



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO.19 OF 2012

REPUBLICPROSECUTOR

VERSUS

JOSEPH ALEMBA MUSALIAACCUSED

J U D G M E N T

Introduction

1. The accused person JOSEPH ALEMBA MUSALIA is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 27/05/2012 at Itoro village CHAMAKANGA sub location of VIHIGA COUNTY WITHIN Western province he murdered L M.

2. The Prosecution called six (6) witnesses while the only witness for the defence was the accused.

Prosecutions Case

PW1 ANNAH KHAVAI GUSIGOLO testified that on the 27/05/2012 at about 10.00am Musalia the father of the deceased herein went to her home together with Antony. Musalia was carrying a pair of shoes which belonged to her employee, the accused. She told the Court that Musalia was also carrying one small shoe. She told the Court again that the shoes belonged to her employee and identified them in Court. He said that the two wanted to go with the owner of the shoes immediately but they did not. They returned at 1.00pm together with the Assistant Chief and Police officers. This time they had a knife and a cap. She saw the knife in Court. She told the Court that she had given the (cap) to her employee who was herding her cows. She did not see the cap in Court.

3. She testified that she was told that they found the shoes at Shinoko at the river but she was not present when the shoes were recovered. At the time the shoes were brought to her home she had sent the accused to the shop.

4. On cross examination by Mr. Wekesa for the accused she confirmed that the shoes were for the accused and that on the 27/05/2012 the accused was at home herding her cows and he didn't go out. PW2 testified that on the 27/05/2012 at about 10.00am she woke up and prepared breakfast for her two children A (6 years) and L M (5years) and went to the market to grind maize. She later went back home and continued with her work.

5. Her son F L, who testified as PW3 then went to her and told her that Jamin (accused) had taken her daughter. The accused is called Jamin at home. She started screaming as she looked for the child but they did not find her that night. The next day Monday the 28th the search continued. She saw footsteps at

a small forest where trees were planted by a neighbour. She also saw one small shoe belonging to her daughter. She identified it. It was marked as PMF 1 – 2. She said that the small shoes was covered by the pair of Akala shoes (PMF 1 – 4). The neighbours told her to check the shoes and find out whose shoes they were. People went to the neighbours and the accused agreed that the shoes were his. She then reported to the Assistant Chief whereafter the accused was arrested. Police from Mudete went to the scene. She was then called on phone and informed that the child had been found in the river. She told the Court that the shoes in Court PMF 1 – 2 belonged to her daughter and the pair of Akala shoes belonged to the accused.

6. On cross examination she testified that the two knives were retrieved from the house where the accused was working although she was not present when the knives were recovered. She explained that she went back to her home at 1.00pm she had left the home at 10.00a.m. PW3 informed her at about 4.00pm. She had not seen her children between 1.00pm to 4.00pm as she thought they were at her neighbours. She also stated that PW3 told her that the accused gave him mandazi and told him to go away. She re-iterated that she reported to the sub chief and told him it was Jamin who had been mentioned by PW3. She also informed one JESIKA LURENDO.

7. PW3 A L 5 years old gave unsworn testimony. He told the Court that the deceased was his sister and he was with her when Jamin caught her. He knew Jamin. He told the Court that Jamin took the deceased into the water. He identified the accused in Court by pointing at him.

8. PW4 No.73030 PC HERMAN MUTHIGA based at Mudete Police station crime division testified that on 28/05/2012 at about midday he was called by Sgt Apwoyo who told him there was a report of murder. He went to the scene where he found a group of people including the accused who had been arrested and assaulted. On inquiry he was told that a child got lost and the accused was a suspect. He went with the accused together with the Chief of the area. The Chief had one shoe suspected to be that of the accused and a “small” shoe belonging to the deceased. They went to where the shoes had been recovered and searched the area up to Gologoli river. They entered a small forest where they recovered a knife and a white marvin. Thereafter they went to where the accused lived where they found PW1 who told them that the accused was his worker and she had given them the marvin cap to protect them from the rain. He then took the accused to the Station. The following day the Chief called him and told him the lost child had been found and that she had been raped and later killed. He produced the small blue shoes (PEx 2 (a)) and Akala shoes (PEx 2 (b)) and the knife PEx 3). On cross examination he told the Court that he did not recover anything from the accused. He found that he (accused) had been assaulted. He was shown by the crowd where the shoes were found. There was no blood at that place.

9. PW5 DR. JAIRUN AMUNGA a doctor at Vihiga hospital produced the post mortem on behalf of Dr. JEDIDAH MAUBE who he had worked with at Vihiga District Hospital and whose handwriting and signature he was conversant with. He explained the contents of the post mortem report and the opinion on the cause of death. It was opined that cause of death was suffocation leading to cardiovascular arrest secondary either to manual strangulation or drowning. The post mortem report was signed by Dr. Maube and duly stamped. He produced the same and it was marked as PExh 4.

