REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 64 of 2006

REPUBLIC……..……..…..PROSECUTOR

VERSUS

CHARLES NJOROGE NJENGA……...……...……..ACCUSED

J U D G M E N T

The accused**, CHARLES NJOROGE NJENGA**, was, on 7/4/2004, charged with the murder of **JAMES NJENGA NJOROGE,** contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

The offence is alleged to have been committed on 22/3/2004 at Magina Village in Kiambu District, Central Province.

The deceased was the son of the accused.

In the cause of their case, the prosecution called 11 (eleven) witnesses, and the defence called 4(four) witnesses including the accused himself.

For the prosecution P.W. 1, Edward Gitau Njoroge, the Head Teacher, Kiambogo Primary School, told this court that on 22/3/04, he got an SMS, from the Mobile Phone of the accused which states as follows:

" ***I strangled my son to death today at 8a.m. I am free now."***

That SMS was neither read nor produced in court in the course of these proceedings. But the witness stated that he did not know who had sent the message and when he tried to call back there was no response. P.W. 1 revealed the message to the Assistant Chief – P.W. 3 – Wilson Munga Kamau, for the necessary and appropriate action. But P.W. 3 told him to go to the house of the accused first and check, but P.W. 1 decided to ring the Administration Police Officers. The two – P.W. 1 and P.W. 3 – decided to wait for the A.Ps and they went to the house of the accused, where they were joined by two other teachers; and on reaching the house they found the front door locked and they peeped through the window and saw nothing. But one of the teachers peeped through the back window and saw legs of a person lying on the floor. P.W. 1 peeped also and saw the legs and P.W. 3 called the police from Uplands Police Station, who upon arrival broke the door. As it was getting dark P.W. 1 left for his home, which was a bit far.

The witness stated that he did not know who killed the deceased.

P.W. 2 – P.C. Peter Njathi, a police officer at Uplands Police Station, accompanied two relatives of the

deceased on 30/3/04, to the Mortuary where the body of the deceased was identified by the two relatives. And that was all he knew and did in connection with the case.

P.W. 4 – Stephen Chege Kamau – the Chairman of the School Committee where the accused was the Head Teacher told the court that he got an SMS from the phone number of the accused saying that the accused had strangled his son at 8a.m. that day, 23/3/04. This was at 5p.m. and he got to the house of the accused at 6p.m. when it was dark and could not see well. By then the Assistant Chief and the A.Ps were already there. On Cross-Examination he told the court that the SMS was in English and he could not recall clearly what it said.

P.W. 5 – P.C. Dalmas Wambua arrested the accused on 23/3/04 at a Bar at Kimende. He knew the accused earlier when he use to work in Kimende, and upon reaching the Kimende Police Station, the accused was interrogated. The accused did not attempt to run away.

On the crucial ingredient of the crime of murder - **actus reus –** P.W. 5 Sgt. Paul Ndingori, an Administrative Police Officer, at Magina Post, Kijabe, told the court how he got a call from the Assistant Chief – P.W. 3- over his mobile phone, stating that there had been A murder report at Magina Trading Center. He then went to the Center where he found the Assistant chief and lots of other people. He accompanied the Assistant chief to the house of the accused; found it locked with a padlock at the rear and the front door was locked from the inside. HE and the Assistant Chief peeped through the window and in one of the rooms he saw a boy lying on the floor. He could see the whole body. He then called the Lari Police Station and the police came in a Land Rover; broke the back door, and entered into the room – him; the police officers and the Assistant Chief.

Inside the room they found a boy strangled with a neck tie. The head of the boy was covered by Safari ants. He was dead. The police took the body to the vehicle and he was later called and recorded a statement at the Police station.

The witness was shown the tie which he said was the one around the neck of the deceased. It was a brown tie. He told the court that the tie was tightly tied over the boy's shirt at the neck. He admitted, on cross-examination, that the tie he was shown, and which he saw around the deceased neck, was not the only one of that colour in the market. He further told the court that the tie was removed by the police, in his presence.

He told the court that the way the tie was in court, is not the way it was at the deceased's neck. He also described how the deceased was dressed adding that there were no blood stains on the floor where the body lay. There were also no chairs or anything else where the body lay. The room was a bedroom.

P.W. 7 – John Mbugua Njenga – was the Uncle of the deceased and his role was only identification of the body at the mortuary for post mortem purposes.

P.W. 8 – Dr. Moses Njue Gachoki – did the post mortem and his conclusion was that the cause of death was strangulation by tie/string applying pressure. The cause of death was related to the injuries caused by the tie. He said the body had blood at the bridge of the nose and there was bleeding on both eyes, and the tracea was fractured.

