



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 60 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

B M M.....ACCUSED

JUDGMENT

1. **B M M**, the accused is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence being that, on the **7th day of October, 2006** at around midday at [*particulars withheld*] **village, Nzauni sub-location** in **Mwingi District** within the **Eastern Province**, murdered **K J**.
2. Briefly, the facts of the case are that on the **7th October, 2006**, **J K** (deceased) a child aged 4 years old went missing from home. His body was found in a thicket. The deceased had been left at home with a relative. Investigations carried out culminated into the arrest of the accused who was charged.
3. To prove the case the prosecution called **8 witnesses**. PW1, **G A M** the mother of the deceased went to a meeting leaving children; **M** and **K** under the care of one, **W**. She got information the child had gone missing. The following day the body was recovered from a thicket.
4. PW2, **W M M** was one of the person who went in search of the deceased. They found the body in the thicket. PW3, **J M M** the deceased's father was away from home when the incident happened.
5. PW4, **Antony Muthui Mungeli** the Assistant Chief of **Nzauni sub-location** received a report from PW1 of the missing child. Later on the body had been recovered. He saw the body. He also participated in the arrest of the accused.
6. PW5, **Joseph Musyoka Muthangia**, the chief **Nzauni** went to the scene after the body was recovered. Per his observation, there were 3 stones beside the body that was on a dry river bed. There was a bottle of poisonous contents. The body had injuries on the face and hand. The police collected the body and the exhibit he mentioned.
7. PW6, **M M** the grandfather to the deceased and father to the accused also participated in the search. He was present when the body was removed by the police. PW7, **DM** was told by **W** that the deceased was missing. The following day they continued with the search. He decided to go and have breakfast. Later **W** went and told him that the body had been found. He accompanied her to the scene where they found the deceased. He informed the Chief of what they found. He accompanied the body to the Police Station, and then the mortuary.
8. PW8, **B M** stated that on the **7/10/2006** at about **1200 noon** he met the accused with the deceased. When he asked him what he was doing, he said he was waiting for the deceased who had gone to answer a call of nature. Thereafter the accused went home alone. He alleged the child was at **Auntie L's** place. The accused had a bath and said he was going to **Mwingi**. **W** went in search of the deceased. Thereafter the body was recovered. On cross-examination he said the offence was committed in **2006** but per his statement he said he encountered the accused and deceased in **2010**. He denied having recorded his statement on **9/2/2011**.

9. The accused was found to have a case to answer hence put on his defence pursuant to the provisions of **Section 306 (2)** of the **Criminal procedure Code**. Having complied with the provisions of **Section 200(3)** of the **Criminal Procedure Code**. I took over the case at that stage.
10. In his defence the accused said that by then he was a student. On the material date he left home after breakfast going to **Musyoka Ndanu's** place. One of the persons he left at home was PW1. He went to assist **Musyoka** who was carrying sand on a handcart. He worked with **Musyoka** (now deceased) till **7.00pm**. He went home and slept. The following morning he was to go to church at **Miguani Mission**. He had been given money to purchase a dictionary by PW1. On his way home he was arrested. He stated that he was **14 years** old then and he was framed up. He noted that one of the witnesses recorded a statement in **2011** after it was alleged that the offence was committed in **2006**.
11. Only the defence counsel filed submissions on this matter. This is a case where at the close of the prosecution's case no medical evidence had been adduced. Without evidence of a postmortem having been conducted, there would be no proof of *actus reus*.
12. The question that remains unanswered is whether there was any killing? And assuming that it happened, the next question will be what the cause was? It is only a postmortem report that would have resolved this mystery. In the opening statements of the prosecution, they were to prove that injuries sustained by the deceased were consistent with an intention to kill. This evidence, however, was not adduced.
13. It was alleged that the accused was seen with the child. PW1 said she left the children with **W**. Surprisingly the alleged **W** was not called as a witness. **PW8** the only witness who claimed to have seen the accused with the child recorded that in his statement he saw them in the year **2010** long after the deceased was said to have died. With this kind of evidence, it is apparent that the accused was arrested following suspicion. Suspicion however strong cannot be a basis for a conviction.
14. The accused had no duty of filling the gaps left by the prosecution. The duty was upon the prosecution to prove the case. In the case of **Woolmington versus DPP[1935] UKHLI the Court held thus;-**

“throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt... if at the end of the whole case, there is a reasonable doubt, created by the evidence given by either the prosecution or prisoner... the prosecution has not made out a case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of common law... and no attempt to whittle it down can be entertained.”

15. With the authority cited in mind, it does not matter that the accused was charged with a serious offence. The prosecution had a duty of proving the case beyond any reasonable doubt.

From the foregoing, it is obvious that the burden was not discharged. In the premises, the case against the accused fails. He is acquitted of the charge of murder and he shall be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 3RD day of APRIL, 2014.

L.N. MUTENDE

JUDGE