



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS**

Criminal Case 24 of 2003

REPUBLIC PROSECUTOR

VERSUS

WAMBUA MUSYOKI ACCUSED

J U D G E M E N T

Wambua Musyoki, a minor aged about 15 years faces the charge of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that on 3/4/02, at Uvilani village, Makueni District, murdered Kanyivu Kasuva. He denied the offence.

Briefly, the prosecution case is as follows:

The offender Wambua Musyoki, is aged about 15 years. On the other hand the deceased was a little girl aged about 3 to 4 years. On the fateful day, 3/4/02, the deceased went out to play on the road near their home in company of Nzisa Mbuta (PW2) whose age was not ascertained but was in class two at the time of her testimony and the deceased's sister Mutindi Kasuva, aged 9 years old. As they played, the offender Wambua Musyoki, who is their neighbour came and picked up and carried the deceased away saying that he was going to buy her sweets called 'Koo'. They waited for the offender to bring back Kanyivu but he did not. They looked around for the offender and Kanyivu but did not get them. They went home and PW3 reported to her older brother Mulwa.

On this same day PW4, Francis Kasuva, the father of the deceased and PW5 Musyoki Mulonzi, the offender's father were harvesting maize in the same farm, Mulwa PW4's son and Mbai Mbuta his nephew came and reported to him that Wambua, the offender had taken the deceased away and that they had looked for them and failed to get them. PW5 was present when this report was made to PW4. PW4 went in search of the deceased with a group of people whereas PW5 left on his bicycle to go and look for his son the offender. PW4 and his group found the deceased dead in the shamba of one, Peter, about 500 metres from her home. PW4 noted that the dead was injured on the face, chest, blood was oozing from the nose, ears, mouth and anus. Meanwhile, somebody was sent to look for the chief. PW1, the Assistant Chief of the area was informed of this incident and went to the scene and confirmed the death.

Meanwhile, PW 5 did not get the offender at his home or his grand mother's home. He traced the offender on a road - side at his maternal grandmother's home and took him to PW1 who later handed the offender to the police.

The postmortem on the deceased was performed by Doctor Salim. However, the postmortem report was produced by PW6, Doctor Macharia, who had worked with Doctor Salim and knew his handwriting and signature. Doctor Salim could not be traced without unreasonable delay or expense. The postmortem was conducted on 5/4/02 and the doctor found the following injuries:

The body was swollen and had maggots; body was darkened due to lack of oxygen; there was a cut wound on left parietal area. Externally, on the genitalia, the left labia majora had bruises; a cut along the inguinal ligament; bruises in urinary system and haematoma.

The doctor formed the opinion that the cause of death was haemorrhage leading to hypoleaimic shock which occurs due to too much blood loss and ultimately leads to cardiac arrest. He opined that the bleeding was from the labia majora.

In his unsworn defence, the offender denied knowing the deceased or knowing the reason for his arrest till he reached the police station when she was informed of this offence.

This court warns itself that though PW2 and 3 are minors, they were examined by the court and the court was satisfied that they understood the meaning of oath and gave evidence on oath and they impressed the court as intelligent enough as to understand what was going on in court. Infact, they were very clear and consistent in their testimony. They saw the offender take the deceased claiming to be going to buy her sweets. They later reported to Mulwa the elder brother of PW3 and the deceased when they could not trace the offender and the deceased. Mulwa then reported to PW4 in the hearing of PW5, the offender's father, that the offender had taken the deceased away and both could not be traced. PW2 and PW3 were truthful.

PW2, 3 said they knew the offender. PW2 knew the offender as Wambua and offender's father as Musyoki and so did PW3. PW4 and 5 confirmed that the offender an immediate neighbour of the deceased. Their homes share the same boundary. Infact, PW4 and 5 were working together, harvesting maize on that day which confirms the above facts.

The

offender cannot be saying the truth when he says that he did not know Kanyivu, the deceased.

The court does believe PW2 and 3's evidence that it is the offender who took the deceased away. She was later found dead in a bush near their home. The offender was found 4 kilometres away by his father (PW5), near his maternal grandmother's home. The denial by the offender that he did not know Kanyivu and hence did not murder her is merely trying to avoid the onus which fell squarely on him to explain where he took Kanyivu after he carried her away. He should have explained when they parted company with the deceased if at all (Section 11 1 (1) Evidence act) but since he did not explain, a rebuttable presumption arises that he knew under what circumstances the deceased was killed. It is a presumption of fact that the court is entitled to make under Section 119 of the Evidence Act. It does not amount to the burden shifting to the accused at all.

The deceased was found dead a few hours after the offender carried her away. The body was found about 500 metres from her home. She had very serious injuries to her private parts – the labia majora, inguinal ligament, bruises to the urinary system. She had bled a lot from these injuries which resulted in her death. Though there was no specific finding by the Doctor, the deceased's injuries were concentrated in her private parts and it seems that the offender attempted or sexually assaulted the deceased and totally ripping her apart. The injuries found on the deceased are evidence of intention to cause grievous harm to the deceased and from there follows malice aforethought.

Nobody saw the offender murder the deceased. But from a consideration of all the evidence above in its totality, I have no doubt in my mind that the offender did murder Kanyivu and attempted to get away. I hereby find that the offender did murder the deceased.

R.V. WENDOH

JUDGE

Dated at Machakos this 29th day of July 2005

R.V. WENDOH

JUDGE