P.W. 5 – Dr. George Kungu Mwaura gave evidence on how he examined the accused for purposes of assessing age and the mental status prior to the formal charge of murder.

P.W.10 – Inspector Stephenes Githimi, was the officer on duty at Lari Police Station when the Assistant Chief called over his mobile phone, concerning the murder at Magina. He accompanied the Assistant Chief and an A.P. to the house of the accused. He is the one who broke the house of the accused to gain entry into the house where he found the body of the deceased. He found the body with a tie around the neck.

He told the court that **the tie which had been produced in court was not the one which had been used**

to kill the deceased. The tie was not tight. P.W. 10 was the first person to get entry into the room. He observed bruises on the face of the decease. He, P.W. 10, is the one who removed the body to the police vehicle and took it to the City Mortuary. On the way to Lari Police Station from the mortuary, he received a call that the father of the deceased – the accused – had been at Kimende Township; and he proceeded there where he found the deceased had been arrested by officers at the Police Station. He then took the accused to Lari Police Station and began investigations into the case.

His investigations had established that the accused had had a domestic quarrel with the mother of the deceased, as a result of which she had run away to her parents home with her 3 kids, including the deceased. This was in January, 2004.

In March 2004, accused had gone to the grand parents of the deceased and taken back the deceased. Three days later the mother of the deceased tried to call the accused to know whereabouts of the deceased. She could not reach him and left an SMS wanting to know the whereabouts of the deceased. The accused left an MS saying that the deceased had gone to his grandmother's home at Githunguri. They tried to trace the deceased at Githunguri, but the deceased could not be traced.

On 21/3/04, the day before the death, a Sunday, accused went to his mother-in-law's house, and asked his wife (mother of the deceased) to accompany him to Githunguri to get their son. His wife refused to accompany him. During cross-examination, P.W. 10 who had been conducting investigations on murders within the police force for over 10 years, told the court that he did not charge the accused with murder on the basis of SMS from the teacher in the school. Neither did he, P.W.10, preserve the SMS. He is the one who broke into the house of the accused, but at the time he did not know that that was the home of the accused. He did not know whose house it was where the body lay. P.W. 10 did not preserve, as part of the scene of the crime, the padlock, even though he did consider the breaking as part of the scene of the crime.

P.W.10 also told this court, that there was no murder weapon! And he did not get the scene of crime personnel to dust the scene. He further told the court that the tie was not a murder weapon! He recorded statements from those around – the scene – the Assistant Chief and the AP; and the wife of the accused – mother to the deceased. He also admitted that as the investigating officer, he was responsible for preserving the Exhibit – the tie. **He further admitted that he did not preserve the Exhibit the way it was, when he first saw it around the neck of the deceased.** Apart from the colour and make, the witness said there was no other mark to say this was the tie. He did not subject the Exhibit to any other examination. The Exhibit he preserved had been tampered with, concluded the witness – P.W. 10. When he broke the house of the accused, he was with only one other police officer - his driver, who has not been called as witness. He, P.W. 10, refused entry into the house to any other people.

On re-examination by the State Counsel, P.W. 10 said that the tie could not have been used to kill the deceased because it was tied several times round the neck. He concluded the killing was done then the tie tied later.

P.W. 11 – Mary Wambui – was the grandmother of the deceased and she told this court as follows: On 16/3/05, at 3.30p.m. the Sub-Chief – Muchiri – went to her house and asked her whether she knew Lucy Wanjiku and whether Lucy had a child by the name James Njenga. She replied in the positive. Then the Sub-Chief told her – P.W. 11 – that he had received a call from a teacher – Mr. Muhugu – that James Njenga was at the D.O.'s office; and he, the Sub-Chief wanted to know where Lucy was to go and collect the child. P.W. 11 told the court that for about 1 ½ days, Njenga – her grandson, had not been at her home. He had gone to play with other kids.

On 21/3/04, at about 9a.m. P.W. 11 sat with her daughter, Mary Wambui – mother to James Njenga, and then the accused came and joined them. P.W. 1 asked the accused why he had taken the report of the missing child to the Sub-Chief first, and not to her. The accused told her, P.W. 11, that he wanted his wife to go with him to the D.O's place and collect their son. P.W. 11 told this court that accused stood up, and told his wife: **that if she has refused to accompany him to the D.O.'s place to collect their child, she will get him (their child) in mortuary and bury him, and he, the accused, will be in cells.**

Upon the foregoing evidence by the prosecution, the court found and ruled that the accused had a case to answer. This was after lengthy submissions by Counsel for both sides.

The accused then called 4 witnesses, including accused himself.

