



REPUBLIC OF KENYA

High Court of Kisii

Criminal Case 3 of 2009

NO.685

REPUBLIC PROSECUTOR

VERSUS

SAMUEL OGANGA OKEMWA ACCUSED

JUDGMENT

1. The accused Samuel Oganga Okemwa is charged with murder contrary to **section 203** as read with **204** of the **Penal Code**. The particulars of the offence are that on the 24th day of December, 2008 at Nyataro village in Gucha South District within Nyanza Province he murdered Veronica Kerubo Machuka.
2. The evidence of the first two prosecution witnesses was taken by my predecessor Musinga, J. as he was then. PW1 was Alex Atuta (a minor) who after being taken through a voire dire examination, gave evidence on oath. PW1 told the court that on 24th December 2008 he was in the company of Esponi and Veronica when his mother sent them to the kiosk to buy tomatoes and paraffin. On the way to the kiosk Veronica (the deceased) was taken by the accused on the promise of buying her a “mandazi”, but instead she was taken to the sugar

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plantation and killed. That on returning home he told his mother what had happened. Later PW1 joined other family members to look for the deceased in the accused home but did not find her. The deceased was later found in a sugar plantation and the body taken to the mortuary. PW1 identified the accused in the dock and also told the court that the accused was the one who took the deceased to the sugar plantation.

3. On cross examination he revealed that Esipon was older than he was, that they had been given Kshs.10/=; he did not see the accused buying the deceased mandazi, but that he saw the accused murdering deceased by strangling her.
4. On re-examination PW1 confirmed that they found the accused where the body of Veronica was.
5. PW2 was Esipon Epo, a minor aged 10 years. After conducting a voire dire on him Musinga J (as he then was) opined that the witness was intelligent enough to testify though not under oath. He confirmed to the court that on 24th December 2008 their aunt Nyanchera who testified as PW3, sent him, PW1 and the deceased to a kiosk to buy tomatoes and paraffin. That the accused emerged from a foot path and told

them that he was taking the deceased to buy her mandazi.

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At first the deceased resisted but the accused carried her on his shoulders. They proceeded to the kiosk, bought what they had been sent for and on getting home they informed their aunt what had transpired. Their aunt later sent Philipo to look for the deceased in the accused's house but on not finding her they both (his aunt and Philipo) returned to the accused's house where the accused on being slapped by his brother led the people to a sugar cane plantation. He also identified the accused in court and informed the court that he had known the accused prior to this incident because they were neighbours.

6. On cross examination PW2 testified that when the accused took the deceased to the sugar plantation he (witness) was not present. PW1 had told them that the accused murdered the deceased. Before they went home they passed through the accused's house to look for the deceased but did not find her. PW2 also stated that contrary to PW1's testimony, PW1 had been given Kshs.50/= out of which they bought paraffin for Kshs.20/= and tomatoes for Kshs.30/=. This witness also stated that when the deceased's body was retrieved from the plantation he was not present.

7. On re-examination PW2 maintained that he saw the accused carrying

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the deceased on the shoulders.

8. PW3 was Rhoda Nyanchera Okiamo an aunt of the deceased. She confirmed to the court that on 24th December 2008 at about 5.00 p.m. she sent PW1, PW2 and the deceased to buy paraffin and tomatoes. That later her brother Stephen Kengere came with PW1 and PW2 and on enquiring where the deceased was they told her that the accused had taken her. She then proceeded to the home of the accused only to find his mother who told her that the accused was not at home. She then proceeded home and informed her mother that the accused had taken the deceased. They continued to look for the accused who later turned up in her mother's home. At first on being asked where the deceased was, the accused said that he had given her money to buy mandazi but later the accused requested for one of his brothers and when the brother came he took them to a sugar cane plantation where the deceased's body was found.

9. PW3 further informed the court that on the material day, the deceased was wearing a pink spotted dress and a panty. She identified the spotted dress as PMF1-1 and the creamish yellow panty as PMF1-2.

10. PW4 was Zebedayo Nyabwanga the father to the deceased. He

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told the court that on 29th December 2008 he identified the body of the deceased at the Gucha District Hospital mortuary after which a post mortem examination was carried out and the body of the deceased was released to him for burial.

11. PW5 was Stephen Kengere Okiama a minor aged 16 years and also an uncle to the deceased. After conducting a voire dire examination, court was satisfied that he was not only intelligent but also understood the importance of giving evidence on oath. He told the court that on 24th December 2008 he met PW1 and PW2 on their way to the shop. That PW1 decided to go back home with him while PW2 proceeded to the shop. On arriving home, PW3 asked where the deceased was and PW1 told her that accused had taken deceased to buy her mandazi.

