



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 41 OF 2002**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**M W N .....ACCUSED**

**JUDGMENT**

The subject who is a minor below the age of 18 years was charged with the offences of murder, contrary to Sec. 203 as read with Sec. 204 of the Penal Code. The facts of the prosecution case as stated in the Charge Sheet are as follows:

***Count I:***

***On the 4th September, 2001 at Kirima village in Koibatek District within the Rift Valley Province, the accused murdered Moses Gikonyo.***

***Count II:***

***On the 4 th September, 2001 at Kirima village in Koibatek District within Rift Valley Province, the accused murdered Joseph Maina.”***

During the trial, the prosecution called nine witnesses who included Dr. Christopher Kemboi who had conducted the post-mortems. This Court has summarized the evidence of the above witnesses during the summing-up. Despite the above, the Court hereby wishes to recall the evidence of the PW1 – L N A W who is the mother of the two deceased children. The PW1 recalled that she had four children before the unfortunate incidents of the material day. She now has only two children: namely

- O K

- T W

She recalled that on the material day, she had gone to dig some land for the church – and hence she left the children with the subject who is her niece. On going back to her house at around 11.00 a.m. to 12.00 noon, she found that the door to the main house and kitchen were wide open. On asking the subject, she replied that she had gone to the home of her brother-in-law to look for M G aged 3 years old.

While looking for MG, the PW1 was told by the subject that a visitor had come while looking for a job. While searching for her children at around 1.00 p.m. to 2.00 p.m., the PW1 saw a large group of

people besides her gate. She was taken to the house where she was informed of how Moses had been slaughtered. Eventually, the PW1 was also shown the body of Joseph Maina. On seeing his body, she never observed any injuries.

Subsequently, the other witnesses explained how they saw the bodies of the deceased. In his medical evidence, PW9 – Dr. Christopher Kemboi deposed that he was the person who had conducted the post-mortems on the bodies of the deceased children on 6th September, 2001. On the body of Moses Gikonyo, aged 3 years old he observed the following:

- *a huge cut on the right ear to right clavicle.*
- *there was a similar injury to the left side.*

The whole anterior neck from the cut wound was missing. Dr. PW9 observed that what was joining the head with the body was only some skin and muscle. The cervical spine No. 2 to No. 6 were all missing. The oesophagus and trachea and major neck muscles and vessels were also missing. The lower 2/3 of the oesophagus was intact and normal. The external genitalia were excised and were also missing. The penis had been excised from the root and the scrotum had been removed completely.

He concluded that the cause of death was severe blood loss due to decapitation and excision of external genitalia. The PW9 was of the considered opinion that the probable weapon used was a very sharp object – and that the excision was very precise in both the neck and genital area.

On the same day, the PW9 carried out a post-mortem on J M – who was about 5 months old – and found that there was a mark all round the neck which may have been made by a wire. The PW9 was of the opinion that the trachea had collapsed at the level of cricoid – that is at the Adam’s apple. He concluded that the cause of death was due to strangulation

In her defence, the subject has denied committing the offences for which she has been charged of. The subject confirmed that she had been staying with the PW1 together with her four children – and that she was a maid.

The subject confirmed that on the material day, the PW1 had gone to do some church work and she remained behind with the children. She also explained how a stranger had come to look for employment. On being replied in the negative, he asked for the home of Githinji and he was shown.

When the PW1 came back, she found her still looking for the children. It was when a proper search was mounted that the two deceased’s bodies were recovered.

On conclusion of the case, all the three assessors passed a verdict of **“not guilty”** against the subject for all the two charges. A review of the evidence on record clearly show that none of the witnesses ever saw the subject committing the offences. Apparently, the prosecution relied heavily on circumstantial evidence to prove their case. This Court concedes that the test to be applied in such cases has been appropriately laid out in the following case:

**Rex Vs Kipkering Arap Koske & Kimure Arap Matatu (1949) E.A.C.A. Pg. 135**

where it was emphatically stated as follows:

*“That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”*

In this particular case, apart from the fact that there was no eye-witness, the conduct of the subject needs to be reviewed. The subject participated fully in the search of the missing deceased children and secondly, she never escaped from that home. That conduct was not consonant with a guilt mind. Had she killed the children, then the natural step was for her to escape from that home.

Significantly, the prosecution failed to lead any evidence to show what was the motive for the murders. In such cases, motive is a crucial ingredient. Unfortunately, the prosecution case never addressed itself to the above. Besides the above, the murder weapon which was said to be very sharp was never recovered at all. In addition, the comments and observations by Dr. Kemboi was that the person who committed the murder on Moses Gikonyo – did the same with a lot of precision. That in my mind suggests some specialized training like surgery. Unfortunately no evidence was adduced to prove that the subject had undergone any such training.

Lastly, it was apparent that the subject retracted the statement that she had made to the police on the ground that she had been tortured. Though the prosecution have a duty to prove their case beyond any reasonable doubt, it is apparent that they have failed to discharge the same in this case. The circumstantial evidence in this case does not irresistibly lead to the conclusion of the guilt of the subject. Apparently, any other person including the stranger could have killed the two innocent children. Whereas the prosecution was able to cast strong suspicions on the subject – the same are not sufficient to sustain a conviction. In view of the above, the Court hereby finds that the subject is “not guilty” of both counts. The subject is hereby “acquitted” of both counts of murder, contrary to Sec. 203 and 204 of the Penal Code. She should be released forthwith unless held lawfully.

**MUGA APONDI**

**JUDGE**

**Judgment read, signed and delivered in open Court in the presence of M/s.**

**Mbeche, Advocate and Mr. Koech, State Counsel.**

**MUGA APONDI**

**JUDGE**

**3RD MARCH, 2004**