10. On cross examination by Mr. Wekesa he explained that from the report, the cause of death was suffocation caused by either manual strangulation or drowning and that the findings were not specific.

11. PW6 No.219685 CI PETER KIEMA O C S Mudete Police station testified that on 28/05/2012 he received a report of a missing child and that members of the public had arrested a suspect in connection with the missing child. The report was that the child had gone missing on the evening of 27/05/2012 and that she had last been seen with the accused. He instructed his officer to mount a search around the area for the missing child but the search was not successful that day.

12. On 29/05/2012 he recorded a statement from the victim’s mother. He also got a report from the area Chief that the body had been spotted somewhere along a stream. He went to the scene where the body of the young girl aged 5 years was discovered.

13. He observed that it was dressed in a red sweater and removed it from the water and took it to the mortuary for post mortem. Looking at the body he saw signs of strangulation at the neck and the body looked like it had been defiled. The body was positively identified to be that of L M who was reported missing. They took a sketch plan of the scene. He then handed the file to the DCIO for their investigations. On cross examination he explained that he did all the investigations before handing over the file to the DCIO. He opined that the cause of death was strangulation and possibly defilement.

14. After a careful analysis of all the evidence tendered by the Prosecution the Court was satisfied that a prima facie case had been established against the accused person and he was put on his defence.

15. The accused opted to give a sworn testimony and he did not call any witness. He told the trial Court that on the 27/05/2012 at about 6.00pm he was at his employers home (PW1) where he worked as a herdsman having been employed in June 2011.

16. On that day he woke up in the morning and was sent to buy milk and sugar by PW1. Coming back he found two people in their compound who were carrying 3 shoes. One of them (Musalia) asked him whether the shoes were his but he denied Musalia then told him that he was told that the shoes were his. They took him and tied his hands at the back and walked with them to the road near GIDEONS SHOP where they sat him down. They called members of the public who they told that the shoes were his. When they were about to beat him up the area sub chief and village elder appeared and when asked again whether the shoes were his he denied.

17. Thereafter he was taken to the sub chief where they called the Police. He was then taken by the Police to Vihiga police station and put in the cells. He denied that he committed the offence. He was the cross examined by Mr. Oroni for the State. He confirmed that he was employed by PW1. He denied that the items produced in Court were his. He also denied that he knew PW3. He wanted to deny knowledge of PW2 but changed his mind. He told the Court that he knew PW2 who was his neighbour but maintained that he did not know PW3. He claimed that PW1 lied when she said that the "akala" shoes were his because she owed him some kshs.3000/=. He maintained that he did not know PW2's children.

18. On re-examination he maintained that the "akala" shoes that were produced in Court were not his. Examined by the Court he explained that he started working for PW1 in June 2011 until October or November 2011. He told the Court that he was sent to buy milk and sugar on 27/06/2011 and not 27/06/2012. The defence closed their case but did not make any submissions; this was the case with Prosecution. This Courts duty is therefore to determine whether the Prosecution has proved its case against the accused beyond reasonable doubt.

Analysis of the Evidence

19. From the evidence the deceased went missing on the 27/05/2012 as per the charge sheet and she was not traced that night which means that PW1 gave a wrong date when she told the Court that the deceased "father" went to her home on the 27/05/2012. The child went missing in the evening of 27/05/2012 thus the father of the deceased could not have gone with the exhibits on the 27/05/2012 at 10.00a.m since by that time the child (deceased) was with her mother PW2. The evidence by the Prosecution witness point at the accused as having taken the deceased at about 4.00pm on the 27/05/2012. The only person who saw the accused take away the deceased was PW3 who is the deceased's brother and who was left by PW2 at home together with the deceased. PW3 at the time of giving evidence was six (6) years old. The Court allowed him to give unsworn evidence after taking him through a voire dire examination. His explanation of how her sister disappeared was short and to the point. He told Court that "I know L M, she was my sister, I was with her. She was caught by Jamin. I know Jamin. He then pointed at the accused who was seated at the dock. He did not waver. Surprisingly he was cross examined by Mr. Wekesa and he reiterated that he knew the accused. There was no other eye witness in this case.

20. PW1 on the other hand identified the accused's shoes (PEx 1) in Court. She told the Court that the accused was her employee who used to work for her as a herdsman and that she gave the accused a marvin cap to protect him from the rain although the cap was not produced in Court as an exhibit. She

repeated her testimony when she was cross examined. She told them that she was not there when the shoes were recovered although she was told that the shoes were found at Shinoko at the river.

21. PW2 narrated on how she woke up on the 27/05/2012 and prepared breakfast for her children the deceased and PW3. She then left them in the house and went to the market to grind maize. When she returned to her home she continued with her daily chores. At about 4.00pm PW3 went to her and told her that L had been taken by the accused. She started screaming and they started looking for the child. That night they did not find her. The next day she continued with her search and found akala shoes (Pexh 2) and one of her daughters shoes (Pexh 1) in the forest. People went to the neighbours asking whose shoes those were (PExh 2). The accused was the one who accepted that the shoes were his. She identified PExh 1 and 2 in Court.