12. PW3 then requested PW4 to accompany her to the accused's home to look for the deceased and at about 7.30 p.m. accused came home. On being asked where deceased was PW3 and his mother started screaming, and when people came, the accused pleaded with them not to kill him and told them to call his brothers so that he could tell them where the deceased was. His brother one Ayora came,

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slapped him and the accused led them to a sugar plantation where the deceased was. The plantation was about 500 m away. Ayora was not called as a witness.

13. At the sugar plantation, they saw the deceased lying down, with her panty on her left leg and her dress lifted up to her chest. She had injuries on her neck and private parts. He identified the dress the deceased was wearing and the panty. The body of the deceased was later taken by the police to Tabaka Hospital Mortuary.

14. On cross-examination PW5 maintained that he met PW1 and PW2 but did not see the deceased and that it was the accused who led the villagers to where the deceased was.

15. On examination by court, PW5 maintained that it was the accused who led the way to where the body of the deceased was.

16. The evidence of PW5 marked the end of the prosecution's case. The accused was thereafter put on his defence. He chose to give an unsworn testimony with no witnesses. He told the court that on 24th August 2008 (this should be 24th December 2008) he was at home revising when someone came looking for him and on opening the door he saw a multitude of people who took him away to the chief's camp,

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then to the police station and later he was brought to court where these charges were read to him. He blamed his arrest on PW4 stating that PW4's family wanted to punish his family because they were learned.

17. At the close of the accused's defence, counsel for the accused submitted that the prosecution had not proved its case beyond any reasonable doubt as no evidence was led concerning the investigations carried out into this case and no medical evidence was adduced to confirm the cause of deceased's death. He urged the court to find that the prosecution had not proved its case against the accused beyond any reasonable doubt and to acquit him of the charge of murder.

18. As I pointed earlier in this judgment, I did not hear the evidence of PW1 and PW2, however as I proceeded to hear and record the evidence of PW3 to PW5 it became evident that this case was marred with numerous adjournments instigated by the prosecution on account of not having witnesses in court. Eventually, the prosecution was forced to close its case without the evidence of the investigating officer and the doctor who carried out the post mortem examination on the body of the deceased. Can it then be said that with the evidence on record the prosecution has proved its case beyond any reasonable

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doubt, especially when both the investigating officer and the doctor did not testify?

19. In **Jeremiah Gathiku Kirungi –vs- Republic** (Criminal Appeal No. 73 of 2008) which was cited in **Gabo Abdi Songolo –vs- Republic [2011] e KLR – Criminal Appeal No.195 of 2009 at Mombasa High Court**, the court said the following... ***“the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate.”***

20. In the instant case, and as correctly submitted by learned counsel for the accused, even though the prosecution had reasonably convinced this court that the child Veronica died, there was no medical evidence to establish the cause of death and neither did the investigating officer testify in this court as to how he investigated this matter. Evidence by PW1-PW5 only indicated that Veronica was dead but as to how and the person who killed her has not been proved beyond reasonable doubt by the prosecution. Though PW1 alleged to have seen the accused strangling the deceased that evidence crumbled under the weight of cross-examination. PW2’s testimony was of no help either. Ayaro was

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also not called as a witness to strengthen the evidence by PW3 and PW5.

21. It must be noted that in all criminal matters, the prosecution needs to bear in mind that whenever it fails to produce sufficient evidence, such failure must be to the advantage of the accused. In the case of **Juma & others –vs- Attorney General, Nairobi Misc. Cr. Application No.345 of 2001**, (unreported), Msagha and Kuloba JJ stated; and I agree with them, that:-

“Always remember that the purpose of a criminal prosecution is not to

obtain a conviction, it is to lay before the court what the state considers to be credible evidence relevant to what is alleged to be a crime. The prosecutor has a duty to see that all available legal proof of the fact is presented; and this should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing. His function is a matter of public duty which in civil life there can be none charged greater personal responsibility. It should be efficiently performed with an ingrained sense of dignity, the seriousness and the justice of judicial proceedings.”

22. Regrettably in the instant case, the prosecution failed to discharge its duty with diligence and efficiency. The investigation seems not to have been done with any degree of seriousness and so was the duty to summon and call witnesses.

23. In the circumstances, and there being no evidence to discharge the prosecution’s onerous duty of proving its case against the accused

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person herein beyond any reasonable doubt, I find the accused not found guilty of the charge of murder and accordingly acquit him under **section 322 (2)** of the **Criminal Procedure Code**. Unless he is otherwise lawfully held, the accused shall be released from prison custody forthwith.

24. It is so ordered.

Dated and delivered at Kisii this 14th day of March, 2013

**RUTH NEKOYE SITATI
JUDGE.**

In the presence of
Mr. Shabola for State
Mr. Mutai for S.M. Sagwe for Accused
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.

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