



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 98 OF 2017

REPUBLIC.....PROSECUTION

-VERSUS-

WAMBUA MUSYOKA *alias* KIOKO.....ACCUSED

JUDGMENT

1. Wambua Musyoka *alias* Kioko, the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars are that on 26th November 2016 at Mito Andei Location in Kibwezi Sub-County within Makueni County, the accused murdered CMJ.
2. The prosecution called six (6) witnesses in support of it's case while the accused gave sworn evidence without calling any witness.
3. **PW1 MNS** who is the deceased's grandmother, testified that on 26/11/2016, her husband, Samuel Mutinda (PW4) asked their grandchildren, JM (PW2) and CM (deceased) to go to school. Herself and PW4 then proceeded to check on their building. Their workman Kioko (accused) arrived at 10.00am and asked for work but they told him to go and rest as the tractor was not functioning. She then saw J taking the cattle to the river and upon asking him where the deceased was, he said that the accused had taken him to go and look for sheep.
4. E, the sister to PW2 and the deceased arrived to ask what she would cook and she told PW1 that the deceased had not returned. By 7.00pm, he had not returned and they started calling their neighbors to make enquiries. PW1's husband reported to the chief the next day and announcements were made. PW4 decided to go to the accused's home in Kathonzweni to look for the boy but before his return, people arrived at their home screaming and saying that deceased's body was at the dam. That was on 29/11/2016. The deceased died while aged 9 years.
5. The body was retrieved and taken to the mortuary. PW4 returned and said that he had not found the accused. He however had information that the accused was known as Wambua and not Kioko. He was also told that the accused had disappeared after doing a very bad thing, at their home. He was later found in Kitise.
6. Upon cross examination by Mr. Hassan she said that PW2 was taking the cattle to the river at around 1.45pm. That on 27/11/2016, Ndolo (PW3) told them that he had seen the deceased and accused at a water selling point which is 500-600 meters from the dam. In between the water selling point and the dam is the railway line and nothing else. She said that many people take cattle there for grazing. She also said that some sheep had gotten lost in 2016. The accused had been with them for about 8 months. She was not sure if any other report against the accused had been made. They had paid him all his dues.
7. **PW2 JMJ** aged 17 years, testified that he lives with his grandparents, brothers, sisters and uncle. He recalled that on 26/11/2016, his grandfather asked him and the deceased to take the cattle for grazing at the school and while there, the accused arrived and asked the deceased to accompany him to look for PW1's sheep.
8. They left between 10 and 11 am and never returned. As he took the cattle home, his grandfather asked about the deceased and he explained what had happened. He went home and continued grazing. His uncle also asked him about the deceased and he started looking for him. After 3 days, the deceased was found dead in a dam at Mito Andei.
9. In cross examination by Mr. Hassan he said that he arrived home at noon and went to the river at 1pm. His uncle found him at home. The accused never returned the deceased to the home. Further, he said that it takes only five (5) minutes to walk from the dam to their home. The accused was never violent to them and was alright when he took the deceased. He confirmed that many people graze at the dam.
10. **PW3 ANN**, a form two student, testified that he lives with his parents DN and MD. He recalled that on 26/11/2016 at 5pm, he was fetching water at Maanya's when he saw the deceased and their workman called Kioko (the accused). He asked the deceased what they were doing there and he replied that they were looking for sheep. The next day, he heard that the deceased was missing and he told PW1 that he had seen him and the accused on 26/11/2016. He later heard that the deceased had been thrown into the dam.

11. Upon cross examination, he said that the river and Iviani primary school are 1km apart. That when he saw them at 5pm, the deceased appeared alright. He believed that they were looking for sheep as told and he had not heard much about the accused, and neither had he heard any bad report about him.

12. **PW4 SM**, the deceased's grandfather, testified that the accused was known to him but he later learnt that he was known as Wambua and not Kioko. Further, he testified that on 26/11/2016, he asked the deceased and his brother (PW2) to take the cows for grazing. He then left for Ithiani market with PW1 where they were going to paint a house. At 2pm, he saw PW2 passing with the cows and on enquiring about the deceased, PW2 replied that he had left in the company of the accused to look for sheep. At around 5pm, E called and said that the deceased had not returned.

13. They returned home and waited for them in vain. PW1 made calls to the neighbors and the chief but the two did not return for the entire night. The deceased was found dead in a dam three days later and he saw the body at the mortuary. On 26/11/16, the accused had gone to the painting site to enquire about work but PW4 had told him to rest as the tractor had a problem. PW4 said he really trusted the accused among his workers. He had told him that his name was Kioko from Kitise but PW4 never asked for his ID card.

14. PW4 further testified that the accused did not return after the disappearance of the deceased but he was later found at his home in Kitise. After searching for the deceased for 3 days in vain, PW4 testified that he decided to go to Kitise to look for the accused. He was assisted by the elders and after explaining to the accused's mother she told him that he should have gone with the police as the accused was being looked for.

