



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO  
Criminal Case 24 of 2006**

**REPUBLIC .....PROSECUTOR**

**-VERSUS-**

**PETER MOSA WAMBURA MWITA.....1ST ACCUSED**

**CHRISTINA MARY BOKE.....2ND ACCUSED**

**MAURICE OCHIENG AONGO.....3<sup>RD</sup> ACCUSED**

**MICHAEL OTIENO NYAWALA .....4<sup>TH</sup> ACCUSED**

**JUDGMENT**

The four accused persons namely, **Peter Maosa Wambura Mwita, Christina Mary Boke, Maurice Ochieng Aongo and Michael Otieno Nyawala**, being the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons respectively, were charged with the offence of murder contrary to section **203** as read with section **204** of the Penal Code. The particulars of the charge stated that, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons, on the 21<sup>st</sup> day of August 2006 at Mjini Estate, in Kericho district within the Rift Valley province jointly murdered **MWM**

The prosecution relied on evidence by a total of ten (10) prosecution witnesses in their bid to prove the charge against the accused persons. The evidence by the prosecution witnesses is hereby summarized albeit briefly.

**EN PW1**, testified that on 21<sup>st</sup> day of August 2006, they were watching videos at a local video shop from 5.00 pm upto 8.00 pm in the company of the deceased and her other siblings. She was also in the company of her younger brother Anthony Waweru who testified as PW4. The deceased was the daughter of the 1<sup>st</sup> accused person, and the step daughter of the 2<sup>nd</sup> accused person. The deceased had come to live with the 1<sup>st</sup> and 2<sup>nd</sup> accused persons and they had stayed together for a period of about 1 1/2 months prior to her death. The house in which they were occupying was a rented premises owned by PW1's mother P W. At about 8.00 pm, the video shop closed and the deceased in the company of PW1, PW3 and the other siblings of PW1 started walking home. They walked home together with the deceased, but as they were entering their house, PW1 saw the deceased walking backwards as if she was going back to the video shop; however, PW1 saw the deceased walk past the video shop. PW1 went inside their house and slept and after sometimes she was woken up by the 2<sup>nd</sup> accused person. The 2<sup>nd</sup> accused person wanted to discuss something with PW1's mother P W, PW2.

After some discussions, the 2<sup>nd</sup> accused person told PW2 that she heard something being dropped and upon checking through the door, she saw the deceased being carried by two men to the bathroom. It is at this point that PW2 decided to call a neighbour by the name Odongo so that they could establish what the 2<sup>nd</sup> accused person was talking about. In the company of Odongo, the three of them went outside to check on what the 2<sup>nd</sup> accused person was talking about. They first checked the bathroom where the 2<sup>nd</sup> accused person said she had seen the deceased body being dumped, but they did not see anything. When they were turning a corner, they heard somebody locking the door to another room in the same compound which was not occupied. The person was dressed in black and it was dark, PW2 testified that they were not able to identify whether it was a man or a woman. The person walked fast and disappeared despite PW2's screaming, the trio decided to go back to room No.4 which the person was seen locking and that is where they discovered the body of the deceased lying naked. The body was only dressed in a top and it was naked downwards. Due to the screaming, other neighbours joined and they started interrogating the 2<sup>nd</sup> accused person. The 2<sup>nd</sup> accused person was interrogated and upon asking her why she did not scream when she saw people allegedly dragging the deceased, they found her explanation was not satisfactory.

The police were called, Chief Inspector **Suyanga Cunningham PW8** lead a contingent of police who broke into the room which was locked from outside with a padlock, after ascertaining that there was a body of a girl lying inside. After inquiring from the land lady what had happened, and after speaking to the 2<sup>nd</sup> accused who did not give straight answers as to what happened, PW8 arrested the 2<sup>nd</sup> accused person, he also checked the body of the deceased for any visible injuries and found none. He took the body to the Kericho district mortuary and on the 22<sup>nd</sup> August 2006, he visited the scene.

In the course of investigations, he arrested the 3<sup>rd</sup> accused person in a police swoop. In the course of the investigation, the 2<sup>nd</sup> accused person confessed that she had witnessed the murder of the deceased which was masterminded by the 1<sup>st</sup> accused person and was carried by the 3<sup>rd</sup> and 4<sup>th</sup> accused persons. The confession statement by the 2<sup>nd</sup> accused person which linked the murder of the deceased to the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> accused persons was recorded by Mr. Keana Mogambi, a Senior Resident Magistrate, PW7 on the 24<sup>th</sup> August 2006.