D.W. 1 – Samuel Ng'ang'a Gitau told the court that on 27/1/04, accused had gone to him in the evening and told him that he had come from work and found his family not at home. This was late in evening and accused slept in D.W. 1's house till following day, 28/1/04, when he went to his home and found the house empty, - all items had been taken away, including domestic animals.

D.W. 1 told accused to send an elder to accused's in-laws to check whether his family was there. If the family was there, then he would go to the in-laws during the school holidays, in April. Meanwhile the accused was given a house by D.W. 1 while organizing himself. Accused stayed in D.W.1's home till 22/3/04, when he was arrested at Kimende Shopping Center. Since then, he never slept in D.W.1's house again.

The accused had sent elders to his parents-in-law and his family was there – at the in-law's place.

On cross-examination, the witness said accused occupied a house at the far corner of his compound, and he could not tell whether accused was in that house on a daily basis from 27/1/04 to 22/3/04 when he was arrested. The witness told court that with the accused they had gone to accused home and it was true there was nothing in any of the rooms or the temporary kitchen. Accused was not doing anything to prepare to go back to his home, and D.W. 1, did not pressurize, him as the house was unoccupied till April when the kids of the witness would be on vacation.

D.W. 2 – Daniel Kimani Kihara, a retired teacher told this court of how he was sent by accused, and went to find out whether the family of accused was at his in-law's house, on 28/1/04. He did not know the father of the accused, despite his claims that he knew the family of the accused.

Defence Witness No. 3 – Joseph Mwaura Mahugu – was the Headmaster of Kinari Primary School, near the in-laws of the accused and he had first to seek approval of the accused – at that time Headmaster of another school – before admitting the kids of the accused, upon request by the wife of the accused.

On 10/3/04 D.W. 3 learned that one of the kids, deceased, had not been coming to school. He called accused on 15/3/04 to find out where the kid was. Accused told D.W. 3 that he had not found the child. Later, D.W. 3 learned that the child had been found dead. The child was in Standard 6.

On Cross-examination, D.W. 3 said he did not call the mother of the deceased when deceased failed to go to school. Instead, he called the accused, even though he knew the kids stayed with their mother, at their grandparent's home.

He learned of the death of the child after about ten days. He did not know how the child died. But he had heard that the child had been murdered. He had asked the elder sister of the deceased – also a pupil at the school – about her younger brother, but she said she did not know.

He told this court that he did not know whether the mother of the deceased knew whether deceased was missing at school.

The witness was the class teacher of the deceased in the nearby school and knew the kids were staying with their mother!

D.W. 4 – Charles Njoroge Njenga – the accused, was the father of the deceased and had quarreled with the mother of the deceased over her having initiated their daughter without his knowledge and or permission. That is why the wife had gone back to her parents at Kinari, together with the kids. He told the court how he came back on 27/1/04, from School – Juvenalis Primary School, where he was the Headmaster at 7.30p.m. and found nobody in the house; how he sent an elder to go the following morning

and check whether the family was at his in-law's home.

After finding the home deserted, he went to the shops and bought a torch which he used to peep into the house, when he found all the rooms were empty. He did not break into the house as it was night, and he went to look for accommodation at the home of D.W. 1 – his Uncle Samuel Nganga Gitau – till 28/1/04 when both of them visited the house of accused, opened and broke the inner door to gain access to the other 3 rooms. The rooms were all empty – no furniture of any sort. He closed the door. He had told the court that the family mobile phone which he had bought to be able to communicate with the family while at work, was also missing.

He then closed the door and went to the School, told the Deputy Headmaster, before proceeding to Cross Road Primary School where he informed D.W. 2 and sent him to his – D.W. 4's –in- laws to check and report back to him.

D.W. 4 – the accused also told the court that there were three (3) sets of keys to the house; he had one set which did not have the keys to the inner rooms. The other two sets were one with his wife and one set was kept somewhere where he could find it if need arose.

When he found that the deceased had been missing in school, accused told the court that he went looking for him and announced to the Sub-Chief and in the church about his missing child. But at no time did he report the matter – about the missing son to the police or to his wife with whom the child was staying since January, 2004 when they parted ways with his wife!

On Cross-examination he told the court that the family mobile phone was at home, even though his wife was also working and used to leave together with the kids for school, before the accused had left. The accused could not explain the purpose of the phone if it was left at home where there was nobody during the day and who would receive or call from it.

Accused said he did neither kill his son nor knew who killed him.

The foregoing is the evidence from both the prosecution and the defence, upon which you – the assessors - returned their opinion on whether or not the accused is guilty.

I must, before you consider the facts and the evidence, and return your opinion, remind you of the law.

Under our Penal Code, Cap. 63 of the Laws of Kenya, Section 203, murder is defined as **the causing of the death of another person, by an unlawful act or omission, with malice aforethought.**

Put differently, murder is the act of killing of another person with the intention to kill that killed person.

