



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**MURDER CASE NO. 2 OF 2010**

REPUBLIC.....PROSECUTION

VERSUS

JOSEPH KAMANDE GATHEYA.....ACCUSED

**J U D G M E N T**

**JOSEPH KAMANDE GATHEYA** herein referred to as the accused is charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code.**

The particulars as stated in the charge sheet are as follows:-

***On the 24th day of December, 2009 at unknown time at Kibatiro village in Kirinyaga District within Central Province unlawfully murdered MELVIN MWANGI MAINA.***

The prosecution called a total of twelve (12) witnesses. The evidence is that on 24/12/2009 11.30 a.m. the accused went with the deceased to a cow or cows in the grazing field. The accused a brother to the deceased's mum (PW1). Therefore the accused was a maternal uncle to the deceased. Accused returned home at around 6 a.m. without the child.

There is evidence from PW2 and PW6 that the accused had been seen with the deceased child at Ngomongo around 3 p.m. - 4 p.m. He was in Ngomongo taking alcohol while the child played with other children. These 2 witnesses stated that the accused left with the child. PW9 received an alert from her grandchildren of a child's body at Thiba River. She went and together with the children present she pulled the body from where it was stuck and placed it on the River Bank and covered it with a lessa. She sent for the chief. She said the boy's tummy was not swollen indicating he had not swallowed water.

PW10 Dr. Nderitu found the cause of death to be strangulation (EXB1). He had noted the following

- bruise on front part of head 3 cm x 4 cm
- bruises around the neck
- vomit in nostrils
- no fractures noted on head.

Upon mental assessment the accused was found to be mentally fit to stand trial (EXB2). PW12 was at Kutus Police Station when he received a report of a missing child from PW1, accused and two others. While still there a motor vehicle arrived with the deceased's body having been retrieved from the river. The accused was then detained.

In his sworn defence the accused denied the charge. He admits having been with the child on 24/12/2009

as he went drinking in Ngomongo. As he left for home he did not see the child and he assumed the boy had gone home as he had done before.

Mr. Ithiga for the accused filed written submissions at the close of the defence case. He submitted that the Prosecution had not proved the 2 ingredients in a charge of murder. He submitted that the evidence before the Court was purely circumstantial and the Court would not rely on it to convict.

The evidence before the Court is that the deceased's body was recovered from Thiba River. It was retrieved by PW9 and some children at around 6.30 p.m. on 24/12/2009. There was no dispute that this was the deceased's body. I therefore find the fact of death to have been proved.

PW10 Dr. Nderitu who carried out the postmortem found the cause of death to have been strangulation. (EXB1). That being the case the next issue for determination is who killed the deceased. There is no dispute that the accused left home with the deceased on 24/12/2009 11.30 a.m. or thereabouts. There is also no dispute that the accused went with this child to a drinking den in Ngomongo.

- It is true that when the accused finally reached home at around 6 p.m. he was alone minus the deceased.
- It is true that the deceased's body was seen by some children at Thiba River. These children called their grandmother (PW9) who had the body retrieved and placed at the river bank.

The witness (PW9) said the boy had not drunk water as his stomach was not swollen. Did he therefore drown? The doctor (PW10) said the cause of death was strangulation. He had noted some bruises on the neck and front part of head and vomit in the nostrils. PW7 and PW8 are police officers who visited the scene and found the body on the river bank. PW7 indicated that he saw a small bruise on his forehead; bleeding from the genitals and marks on both sides of the neck. However, PW8 indicated that he did not notice any visible injuries on the body. PW4 saw nail marks on the neck while PW3 did not see any marks on the body or any blood.

It is therefore not clear whether PW3, PW4, PW7 and PW8 were seeing the same body. At Ngomongo where the accused was drinking from around mid-day to 6 p.m., it is said by the liquor seller that the deceased was playing with other children. PW2 who was at Ngomongo said he saw the accused and deceased leave together. But he adds that there are many drinking dens in Ngomongo and he did not personally see the accused drink alcohol where he was. PW6 sold alcohol to the accused person and she said she saw him leave with the child. The child had been playing with other children.