Mr. Mogambi testified that he was called by a CID officer at 6.00 am on the material day and was requested to go to the Kericho police station and record a statement by the 2<sup>nd</sup> accused person. He testified that he took the statement in a private room where the 2<sup>nd</sup> accused person stated that the deceased was the daughter of the 1<sup>st</sup> accused person and she had joined them one and a half months prior to her death. The 2<sup>nd</sup> accused person had married the 1<sup>st</sup> accused person and they had lived together with the 1<sup>st</sup> accused person for three months as husband and wife prior to this incident. It is in the course of living together that the deceased a young girl of about 16 years started misbehaving and one day she told the 2<sup>nd</sup> accused person that the 1<sup>st</sup> accused person was not her biological father. This was reported to the 1<sup>st</sup> accused person. On the material day, the deceased had gone to the video shop with the 2<sup>nd</sup> accused person after about ten minutes, the 2<sup>nd</sup> accused person left to prepare the evening meal. The 1<sup>st</sup> accused person returned home and the 2<sup>nd</sup> accused person reported to him that the deceased was at the video shop that is when the 1<sup>st</sup> accused person said that the deceased would be punished on that day. The 1<sup>st</sup> accused person returned with two boys. She saw them holding the deceased. One of the boys hit the deceased and the other one started raping her, while the 1<sup>st</sup> accused person was just watching. The 2<sup>nd</sup> accused person was watching all this from the door of their house. The two boys then carried the deceased to the bathroom in the same compound. After that the 1<sup>st</sup> accused person came and told the 2<sup>nd</sup> accused what had happened and named the assailants as Maurice and Ben. According to the confession, it was Ben who remained behind and locked the door where they had dumped the body of the deceased. The 2<sup>nd</sup> accused person went on to state that in the company of a man called Odongo and the neighbours, they saw Ben running away. She screamed and they were joined by neighbours after discovering the body of the deceased, the matter was reported to the police. The police arrived immediately, they broke into the room where the deceased body was dumped took the body and arrested the 2<sup>nd</sup> accused person. The 1<sup>st</sup> accused person came to the police station and warned her not to disclose what had happened.

This matter was investigated by **PC Nancy Koskei, PW10**. She is the one who arranged for Mr. Mogambi to record the confession statement by the 2<sup>nd</sup> accused person. As the investigating officer, PW10 also attended the mortuary when the post mortem examination was done on the body of the deceased by **Dr. Athanaceas Ochieng PW10** on 28<sup>th</sup> day of August 2006. The post mortem report was produced in court as an exhibit, in the opinion of the doctor, the deceased died as a result of strangulation. Upon examination of the body, he found blood oozing from the nostrils and scratch marks on the ears. Internally there was a fractured iota bone on the neck. There were no lacerations in the vagina and in his opinion there could have been sex but no forced entry because if there was forced entry, there could have been resistance which is followed by injuries such as laceration. Dr. Ochieng also produced the P3 form in respect of the mental status of the four accused persons which were completed by his colleague, a clinical officer by the name Yego Kirwa with whom they had worked for the last four years and he was familiar with his handwriting.

All the accused persons were examined and they were found mentally fit to stand trial. Prior to the post mortem examination, the body of the deceased was identified by **Ellias Mwita Mukanyi PW5**, and **Paul Senso Muniko, PW6** who are the brother and brother in law to the 1<sup>st</sup> accused person respectively. They knew the deceased as their niece and they were able to identify her body for purposes of post mortem examination.

After the close of the prosecution's case, both Mr. Rotich and Mr. Onyango, learned counsel for the accused persons submitted that the prosecution had failed to establish a prima facie case to warrant the accused persons being put on their defence. It was their submission that there was no eye witness and no one witnessed the accused persons inflict injuries on the deceased. The only evidence that linked the accused person to the murder was the confession which was recorded by Mr. Mogambi. The confession is not admissible because it was not taken in court. It was taken in a police station at 6.00 am on a Sunday, in circumstances that clearly show that the 1<sup>st</sup> accused person must have been induced or threatened by the police. Mr. Mogambi confirmed that he did not caution the 2<sup>nd</sup> accused person that the statement he was recording, was going to be used against her in court, moreover, the content of the statement is contradictory especially the evidence of the doctor who said that there was no rape on the deceased.

The 2<sup>nd</sup> accused person was acquitted at this stage under section 306 of the CPC there having been no evidence to link her with the murder of the deceased. In the least the 2<sup>nd</sup> accused person should have been a prosecution's witness because the so called confession only implicated the 1<sup>st</sup> accused with Maurice and Ben.