So, the prosecution must prove, beyond any doubt, that the accused killed the deceased, and with intention to kill the deceased. Each of the two ingredients – the **act of killing** and **the intention to kill** must be proved, by the prosecution, beyond any reasonable doubt. If there is any doubt as to whether the accused killed the deceased, or whether the accused, at the time of the killing had the intention to kill the deceased, the law is very clear that such doubt must be decided/given in favour of the accused.

I must also remind you, the assessors, that the accused has nothing to prove. As a matter of law, the accused need not even open his/her mouth. It is the prosecution – the State – to prove, and beyond reasonable doubt, that the accused person unlawfully killed the deceased, with intention to so kill the deceased.

On the above summing up and directions on the law, the three assessors returned a ananimous verdict of **not guilty.**

It is on the basis of the foregoing evidence that the following judgment is founded.

None of the 11 prosecution witnesses witnessed the death – the killing of the deceased. None of them was at the scene of the killing when the killing took place.

From that perspective, the prosecution had no option but rely on circumstantial evidence, in the absence of any direct evidence.

For the court to convict on circumstantial evidence, everything must point at the accused as the person who killed the deceased. And that is not all. The circumstances must be such that there is no other agency which could have caused the death.

In the present case a close review of the evidence adduced by the prosecution falls far short of what is expected of circumstantial evidence.

To begin with, doubts abound regarding the murder weapon – the neck-tie. The tie which was produced in this court was categorically denied as the murder weapon by the Investigation Office – P.W. 10 – who was the first person to enter the room where the body of the deceased lay. That witness, who was also supposed to preserve the scene of crime, which included the tie, admitted that he did not preserve the scene of crime, nor did he subject the tie to dusting to find out whether the fingerprints of the accused were present on the tie. That was not all. This key witness told the court that the Exhibit had not been preserved and had actually been interfered with.

The preservation and dusting of the of murder weapon may not have appeared important to the Investigating Officer because he told the court that the tie was not the murder weapon. He was of the opinion that the deceased had been killed elsewhere, then dumped at the room where the body was found lying. That opinion was fortified by his evidence and that of P.W. 6, that there were no blood stains where the body lay, even though the evidence of the pathologist stated that there was blood at the nose bridge of the deceased and the trachea.

It is also important to note that there is no evidence that the tie, allegedly used to strangle the deceased, belonged to the accused. That was in addition to the evidence that the tie was not the only one of its type and colour, in the market.

The greatest gap in the circumstantial evidence sought to be relied upon by the prosecution is that there were three sets of keys to the house where the body of the deceased was found. The accused had one set while the other two sets were one with his wife and the other set used to be left where accused could find it if need arose.

On the basis of the foregoing evidence, there is no way one can conclude that the circumstances leading to the death of the deceased point at nobody else but the accused.

There are simply too many gaps which make it difficult to pin down the accused as the one who killed the deceased or conclude that nobody else, but the accused, could have killed the deceased.

In the result, one of the two ingredients of the crime of murder, **ACTUS REUS** has not been proved.

On the other ingredient necessary to prove the guilt of a murder suspect – that is **MENS REA**, the prosecution's evidence that comes close to proving that is as follows: The accused had quarreled with his wife, the mother of the deceased, as a result of which the wife went back to her parents' home, taking with her the three kids, which included the deceased. No evidence was adduced that the accused had any quarrel with the deceased, or any of the other kids. The only evidence adduced was by P.W. 11 – the grandmother of the deceased to the effect that when accused went to his parents' in law's home he requested his wife to accompany him to the District Officer's office so that they could collect their son. When the wife refused to accompany him, the accused is alleged to have said in the presence of P.W. 11 – his mother in law "**that if you have refused, you will collect the son from mortuary and I will be in the cells."** That is the statement that the prosecution submitted and which came close to proving the intention to kill the deceased.

But that evidence was ruled as inadmissible as it is tantamount to a confession or admission, and since it was not made before court, as stipulated in Section 25 of the Evidence Act, Cap. 80, Laws of Kenya, it was not admissible.

To that end, the prosecution failed also to prove the second crucial ingredient of the crime of murder – **malice aforethought** or intention to kill the deceased.

All in all therefore, I find and hold that the prosecution failed to prove both **actus reus** and **mens rea**, the two ingredients of murder.

Accordingly, I hold that there is no evidence upon which to convict the accused in this case, and under the circumstances, I acquit the accused and order his immediate release, unless he is otherwise lawfully held.

DATED and delivered in Nairobi, this 5th Day of December, 2008.

O.K. MUTUNGI

JUDGE