



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO.129 OF 2003**

REPUBLIC PROSECUTOR

VERSUS

ANTHONY MAGUA GITUCHU ACCUSED

JUDGEMENT

The Accused before me faces a charge of murdering a school going girl attending class IV in Magutuini Primary School in Kiambu District, Central Province. As per the information, the Accused is alleged to have committed this offence between 2nd day of August, 2001 and 10th August, 2001 at Gikambura village, in Kiambu District. It has undisputedly emerged from the evidence of both sides in this trial that the Accused and deceased were residents of the same village and did not live far. As per Accused's sworn testimony he had known the deceased since her birth and that the two families had no disputes.

The deceased and her two cousins Susan Wangui Thairu (PW.4) and Margaret Njeri were studying in the same school and used to walk together to school because since January, 2001 the new head teacher wanted students to report early to the school (as per testimony of Jane Wanjira Ngure PW.2).

On 2nd August, 2001, however, they did not walk together as the deceased stayed back to greet her father (PW.1) who had come from safari to Mombasa late previous night. She delayed for five minutes and the two cousins went ahead leaving the deceased behind. That was the last the deceased was seen.

Before I dwell upon the evidence of all prosecution witnesses, It may be appropriate to state that the prosecution has satisfactorily proved the death of the deceased by producing post mortem report (Ex.3a) and evidence of identification of the body of the deceased.

The post mortem was produced without medical evidence as the prosecution had difficulty in calling the doctor who performed the post mortem and the learned Defence Counsel readily agreed as he did not have any questions to ask on the post mortem report. Having satisfied myself, I allowed the production of post mortem report filled by Dr. Maundu who actually performed the same, under Section 33 as read with Section 77 of the Evidence Act (Cap.80 Laws of Kenya).

The Doctor found that apart from lower limbs the body was decomposed. He made following observation on external appearance of body, namely Tibia, Tibular missing; Tibia eaten and; left lower limb intact, areas of wounds left medial knee; left buttock exposing right hip and pelvis;

uterus eaten; Right femur, Tibia exposed (decomposition); Tibia eaten lower end. On internal examination, it is observed; in Genito; Urinary system, bruised vertex and occipital separation of suture and fracture 3" on head. Bruises on sub-scalp, occipital. Neck shows soft tissue bruising also over the larynx.

After these observation and examination he formed an opinion that the cause of death was head injury, brain hemorrhage, Asphyxia due to strangulation (cord). He also removed blood from the body for grouping. In the Post Mortem Report, he had also drawn sketches of the body which made it easier for me to understand his examination.

I shall pick up the thread of material day after Bernard Ngure (PW.1) the father of the deceased was told, on his return home at about 8 p.m., that the deceased had not returned from the school. Search was mounted but of no avail. He was told by his niece Susan Wangui Thairu (PW.4) that on their way to the school they had greeted the Accused (Anthony). He also told that on further asking Susan (PW.4) informed him that once the Accused was asking her about who the brown girl (deceased) was. This evidence is corroborated by Susan (PW.4) and I shall quote her evidence:

"I was asked by my uncle whether I had met anyone that day. I told him on Wednesday I had met Magua on the way carrying a chicken. He wanted to know more about the deceased. He wanted to know whether the brown girl I accompany was ours or was (sic) my uncle's daughter. I told him she was my uncle's daughter. On Thursday we missed the deceased. That is why I suspected and I told him what happened"

In cross-examination this witness stated she did not speak to or even see the deceased that day. This she said after questions were asked about what happened at the school. But in examination in-chief she had said that Susan was less than one km. behind her. She also was alone that day as Margaret was ahead of her by few meters. She also clarified that she meant the Accused when she talked about Magua.