The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons were placed on their defence. They all gave sworn statements of defence. Peter Mosa Wambura, 1<sup>st</sup> accused person denied having had any involvement in the death of his daughter. He testified that on the material night he was working with Highlands Security Company Ltd. He left his house at Mjini Estate and reported for work at 5.30 pm upto 6.30 am the following day. He had left the deceased under the care of the 2<sup>nd</sup> accused person and it is the following day when he left his place of work that he was advised to report to the police station where he learnt about the death of his daughter. He asked for permission from his place of work due to the death of his daughter. He was granted permission to arrange for the funeral of his daughter thus he did not go to work on the 22<sup>nd</sup> August 2006. He produced the employment card which showed that he had been on duty on 21<sup>st</sup> August 2006 and was granted an off on 22<sup>nd</sup> August 2006. The 1<sup>st</sup> accused person's evidence was also supported by the evidence of **David Kipkoeh, DW2** who was a supervisor with Highland Security. He confirmed that the 1<sup>st</sup> accused person was an employee and on 21<sup>st</sup> August 2006, he was working as a watchman and remained on his duty station throughout the night. This witness testified that he kept on checking on the employees to find out whether they were asleep after regular intervals and in all the patrols, he found the 1<sup>st</sup> accused person at his place of work.

**Maurice Ochieng Aongo**, the 3<sup>rd</sup> accused person also denied any involvement with the death of the deceased. He testified that on the material day he was in his house watching TV, his neighbours started

screaming saying a young girl had been killed. He joined them after they discovered a body of a girl in a room, he went back to sleep. At that particular time there was increased insecurity within Kericho town and several women had been murdered and their bodies dumped causing an outcry and a demonstration against the police officers for failure to keep security. The third accused person was arrested the following day in a police swoop when they were about 30 of them. The other people were released but he was charged with the present charge. He denied that he knew the 2<sup>nd</sup> accused person or the 4<sup>th</sup> person and had anything to do with the death of the deceased.

**Michael Otieno Nyawala** similarly testified under oath. He was also arrested in a police swoop. He was interviewed by the police. The other persons who were arrested with him were released but he was charged with the present offence. He denied that he was known as Ben and that he had anything to do with the death of the deceased whom he did not even know.

The above evidence shows that the prosecution's case was poorly investigated. It was merely based on the confession statement which was recorded by Mr. Mogambi at the police station. The police did not even carry out an identification parade to test the veracity of the said statement where the 2<sup>nd</sup> accused person only referred to the 3<sup>rd</sup> and 4<sup>th</sup> accused persons as Maurice and Ben.

Section 25 A of the Evidence Act provides that;

***“A confession or any admission of a fact tending to the prove of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court”.***

This confession statement was recorded at a police station at 6.00 am on a Sunday morning. Mr. Mogambi who recorded the statement confirmed in his evidence that he did not caution the witness that the statement would be used against her in court. The court finds that the circumstances under which this statement was recorded were subjective and this lends credence to the submission that the confession might not have been obtained voluntarily.

The other anomaly arising out of the prosecution's case is that the 2<sup>nd</sup> accused person was charged with the murder of the deceased and in her statement; she did not say that she took any part in the murder and one wonders why she was not a prosecution's witness.

Besides the above, there are inconsistencies on how the 4<sup>th</sup> accused person was arrested. According to PW8 and PW10 the 4<sup>th</sup> accused person was arrested at the police station and it is the 2<sup>nd</sup> accused person who identified him. The 4<sup>th</sup> accused person stated in his defence that he was arrested in a police swoop alongside about other 30 people. Another glaring inconsistency from the said confession is the fact that the 2<sup>nd</sup> accused person alleged that she witnessed the deceased being raped by two men but no evidence or lacerations or forced entry was revealed in the post mortem examination. Furthermore, the statement said that the 2<sup>nd</sup> accused person was with one **Odongo** when she saw Ben closing the house where the body of the deceased was found. This is contradicted by the evidence of PW2 the landlady of the plot where the deceased body was found who said that after listening to the 2<sup>nd</sup> accused person's story, they went to look for the deceased. They saw a person who was dressed in black clothes and because it was dark, they were not able to identify whether the person was a man or a woman.

I have also taken into consideration the defence by the accused persons which seriously challenges the veracity of the prosecution's case. The 1<sup>st</sup> accused person produced his employment card which was signed by PW2 who testified that the 1<sup>st</sup> accused person was at his place of work on the material night. This also points at poor investigation in which the police did not even bother to verify the whereabouts of the 1<sup>st</sup> accused person on the material night. Similarly, the confession refers to the 4<sup>th</sup> accused person as Ben and his name is Maurice. There was no evidence lead to show that the 4<sup>th</sup> accused person was also known as Ben. The name of Odongo was also mentioned severally by many witnesses especially the 2<sup>nd</sup> accused person in the so called confession statement but he was not called as a witness. Apart from the confession by the 2<sup>nd</sup> accused person, there was no evidence whatsoever to support the charge against the

accused person.

The upshot of the above analysis is that the prosecutions case was not proved to the required standard and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons are hereby acquitted of the charge of murder. Unless otherwise lawfully held, they are to be set at liberty forthwith.

**DATED** at **Kericho** this 10<sup>th</sup> day of April 2008.

**M. KOOME**

**JUDGE.**