15. In cross examination, he said that he never had a problem with the accused and was shocked at what he did. He confirmed that he never saw him with the deceased. At the grazing field there was a school and two separate homes. Cows do not drink water from the dam but are taken to a nearby place. He said that they arrived home 10 minutes after the call from their granddaughter. The accused's home report was very bad from the way his mother was talking.

16. **PW5 Dr. Esther Musyoki** from Makueni Sub-County hospital, confirmed to the court her qualifications. She authored the postmortem report with regard to the deceased and produced it as **Exb 1**. The findings were;

- ü Body was decomposed
- ü Eyes & tongue were popping out
- ü Strangulation marks on the neck
- ü The cause of death was pulmonary collapse following suffocation by strangulation on the neck
- ü Possible drowning

17. In cross examination, she said that they could not carry out any internal examination. She concluded that there was strangulation because of the popping eyes, popping tongue and neck marks. She could not establish whether the mark was post death, or not. There was no other explanation for the popping out of eyes and tongue. The body had decomposed for some days.

18. **PW6 PC Ali Mwanumba** of DCI Garbartulla, testified that on 29/11/2016, the OCS Mtito Andei informed him of a body that had been found floating in a dam-2kms from the station. They proceeded to the scene and retrieved the body. They examined the body externally and saw marks on the back and a rope mark along the neck which ruled out drowning. The body was taken to Makindu sub-county hospital mortuary and after interrogating witnesses, they found out that the deceased had been missing since 26/11/2016 and had been in the company of his grandfather's employee called Kioko.

19. The autopsy was conducted on 06/12/2016 and the cause of death was found to be strangulation. They started looking for Kioko who had disappeared and on 03/01/2017, he returned home and was arrested by members of the public. He was taken to Kitise police post and later to Mtito-Andei police station. Kioko (the accused), upon interrogation, said that he had gone to Mombasa on 26/11/2016 to look for work. He did not give any other details. The deceased's eyes were popping out and he had bruises on the back.

20. Upon cross examination, he said that he had nothing to confirm that the body had bruises. There was a missing sheep and the accused said that he had left the child on his way home and he was alright. Further, PW6 said that he had been working at the DCI Mtito Andei since 2013. He also said that it was possible that somebody could have killed the deceased on the day he went grazing with his brother.

21. In his sworn defence the accused testified that he hails from Kitise sub-location and worked as a casual. He said that his services had been terminated on 20/11/2016 and his employer told him that he had no money to pay him, and he should look for work elsewhere. On 26/11/2016, he left Ithiani at 9.30am to look for a job. He met his boss at the market and was paid the balance of his dues. He boarded a Nairobi bound matatu and alighted at Mtito Andei where he stayed for two weeks.

22. Having not found a job, he went to Kambo market and got a job as a cook in a hotel. On 02/01/2017, he decided to return home and after crossing Kiboko river, he met a group of people on the road. They asked for his name which he gave them. They asked if he had lived in Mtito Andei and he said yes. They informed him that his boss Samuel Mutinda (PW4) had asked them to arrest him.

23. They called the chief who arrived with his officers at around 8pm. He was placed in the cells at the chief's office and taken to Kavumbu police station the next day. He was then transferred to Mtito Andei police station where he was asked about the deceased and he replied that he had left him at home. He said that there was an attempt to force him to say what he had not told them. He never understood why he was

taken to Court. It was alleged he had injured the deceased but he replied that he had left him in a good state.

24. In cross examination, he confirmed that he had worked for PW1 and PW4. That they have children plus three (3) grandchildren. He lived well with them and had a house within the boma where he stayed even when he was not working. He mainly worked with the tractor. There was another worker who was his conductor and his name was Mwangi. He denied that an animal had gotten lost and denied having gone to look for sheep with the deceased. He met PW4 at the market but did not meet PW1. He denied that there was a house being painted. The dam is near the road. PW4 paid him his money at the market.

25. Further, he said that he never collided with PW1 and PW4 and was shocked with their lies. PW4 used to call him Kioko. He denied having done anything at Kitise nor knowing JM (PW2). He said he used to have a phone where he worked but it got spoilt on Christmas day in 2016.

26. In answering questions from the Court, he said that he knew JM PW2 but with a different name. He agreed that he knew Albanus Ndolo Nzioka (PW3) who was a neighbor.

27. After the close of the defence case the prosecution elected to rely on the evidence on record while the defence filed written submissions.

28. In her brief submissions learned Counsel for the accused M/s Mbuvi submits that the prosecution did not discharge its legal and evidential burden of proof. Relying on the case of **Republic –vs- Nicholas Onyango Nyolo (2014) eKLR** she submits that the critical elements of the offence of murder are;

ü Proof of the fact and cause of death of the deceased.

ü Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the *actus reus* of the offence.

ü Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the *mens rea* of the offence.

Analysis and determination

29. The accused is facing a charge of murder contrary to section 203 of the penal code. Murder is defined under the said section as:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

30. The accused has correctly submitted the three ingredients which the prosecution has to prove in order to secure a conviction for the offence of murder.