Going back to the testimony of the father (PW.1) he reported to Riu Police Post after he failed to locate the deceased. He was given two officers, but when they went to the house of the Accused, he was not there. He then went to Kikuyu police station and police were directed to bring the Accused to the station following morning. The Accused was taken accordingly to Kikuyu police station but was released by O.C.S. Kikuyu Police Station. When the deceased was still not found he went back to police and in company of four police officers he went back to Accused's home who fled after seeing them. They entered the home and the same was searched. A blood stained rope (Ex.1) was found in his home.

Then he testified how on 10th August 2001 the body of the deceased was found which according to him, was 200 meters away from Accused's home. He confirmed that Accused was still at large at the time of body's recovery. This fact of his escape and resurfacing after about four months has been agreed by the Accused in his testimony. During Cross-examination PW.1 reiterated that Accused did not ask Susan (PW.4) about the deceased on the same day but on earlier date. Thus he corroborated evidence of Susan (PW.4) in this regard.

PW.3 George Mugo Njane is the witness who was told of finding of a body on 10th August 2001 by some young man and went to the place where it was. They could identify the body as well as the parents of the deceased. He went to inform the parents. He said the body was near his aunt's place and that it was within the area of the Accused's home. He knew both Accused as well as parents of the deceased. According to his estimate the home of the accused was at a distance of 100 meters from the place body was found.

Insp. Helen Rotich (PW.5) is another witness who visited the place where body was lying on 10th August, 2001. She described the injuries on the body which were, similar to those mentioned in Post Mortem Report.

PW.6 Stephen Mucheru Njama is another witness who while trying to rescue a fallen dog stumbled over a leg in a sack. He also stated that from the place where body was found it takes

about 10 minutes to walk to the home of the Accused.

Pw.8 P.C. Ngugi Wamaya booked the report of missing girl on 3rd August, 2001. He stated that he recovered a blood stained rope from the house of the Accused on 7th August, 2001 and that the father of accused DW.2 was in compound during the search of the home which was carried out in absence of the Accused person. He also stated that the Accused ran away on seeing the police in company of the father of the deceased. However, he was not very certain of the date on which the rope was recovered from the home of the Accused.

Lastly, PW.7 Clyfus Otieno Ojyode, a Government Analyst, was required to ascertain the blood group of the deceased as well as that of the stains on the rope. He found that blood group of the deceased was 'A'. He also found that the rope was moderately stained with human blood of group A. In short, the two blood groups tallied.

As against the above specified prosecution case the Accused gave sworn testimony and called his father as his witness. However the father agreed that he was present in the court throughout the prosecution case.

The Accused testified under oath. In short he stated that he was a hawker by profession and on the material date i.e. on 2nd August 2002 at about 6.30 a.m. he left his home and waited for the lift promised by one Githua to take him to Wangige Market. He agreed it was on Thursday. Without naming, he testified that a girl known to him passed him and he asked her why she was going alone. Before she has gone much further the vehicle which was a covered Nissan van of Mr. Githua came and he entered the vehicle. When the vehicle passed the girl he offered her a lift to school but she refused and then they went on their way.

He was told, after two days, by his cousin that Police were looking for him. When he went home at about 8 p.m. he found his main door and bed room forced open. He slept the night at his parent's house and next day they went to Kikuyu Police Station. After he told the Police that he did not know anything about the missing girl he was released. Following day when he saw some people entering his homestead, he ran away and went to Mumias to stay with his cousin. He returned after four months. On arrival he found his house was burnt. He was arrested at a Bar situated at Dagoretti after he was asked to buy drinks by deceased's uncle. With this evidence of PW.1 that the search was made around 7 August, 2002 becomes credible.

Although he did not name school girl he met on the road on 2nd August, 2001, during cross-examination he responded in positive when he was asked whether he knew the deceased and that he offered lift to the deceased. He also stated that how far Susan was to the deceased and also that he did not see Susan that morning. It is true that both deceased and PW.4 bear the same name i.e. Susan. But the question was asked describing the girl as the deceased and not as Susan. I do not think the late attempt by the Defence to suggest that the person he met was Susan (PW.4) and not the deceased can be accepted. He also categorically testified that he has known the deceased since her birth and that they are neighbours and that he had no problem or bad relation with her family.

