilt.

Nobody witnessed the murder. This case turns on circumstantial evidence. In ***Abanga alias Onyango v Rep CRA 32/1990 (UR)***, the Learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They stated thus:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:***

- (1) the circumstances from when an inference of guilt is sought to be drawn, must be cogently and firmly established;***
- (2) circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;***
- (3) 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”.***

There is no doubt that the accused lived alone in his house with the deceased, the mother having separated

from accused and left the child with accused.

PW2 told the court that on the fateful day the deceased had been at her home from 8.00 a.m. playing with others as he normally did but that accused picked the deceased up about noon. PW3 also told the court that as she passed by accused's house later that day about 4.30 p.m., she heard the child crying asking the father not to do whatever he was doing to him. Accused did admit that indeed the child used to talk though not so well. PW3 knew the accused and the child because accused is her cousin. PW1 also told the court that accused went to ask her for food about 3.00 p.m. to 4.00 p.m. because she had returned from church at about 2.00 p.m. In his defence accused raised an alibi that he had left home in the morning for Kithurine to shop and returned home at 5.00 p.m. only to find the child unwell. The issue that I need to address is whether accused was at home on Sunday 17/9/07 or was he away and whether he was the last to be seen with the deceased.

In considering the defence of alibi, the court has always to bear in mind that the burden always remains with the prosecution to prove the allegations made against the accused beyond any doubt. In the case of Kiarie v Rep (1984) KLR 73, the learned Judges of the Court of Appeal held as follows:

***“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate’s finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.”***

In another case of Wangombe v Rep (1976-80) 1 KLR 1683, the Court of Appeal said thus:

***“even where the accused raises an alibi and does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused”.***

The standard required to be considered where the defence of alibi is raised was outlined in the case of Uganda v Sabyala & others (1969) EA 204. The Learned Judge quoted a statement by His Lordship the CJ of Tanzania in CRA 12D 68 of 1969 where the judge stated thus:

***“the accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution. Where the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts.”***

It behoves this court to analyse the entire evidence adduced by both sides and satisfy itself whether or not the version of events given by the accused creates doubt in the veracity of the prosecution case.

I have considered the evidence of PW1, 2 and 3 and I am satisfied that their evidence placed the accused at his home i.e. scene of crime, on the whole of the fateful day. PW2 saw him pick the deceased from her house about noon; PW1 saw him about 3-4.00 p.m. when he went to ask for food and PW3 heard the deceased crying begging the accused not to beat him. The alibi did not dislodge the evidence of the three.

The accused raised the defence of alibi for the first time during his defence and in my view it was an afterthought. In the same defence he alleged for the first time that there was a boy called David Muthukumi aged 15 years in the father's house that day. In cross examination by the State Counsel, he said that the boy was not available to testify because he had heard that he lives in Mombasa and it would be difficult to get him. Had accused mentioned the boy before, if indeed he exists, then may be the prosecution would have endeavored to trace him or invoked Section 212 of CPC to call the said boy as a witness. There is no doubt that the accused was seen removing the child from his father's house just before PW1 and 3 noticed the child was dead. PW1 said that accused's house is next to the father's. The

prosecution did not call the accused's father as a witness. However, even accused himself admitted in his defence that his father was not home on that fateful day and so the father could not have had the opportunity to murder the child. The accused also alleged that the witnesses PW1-3 framed him after he alleged that the child (deceased) used to go to their house. However, I find that allegation untenable because PW2 did admit that the deceased used to spend most of the days at her house with other children.

In the end, having found that the evidence of PW1, 2 and 3 was overwhelming as to the presence of accused at the scene of crime on that day, and having been the last person to be seen with the deceased, Section 112 of the Evidence Act placed a duty on the accused to explain what happened to the deceased and that is not in any way shifting the burden of proof on him but he should have given a plausible explanation as to what happened to deceased, which he did not do.

Accused's conduct after the child was confirmed dead speaks volumes as to his guilt. PW3 said that on noticing that the child was dead, she screamed and accused ran off. PW2 and 5 confirmed that accused did run away and PW5 and others chased and arrested him. Why would he run away if he had just found his child dead? It can only lead to one inevitable conclusion, that he was the guilty party.

To prove an offence of murder, the prosecution has to prove:

1. ***that accused committed the act (actus reus);***
2. ***that he had the intention to cause death (mens rea) also known as malice aforethought.***

In this case, I am satisfied beyond any doubt that the circumstantial evidence on record is cogent, is firmly established and has formed such a chain that it points at none else than the accused as the culprit. In the case of ***Margaret Wamunyu Wairiuki v Rep CR.A 35/05*** the court stated that ***circumstantial evidence is very often the best evidence***. The death was by strangulation. Strangulation is a deliberate act and is in itself evidence of malice aforethought. I find that the prosecution has proved its case beyond any doubt as required of it. I find the accused guilty of the offence of murder as charged and convict him accordingly under Section 322 of CPC.

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**R. P. V. WENDOH**

**JUDGE**

**25/9/2015**

**PRESENT:**

Mr. Mulochi, for State

Mr. Muriithi Holding Brief for Mr. Kogora for Accused

Faith, Court Assistant

Present, Accused