



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 30 OF 2014
(FORMERLY KISII HCCR NO. 52 OF 2012)

BETWEEN

REPUBLICPROSECUTOR

AND

JOHN TEMBO NYAMOHANGAACCUSED

JUDGMENT

1. On 5th March 2012, the decapitated body of four year old **BKN** (“Brian”) was found in a bush in Kuria West District. On 22nd March 2012, this court was informed that **JOHN TEMBO NYAMOHANGA** (“the accused”), jointly with others not before the court, had murdered him. He pleaded not guilty and the prosecution called 8 witnesses to prove its case.
2. B was the first-born son of NM (PW 3) and JBN (PW 5). Before his death he was attending nursery school at [Particulars Withheld] Primary School. He used to sleep in his grandfather’s house in the same homestead with his parents. He would be woken up early to go to school with the other children. PW 3 testified that on 5th March 2012, he left early in the morning to go and plough his shamba, when he came back home at about 10.00am to 11.00am, his father, JC, told him that B had not come back from school yet the other children had come home.
3. He decided to go and look for B at the school but on the way he met his sister NM who told him that she had not seen B. He turned to go back home and before he reached, he heard children screaming. When he asked the children why they screaming, they told that they had found a child in the bush. He went to the bush which was along a footpath. The bush was midway between his home and the school. To his shock he found that the child was his son B who was lying face up. His hands were chopped off at the wrists and the legs chopped at the ankles. He had also been strangled with a rope. He immediately raised alarm and people started coming. PW 3 testified that he saw the accused from a distance.
4. JBN (PW 5) recalled that her husband, PW 3, left very early to go and plough. She woke up at 7.00am and made porridge for B and prepared him for school. At about 8:00 a.m, she took him to go with his aunt, N who was also in Nursery School. She went back to do her chores and as she was working the accused, who was her neighbour, passed by and told her about his lost telephone. He left and came back after a few minutes and told her about the same telephone. He came back for a third time and told her had he had found his telephone. At about 11.00am, she went to her mother in law's place to collect water and found N had come from school. Since B used to go to

- school with N, she asked her what happened to B. She told her that B had not come to school and he was not in class. She went home back home and met PW 5 who told her he was going to look for B. When she reached home she heard people including her husband screaming. She followed the screams and reached a thicket where she found B's body. She observed that he had been strangled and that he hands and feet had been cut off.
5. PW 5 testified that there were many people present and that she saw the accused and that he ran away. She described him as looking scared and that when he saw her he looked shocked. More children came to the scene as it was lunchtime. Two children AW (PW 1) and SA (PW 2) said that they saw the accused with B that morning as they were going to school in the morning.
 6. AW (PW 1), a 10 year old, recalled the events of the day B was found dead. He testified that he was from home after having been sent from school for money. At about 10.00 am as he was headed back to school he was with B. The accused was holding B hand as they were headed to school. He proceeded to school. He testified that he did not see B at the school. At lunchtime as he was going him for lunch with other students, they heard screams and went to see what was happening. He saw B's dismembered body. He did not see the accused at the scene.
 7. SA (PW 2), aged 12 recalled that on 5th March 2012, she was coming from school at about 10.00am after she had been sent back home to get examination fees. She testified that she saw the accused with PW 1 and behind them was B. She greeted the accused twice but he did not respond. As they were walking towards the school, she left them as she went home to collect money. She went home collected the money and went back to school. During assembly she saw PW 1 and asked him about the children he was with and he responded that he left them with the accused. At lunchtime she heard people screaming and with her schoolmates, they ran to where the screams were coming from which was not very far from the school. She saw PW 3 screaming. When she reached there she saw B's decapitated body. The deceased's grandfather, JC (PW 4) when cross-examined testified that PW 2 told him that when she left school she saw the accused and B going to school while PW 1 told him that as he was going to school he met the accused and B.
 8. After the B's body was found, people gathered around and police officers from Kehancha Police Station were called. Charles Kipchumba (PW 8), an Assistant Superintendent of Police received a report of murder at Masaba Village near Masaba Primary School at about 3.00pm on the material date. He proceeded there with other officers and upon arrival at the scene, they found a crowd of people and a dead body of male child estimated to be four years old. He noticed that both hands and feet had been amputated. He received information from members of the public that the deceased had been seen with the accused. Police officers removed the deceased body and took it to Pastor Machage Memorial Hospital Mortuary where a postmortem was conducted.
 9. Dr Vitalis Owour K'ogutu (PW 6) conducted the autopsy of the body of B on 8th March 2012 at Pastor Machage Memorial Hospital after the body was identified by PW 4. He noted that the child's upper and lower limbs had been cut just above the wrists and ankles. He also recorded that the body looked pale and had strangulation marks on the neck. He did not see any internal injuries. The doctor formed the opinion that the child had died from external bleeding secondary to assault. He also concluded that the injuries were inflicted by a sharp object. Dr Jacob Onditi (PW 7) examined the accused on 15th March 2015 to determine whether he was mentally fit to stand trial. After examination he concluded that he was mentally fit to stand trial.
 10. PW 8, the investigating officer, further testified that after interviewing witnesses, he concluded from the statements of PW 1 and PW 2 that the accused was the last person to be seen with B. On the 5th March 2012, when they went to the scene, they did not find the accused. They went to the accused's house, which was about 200 metres from the scene but did not find him. The accused was found on 13th March 2012 at Kokomange Village near Isebania, arrested and charged with the murder of B.

