



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 33 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

JOHN NDIRANGU WAHOME.....ACCUSED

JUDGMENT

The accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence states that on the 7th day of May 2006 at Kamukuji Village in Nyandarua District of the Central Province, he murdered C W Wi.

On 7th May 2006, C W PW1, was living with the deceased, a grand child aged about 11 years. PW1 was also looking after the deceased's brother J K PW2 who was aged about 6 years. The two are children of M W, PW4, who at the material time was working far from home and had left her mother PW1 to look after the deceased and her brother. At about 7.00 p.m. the accused person who was well known to PW1, PW2 and also to the deceased, requested PW1 to allow the deceased to accompany him to the home of Francis Mwangi who had taken his cap. PW1 allowed the deceased and PW2 to accompany the accused person in order to show him the home of Francis Mwangi which was just in the neighbourhood.

After sometimes, PW2 returned home alone without the deceased. He informed PW1 that the accused person left with the deceased and disappeared into the maize plantation. PW1 started screaming and was joined by other neighbours. They started searching for the deceased in the maize plantation along the route the accused person led the deceased. PW2 a young child of about 6 years testified that on the material day, PW1 requested him to escort the accused person whom he was calling uncle. Along the way, the accused person told him to stay behind and walked away with the deceased person into the maize plantation. The accused person left PW2 with his slippers, and ordered him to wait. PW2 testified that he saw the accused person leading the deceased into the plantation. After he waited and they did not come back, he met F M PW9, who escorted him home where he was living with his grandmother.

After PW9 escorted the child, PW1 later came to his home to enquire whether PW9 had seen the deceased who had disappeared with the accused person. PW1 was anxious and was screaming. They all decided to comb the maize plantation searching for the deceased. They were joined by many people who testified as Rachel Wanjiru Gathanya PW3, Susan Wangari PW7, Esther Njoki PW8, Samuel Mwaura Kinuthia PW8. They first of all saw the underpants which the deceased was wearing. They also spotted the accused person lying in the maize plantation. He was lying down about 5 metres away from where they found the deceased's underpants. They interrogated him as to where he had taken the deceased, but the accused person refused to talk. PW9 gave him a piece of paper to write down for them where he had

taken the deceased. He wrote on the piece of paper that the child was on the upper side of the farm.

PW9 decided to call the police who arrived and re-arrested the accused person. The police officers also joined in the search for the deceased, but since it was getting dark, they called off the search and resumed the following day. It is on the 8th May 2006 when they discovered the clothes the deceased was wearing when she was last seen alive. The clothes were next to the fence of the farm belonging to PW3. About 50 metres away, they also found the body of the deceased slightly covered by soil in a plantation. The deceased was already dead, her mouth had been stuffed with soil. The deceased was bleeding from her private parts. They called the Police who came and collected the body which was taken to the Nyahururu District Hospital.

A post-mortem examination was carried out by Dr. John Weru, PW5. He observed that the deceased was bleeding from the vagina. Her mouth was filled with soil and she had bruises on the neck. Upon examination of the deceased body, PW5 formed the opinion that the cause of the deceased's death was due to cardio pulmonary failure due to choking and defilement. The body of the deceased was identified by Francis Mwangi, PW9 and Stephen Ndegwa, PW10. The accused person's mental assessment was also done by Dr. Were. He confirmed that the accused person was over 18 years, and was mentally sound to stand the trial.

The accused person was arrested by PC Daniel Njihia, PW11 after he had been apprehended by members of public. He also joined the members of the public in search for the deceased in the maize plantation. PW11 tried to interview the accused person but he kept dodging the questions. PW11 at first booked the accused person for the offence of defilement but the next day he received a call that the body of the deceased was found. He went to the scene with PC Daniel Kiragu, who was attached to the scenes of crime section and took some photographs of the deceased's body and produced them as exhibits.

This matter was investigated by PC Charles Njau PW12. He attended the hospital when the body of the deceased was operated for purposes of post-mortem examination. He also escorted the accused person for the mental assessment. He also recorded the witness statements and kept the clothes that the deceased was wearing at the time, and produced them as exhibits. He also preferred the charge of murder against the accused person.

The accused person was placed on his defence, he elected to give a sworn statement of defence. He gave a detailed account of the events that happened on the 7th day of May 2006, most had no relevance to this case. He testified that he was drinking traditional brew which was prepared at his aunt's house up to 5.00 p.m. When his cousin one called Francis Mwangi took away his cap during a scuffle that had ensued at the beer drinking party. The accused person decided to go for his cap from Francis Mwangi whom he was informed was in the house of PW1. He went to the house of PW1 but did not find Francis Mwangi. He was told that Francis had gone to the house of Kingori. Since the accused said he did not know the house of Kingori, he requested PW1 to allow the children, *i.e* the deceased and PW2, to show him the house of Kingori because there were dogs. The accused person was escorted by the deceased and PW2 and when he reached near the house of Kingori, he asked the children to go and get the cap for him. That is when he fell asleep and passed out until the next day when he found himself at the police station. He denied having murdered the deceased.