Benson Githuchu DW.2 is Accused's father and he testified that when the search was done by the Police at the home of the deceased, he was present and that they did not recover anything from there. He also stated that it was done in absence of the Accused. I cannot much rely on his evidence, as he had agreed that he was in the court all throughout the prosecution case.

From the evidence led, undoubtedly, the case of the prosecution is based on circumstantial evidence. If that, the prosecution has to show from the facts presented before the court that they inevitably lead to the inference of the guilt of the Accused, and that there is not and cannot be any reasonable doubt that the Accused could be innocent. In other words there should not be any weak link in the chain of circumstances leading to death which points an unwavering

finger at the guilt of the Accused. The facts should naturally lead from series of facts to the unavoidable guilt of the Accused. I have to satisfy myself that this is what I have before me.

Prosecution has shown that the deceased went alone to the school on the fateful day. I have no reason to doubt Susan's (PW.4) testimony when she said that earlier the Accused had asked her about the deceased. Accused lived in the same village. PW.4 had during her testimony given a bit confused evidence as to her greeting the Accused on the fateful day. She stated in her evidence in chief that she met the Accused on 1st August, 2001 and specifically stated it was a Wednesday and that on Thursday she missed the deceased. While in cross-examination she stated that she met him on 2nd August 2001. I must state that she was in Std. VI at the time of the incident. When she gave evidence she was 17 years of age. Her evidence had been corroborated by PW.1 father of the deceased. The contradiction, of the date, in my view does not affect her credibility as witness looking to her demeanour. I found her to be a truthful witness and not being under anyone's sway.

Not only that, the fact of seeing the deceased on the material day has been almost accepted by the Accused who had sought to give his 'alibi' by stating that he was given lift by one Githua. It shall be appropriate to quote his evidence in cross-examination:

"I knew the deceased. I asked her why she was alone that day. Other days she used to be in company of other children roughly four. I knew them also. Susan (PW.4) was amongst those children. I do not know how far was Susan from the deceased. I did not see Susan that morning. My conversation with her was short. It was about 6.30 a.m. The vehicle came within five minutes It was a private vehicle not Public Service Vehicle. We caught up with the deceased within five minutes."

After this evidence in my humble submission, it was incumbent upon the Accused, to call Githua to confirm his story. This fact was only within his knowledge and thus onus to prove his alibi on balance of probability is entirely on the Accused. He has failed to discharge that onus.

Consequently, it cannot be gainsaid from the evidence of both sides that the Accused was last seen with the deceased. I have no doubt in my mind from the facts presented that the deceased did not go to school on 2nd August, 2001 and that she left home to walk alone. It is also sufficiently proved that her decomposed and badly injured (including her genital areas) body was found in a sack at a place which was not very far from the house of the Accused.

The accused after he was released ran away when he saw people coming to his home the next day. He hid himself for about four months, without satisfactory explanation.

The blood group of the stains found on the rope (Ex.1) tallied with that of the deceased. The post mortem report mentions that her neck showed soft tissue bruising which was also over the larynx. The cause of death was head injury, brain hemorrhage, Asphyxia due to strangulation (cord). This post mortem report was not challenged by the Defence. The mention of card in the Post Mortem Report and finding of blood stained rope do suggest strangulation.

Thus the circumstantial chain which has given a very strong link by the Prosecution comes out cogent and incapable of any chance of innocence of the accused. This I find after carefully considering evidence on record and demeanor of the witnesses. With this observation, I find that the prosecution has proved the charge of murder against the Accused beyond reasonable doubt and I convict him accordingly.

This finding compels me to ***sentence the Accused to death*** as per law, and I do order that.

Dated and Delivered at Nairobi this 17th day of February, 2005.

K.H. RAWAL

JUDGE