11. The accused elected to give sworn testimony in his defence. He denied that he had murdered B and that he was not at [Particulars Withheld] Village on that morning. He recalled that on 5th September 2015 he left his home [Particulars Withheld] Village at about 5.00 am to go and plough in his shamba in Boherera, Bugumbe. At about 2.00pm, he was called by a neighbour from Masaba who told him that a person had been found with his hand and feet cut and that he was the suspect. He was told that his house had been burnt and the group of people was coming to look for him at Boherera. The accused believed that he was the suspect because of his religious beliefs as he belonged to a religious sect called *Roho Msanda* which people suspected was involved in devil worship as they usually wore white robes for prayers.
12. The accused testified that after he left the shamba and went to his father's home to hide. He saw boda boda riders coming to attack him with Administration Police officers following them. The AP's restrained them the riders from attacking him. He stayed at Boherera overnight but his father told him to go and stay with his uncles at Komwamu for his own safety. His uncle went to Masaba to find out what was going on and came back to report to inform him to report to the police. The accused reported to Komwamu AP Post. He was later charged with murder at Kisii High Court.
13. The fact and cause of death of B is not in dispute. His decapitated body was found in a bush. The cutting of the hands and feet must have caused severe bleeding of the child leading to death. I therefore agree with the findings and conclusions of PW 6 that the child died from external bleeding secondary to assault. I also agree with his opinion that the limbs could only have been cut with a sharp object.
14. The main issue in this case is whether it is the accused who caused the injuries that led to the deceased's death. The case is based on circumstantial evidence as no one saw the accused cut the deceased's limbs. The law in this regard has been restated many times by our courts and it is that in order to justify a conviction based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. The circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on and that the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. (See ***R v Kipkering Arap Koske & Another [1949] 16 EACA 135*** and ***Sawe v Republic CA Criminal Appeal No. 2 of 2002 [2003]eKLR***).
15. The circumstantial evidence is based on the fact that the accused was the last person to be seen with B and within a short span time he was found dead. Since the accused was the last person seen with the deceased alive common sense demands that the accused person explain where and when he parted company with him as he did not return to school. In ***Wilson Wanjala Mkendeshwo v Republic NKU CA Crim App. No. 97 of 2002 [2002]eKLR***, the Court of Appeal stated as follows;

As a general rule the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge. For instance Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. The said section is silent on what would happen if he fails to do so. But section 119 of the same Act deals with presumptions of fact. A court is entitled under that section to raise a presumption of fact from the circumstances of the case, that the appellant knew how the deceased died. The presumption being one of fact is rebuttable.
16. The testimony of PW 1 and PW 2 places that accused in [Particulars Withheld] Village. Both of them saw the accused with the B. More particularly PW 1 saw the accused holding B's hand while

he was going to school. The accused was not a stranger to PW 1 and PW 2 as he lived in the neighbourhood. He lived close to the children and close to the school. Both children knew him as he used to visit their homes. It is therefore likely that the accused was also not a stranger to the deceased child. The testimony of both children was consistent and was not shaken on cross-examination. The accused was seen in the village by B's mother, PW 5, who testified that the accused had come to her home three times to talk to her about a phone that morning.

17. The accused was seen with the deceased at about 10.00am and the deceased decapitated body was found at about 11.00am. PW 3 also testified that he saw the accused from a distance when the deceased's body was discovered while PW 5 stated that she saw the accused briefly before he ran away. PW 1 and PW 2 did not see the accused at the scene because they came later during lunchtime after the accused had left.

18. I find and hold that the accused was present in the village that morning and he was the last person to be seen with the deceased and within an hour the deceased decapitated body was found in a bush near the school. He was also seen at the vicinity of the deceased's body when the body was found. It was therefore incumbent upon the accused to provide a reasonable explanation as to what happened in the span of the hour when he was last seen with Brian. In his defence he stated that he was far away in Boherera Village but in light of the credible testimony of PW 1, PW 2, PW 3 and PW 5, I find that his alibi is mere moonshine. In the absence of a reasonable explanation, this court is entitled to presume certain facts under **section 119** of the *Evidence Act* which provides:-

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.

19. In this case the accused, being the last person to be seen with the deceased, lured the deceased and decapitated him and left his body in the bush. While this court is left to speculate on the motive of his act, under **section 9(3)** of the *Penal Code* the lack of a motive is not necessary to prove murder though it may be useful in piecing all the circumstantial evidence together (see *Libambula v Republic* [2003] KLR 683). **PW 8 alluded to the fact that the accused may have been involved in some religious activity suggesting that he may have been motivated by that fact. Such a conclusion lacks evidential basis. Nevertheless, I have warned myself of the dangers that such allegations may be the basis of prejudice against the accused causing people to implicate him. Having reviewed the evidence, I am satisfied that all the evidence it points inextricably to the accused as the murderer.**

20. **There can be no clearer evidence of malice aforethought than the cutting of the limbs of a child and causing him to bleed to death. Such injuries can only be inflicted with, "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," within the section 206 of the Penal Code.**

21. For the reasons I have outlined, I find the accused **JOHN TEMBO NYAMOHANGA** guilty of the murder of **BKN** and I convict him accordingly.

DATED and DELIVERED at MIGORI this 16th day of November 2015

D.S. MAJANJA

JUDGE

Mr M. Odero instructed by Odhiambo and Company Advocates for the accused.

Ms Owenga, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.