On cross-examination, the accused person admitted that he sent PW2 to Kingori's home and the deceased to her aunt's place. That is he sent the two children in different directions. He also admitted it was getting dark and he asked PW2 to walk fast and he was left with the deceased. Counsel for the accused person submitted that the prosecution failed to prove the charge of murder. The evidence on record is all circumstantial and all it raises is a mere suspicion and there is nothing to connect the accused person with the offence. The accused person was found sleeping at a different place from where the body was recovered. The accused person was charged merely because he was the last person to be seen with the minor. In addition, Counsel submitted that the Constitutional rights of the accused person were infringed upon, and he was denied a fair trial because he was arrested on the 8th day of May 2006 and he was not arraigned in court until the 24th May 2006 after the expiration of 16 days. He urged the court to acquit the accused person.

On the part of the State, Mr. Mugambi argued that the State discharged the burden of prove. Although the evidence was circumstantial, it is the accused person who was last seen with the deceased. The deceased went missing immediately; her underpants were found a few metres from where the accused person was found lying down. It is the accused person who separated the deceased a minor from PW2 and the deceased was found murdered in the same area where the accused person disappeared with her.

Regarding the argument that the accused person's Constitutional rights were infringed upon, counsel submitted that the investigating officer was present in court and no explanation was sought by the defence counsel why there was a delay of one or two days in arraigning the accused person in court. Moreover a delay of one or two days is not inordinate. There is no indication that the Police infringed upon the rights of the accused person so as to deny him a fair trial.

It is clear from the evidence adduced in this matter that there was no eye witness who saw the accused person defile and take away the life of the deceased. This case is purely based on circumstantial evidence that on the material day, the accused person was in the company of the deceased and PW2. Even by the defence of the accused person, he admits that he was with the deceased and PW2.

I have considered the defence by the accused person that he sent PW2 to a certain direction. He was left with the deceased whom he sent to another different direction. This defence is preposterous and defies common sense because the accused person requested to be escorted by the two children so that he can be shown the house of Kingori. It therefore defeats common sense that he could send the two children in different directions when it was getting dark and when he originally intended to be shown the house of Kingori.

The evidence before this court shows that the accused person left PW2 waiting for him on the road and he went with the deceased deep into the plantation. PW2 wandered into the house of PW9 who took him home. He could not explain where the deceased was and this caused an alarm to be raised. A search was mounted and an under pant belonging to the deceased was discovered a few metres from where the accused person was found. The accused person was interviewed but he refused to talk to the witnesses who testified. He was taken to the police station. This also discounts his evidence that he had passed out because PW9 even tried to give him a piece of paper on which he wrote that the deceased was to be found on the upper side of the plantation. He was also interviewed by the arresting officer but kept on dodging the questions.

This evidence clearly links the accused person with the murder of the deceased. It is circumstantial evidence, and for the prosecution to succeed to prove the charge of murder based on circumstantial evidence, the facts in support of the case must be incompatible with the accused innocence and incapable of any other explanation or hypothesis other than it is the accused person and no other was responsible for the death of the deceased. See the case Simon Musoke v. R [1958] EA 715 where the Court of Appeal held:

“In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt”

See also the case of Republic Vs Kipkering Arap Koskei & Another 16 E.A.C.A 135 where it was held:

“In order to justify, the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

I have examined the evidence on record. The fact that it is the accused person who took the deceased from the care of PW1, He separated the deceased from PW2. The under pant of the deceased was found a few metres from where the deceased was found lying down almost one hour later.

At the material time, darkness was setting in, the body of the deceased was not found until the following morning. The body was found a few metres from where the accused person was found lying

down. This is the same area where the accused person disappeared with the deceased. These circumstances point at no other person, other than the accused person who refused to explain the whereabouts of the deceased when questioned by the witnesses and the police who arrested him. Obviously he had no obligation to.

Accordingly I find that the prosecution have proved the charge of murder against the accused person and I hereby convict him of the offence as charged. Regarding the submission that there was delay in arraigning the accused person in court, he was apprehended on 7th May 2006 but at the time the body of the deceased was not found until the following day. The arresting officer testified that he had booked the accused person for the offence of defilement until the next day when the body was discovered. The accused person was arraigned in court on 24th May 2006. The defence counsel did not enquire from the investigating officer why there was a delay of one day in arraigning the accused person in court. Moreover a delay of one day cannot amount to denying the accused person a fair trial. I disregard this argument. Should the accused person feel aggrieved by the failure of the Police to arraign him in court and delay his trial by one day he is also at liberty to pursue general damages for that delay. As far as this court is concerned, the prosecution have proved the case against the accused person to the required standard and the accused person is convicted of the offence of murder.

Judgment read and signed on 31st October, 2008

M. KOOME

JUDGE