The accused person in his defence states that it was not the first time he was going places with the deceased. This was confirmed by PW1. He added that on this day when he was through with his drinking and wanted to leave he could not see the deceased. So he decided to go home as the deceased used to go home alone.

From PW1's evidence the Ngomongo village where the accused went drinking is separated by Thiba river from their home. There is no bridge. The river is just crossed and the water reaches one's waist. So the deceased had to be carried to be able to cross the river.

The doctor did not touch on drowning as the probable cause of death. He said it was strangulation. And if indeed it was strangulation then the boy was murdered elsewhere and brought to the river as a way of covering up. PW6 said he only sold the accused 2 cups of alcohol. It is also PW4's evidence that in Ngomongo village are many drinking dens. It is therefore evident that the accused could not have been in one drinking den for all the hours he was away from home. And if he was in one drinking den then it was not the one of PW6 who only sold him 2 cups of the brew and he left.

And if the accused had been drinking for all those hours, what was the state of his mind by the time he went home? Is there any evidence of him having been seen at the river? PW1 had tried to say she was told by PW2 that the accused and deceased had gone fishing at the river. They even went to the river. At page 6 of the proceedings she states:-

***“I went to my sisters house and called one G. We went to look for the child around the river. It was 6 p.m. We saw some children playing. We asked them if they had seen M. They said they had seen him with M. We crossed the river. K found us there.”***

From this statement its clear the Thiba River had been searched by PW1 and her team. The accused also joined them. When the child was not found they went to the Police. It was later that the body was found. Could it have been the accused who brought it there?

There is no evidence that accused was seen at the river with the deceased. He was generally seen in Ngomongo with him. A fact not denied by the accused. Would the mere fact that he was the last person to be seen with the deceased without any other evidence be sufficient to find him to be the murderer? The evidence I am dealing with is pure circumstantial and that that is why I have asked a number of questions.

In the case of ***NZIVO VS REPUBLIC [2005] 1 KLR 699*** the Court of Appeal had this to say about this subject

***“In a case dependent on circumstantial evidence in order to justify the inference of guilt to the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.”***

It was wrong for the accused to have gone to Ngomongo village to drink in the company of the deceased. There is however no evidence that the boy partook of the brew. He was simply playing with his friends. It has also come out that this was not the first time the accused and deceased were visiting those places together.

Being a child, the deceased must have made friends and endeared himself to many in Ngomongo. The accused says when he was ready to leave obviously after having a bit too many for the day, the boy was nowhere to be seen. Is there a possibility that this could be true? My answer could be yes because M was not drinking and he had to join his friends to play. Could somebody have taken advantage of this to do some mischief?

The conduct of the accused when he learnt that his nephew was not at home is not suspicious. He was surprised/apprehensive. And he co-operated and walked around with them trying to trace the boy. He even went with them to the Police Station to report about the missing child. In the case of ***SAWE VS REPUBLIC [2003] KLR 364*** the Court of Appeal held as follows

- 1. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***
- 2. 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.***

I have indeed above, endeavoured to show that there are other existing circumstances weakening the chain of circumstances relied on by the Prosecution. The investigating officer in this case ought to have done better than he did. He did not get to Ngomongo village for proper investigations. Even those children at the river could have assisted the police in identifying the person/persons who brought that body there. They wholly relied on the fact that it was the accused who had been last seen with the deceased.

This needed more evidence to complete the chain of circumstances. Again in the case of ***NDURYA VS REPUBLIC [2008] KLR 135*** the court of Appeal held thus

***“Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were 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.”***

After evaluating all the evidence adduced herein, I do find that the same does not irresistibly point to the accused to the exclusion of all others so as to justify a conviction.

Having so found, I will not go into the issue of malice aforethought as the killer has not been identified through the evidence before me. For my part I find the prosecution case not proved and I acquit the accused forthwith under Section 322(1) of the Criminal Procedure Code.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JULY, 2013.**

**H.I. ONG’UDI**

**JUDGE**

**In the presence of:-**

**Ms. Ing'ahizu for State**

**Mr. Ithiga for accused**

**Accused**

**Njue CC**