31. Section 206 of the penal code defines malice aforethought as follows:

“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

Proof of death

32. The deceased’s grandfather, (PW4) saw the body at the mortuary and the post mortem report (EXB1) indicates that he was one of the people who identified the body. The said report indicates the cause of death to be cardiopulmonary collapse following suffocation by strangling on the neck and possible drowning. Accordingly, the death of Christopher Musyoki was sufficiently proved.

Proof that the death was caused by an unlawful act committed by the accused.

33. This case is purely based on circumstantial evidence as there was no eye witness. In **Abanga alias Onyango vs. Rep Cr. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those

circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

34. In *Sawe Vs. Republic (2003) KLR 364* the court of Appeal stated that:

- 1. 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 hypotheses than that of his guilt.*
- 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*
- 3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.*

35. The evidence shows that the accused was well known by the deceased's family and he too confirmed that he was indeed an employee of the deceased's grandparents and had lived at their home for some time. PW2 and PW3 pointed to the accused as the last person to be seen with the deceased alive on 26/11/2016 (*material day*) and although the accused had initially denied knowing PW2, he later confirmed that both witnesses were known to him.

36. The accused's statement of having been away on the material day was displaced by his own evidence in which he admitted that he met PW4 at the market where he was paid all his dues. In fact, the accused testified that he left Ithiani at 9.30am hence corroborating PW1's evidence that he met them at the market at 10.00am. Further, the accused's evidence shows that he was indeed with the deceased on the material day only that he insisted to have left the boy in a good state.

37. He however did not say where he left the deceased since the evidence shows that the deceased wasn't seen again after leaving with his brother in the morning and with the accused later in the day. By 5pm on the material day, the accused was still with the deceased according to the evidence of PW3 who saw them at the watering point.

38. In cross examination by the prosecution the accused claimed not to have known JM (PW2). However when answering a question from the court he said he knew JM but with a different name. It follows that he knew PW2 who was the deceased's brother and he lived with his grand parents (PW1 and PW4) who were the accused's employers.

39. PW2 was clear in his evidence that the accused left the grazing field at a school with the deceased on account of going to look for sheep. This is the report that PW2 gave to PW1 and PW4 when they inquired about the deceased's whereabouts.

40. **Albanus Ndolo Nzioki (PW3)** is also well known to the accused as a neighbour to his employer. His evidence is that he met the accused and the deceased at the water point at Maanya's on 26th November 2016 at 5.00pm. He was there to fetch water while the accused and deceased came there to drink water. He inquired from the deceased what they were doing there and he told him they were looking for sheep. The accused was present and he must have heard all this. This evidence was never challenged by the defence.

41. It has been confirmed that the deceased never returned home that day. The accused had not collided with any of these witnesses namely PW1 – PW4 for them to lie against him. He said his services had been terminated on 20/11/16. If that is true, then he should have explained what he was doing at his employer's home on 26th November 2016. PW1 and PW4 in their evidence said they had asked him to go and rest on 26th November 2016 as the tractor was not functioning. This clearly means his services had not been terminated as alleged by him.

42. After the incident the accused disappeared only to return home on 3rd January 2017 when he was arrested by members of the public who handed him over to Kitise A. P. post.

43. From the evidence on record it is clear that the accused was the last person to be seen with the deceased while alive. In cross examination he said he left the deceased well. He did not explain where he was with the deceased when he left him well and when this was. Travelling to Mombasa by itself does not mean he could not have committed the offence before leaving.

44. The evidence of the prosecution witnesses is corroborative and the cumulative circumstances of this case forms a chain that is so complete. The only logical conclusion is that the death of the deceased is attributable to an unlawful act committed by the accused person.

Whether the accused had malice aforethought (Mens rea)

45. Malice aforethought is defined under section 206 of the penal code. In the case of **Republic vs Tubere s/o Ochen (1945) 12 EACA 63** the court of appeal laid down the guidelines for establishment of malice aforethought. It stated thus:

“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before during and after the incident.”

46. In the case of **Daniel Muthee vs Republic [2007] eKLR** the court of appeal stated the following on the issue of malice aforethought:

“When the appellant set upon the deceased and cut her with a panga several times and proceeded to cut the young Allan in

similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the penal code.”

47. From the circumstances and the evidence tendered it is clear the accused by inviting the deceased and not his elder brother (PW2) to accompany him knew what he was upto. The boy was strangled on the neck and suffocated. His body was found floating in the dam. The strangling clearly indicates that the accused knew what he was doing and what the end result would be. It was not an accident. I find malice aforethought established as per the provisions of section 206 (b) of the penal code.

48. I accordingly find the charge of murder proved beyond reasonable doubt. The accused is hereby convicted of the same.

DATED AND SIGNED THIS 19TH DAY OF MAY, 2021 AT MILIMANI NAIROBI BY:

H. I. ONG’UDI

JUDGE

DELIVERED THIS 15TH DAY OF JUNE, 2021 IN OPEN COURT AT MAKUENI BY:

GEORGE DULU

JUDGE