22. PW4 did some investigations after receiving the report of the murder on the 28/05/2012. He went to the scene of crime where he found the accused who had already been arrested. Upon inquiry, he was told that a child got lost and there was a suspect. They went together with the Chief and the items that had been recovered to where they had been recovered at Gologoli river where they also recovered a knife and a marvin cap. He went to the accused home and there he was informed that the accused was a worker there and he had been given the marvin cap to protect him from the rain. He then arrested the accused. The child was found the following day. He produced the items.

23. PW5 produced the post mortem results which confirmed that the deceased died on the 27/05/2012 and that the cause of death was cardiovascular arrest secondary to either manual strangulation or drowning.

24. PW6 was the one who recovered the body and took it for the post mortem examination. In his defence the accused denied that he was the owner of the akala shoes (Pexh 2). He claimed that his employer (PW1) was trying to fix him because she owed him kshs.3,000/=. He also denied that he knew PW3 although they were his neighbours.

25. From the above it can be said that PW1 was in a position to know the accused person's shoes since the accused was her employee and she used to see him on a regular basis. I find her evidence credible to that extent. The accused merely denied ownership of the shoes. He did not give any explanation of his whereabouts on the 27/05/2012. Although PW3 was a child of six (6) years PW3's evidence was also credible. He knew the accused well and that is the reason he was able to point at him out at the dock. No reason was given by the defence as to why PW3 would lie against the accused person. As stated by PW2 he (PW3) was left alone together with the deceased and he is the one who saw the accused take away the deceased. The evidence surrounding the case herein is circumstantial. The deceased shoe together with those of the accused were found in one place. The accused was said to have been the one who left with the deceased before she went missing. He is the only one who could tell the world what happened to the deceased after he took her away from the brother (PW3).

The Law

26. It is the duty of the Prosecution to prove the guilt of an accused person beyond reasonable doubt. As above stated no one saw the accused murder the deceased, therefore the Prosecution's case is premised on circumstantial evidence. In **SIMONI MUSOKE –VS- REPUBLIC [1958] E.A. 715** at holding number (iii) The Court of Appeal for Eastern Africa had this to say about circumstantial evidence.

“In a case depending exclusively upon circumstantial evidence the Court must before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt”

27. It is thus necessary that before drawing an inference of guilt based on circumstantial evidence, care be taken to ensure that there are no other co-existing circumstances which would weaken or destroy the inference. See **NDURYA –VS- REPUBLIC [2005] KLR 135** where the Court of appeal held as follows:-

“Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of proving a proposition. However circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused persons guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.”

28. MWATHI –VS- REPUBLIC [2007] 2 E.A. 334 and MWENDWA –VS- REPUBLIC [2006] KLR 133 where the Court of Appeal held, inter alia that “to prove a case based on circumstantial evidence only every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the Prosecution. Secondly, as is now settled law, the chain must never be broken at any stage.”

29. The circumstances of this case are rather interesting. The deceased’s shoes was found together with the accused’s shoe in the forest. PW3 who was left together with the deceased told the Court that it was the accused who took away the deceased. PW1 confirmed that PEx 2a were the accused’s shoes. She identified the shoes as belonging to the accused who was staying in the same compound. The deceased was found dead in a river after one (1) day or so. From those circumstances the only inference one can make without any other explanation is that it is the accused who killed the deceased in this case.

30. From the evidence of PW5 who produced the post mortem report (PExh 4) the deceased had bruises on the face and neck which were strangulation marks. There was also degloving injury on the perineum and pubic region including anal region with galvemount tissue. Internally the only findings were in the genital area including anal area. There were no external genitals. PW6 who retrieved the body from the river confirmed the injuries as stated in the post mortem report (PExh 4) From the above I find that the deceased was defiled and thereafter killed to cover up for the defilement. She was then thrown into the river.

31. The act of strangling of the deceased after defiling her and throwing her into the river amounts to malice aforethought as defined by Section 206 of the Penal code. Degloving injury is a tearing of the skin on the perineum. No much explanation was given by the doctor on what it means and what causes it. But from reading the post mortem report it is injury on the genital area. I find that the child was defiled before being strangled.

32. From all the above evidence, I am satisfied that the Prosecution has proved its case against the accused person on the charge of murder beyond reasonable doubt. I find him guilty as charged and he is convicted under Section 322 (1) of the Criminal Procedure Code.

Judgment delivered, dated and signed in open Court at Kakamega this 24th day of November 2015

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Wekesa (present) Accused

Mr. Omwenga (present) for State

Mr. Okoit - Court Assistant