



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 15 OF 2018

STATE..... PROSECUTION

VERSUS

GETRUDE ADHIAMBO ONEYA.....ACCUSED

JUDGMENT

1. The accused person **Getrude Adhiambo Oneya** is accused of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. Particulars of the Information dated 13th July 2018 are that on the 27th Day of June, 2018 at 8.30pm at [Particulars Withheld] Aluor Kabare Sub Location Gem Sub County within Siaya County she murdered FO.

2. The accused person took plea on 31st July 2018 and denied the charge. The prosecution called 8 witnesses who established a prima facie case and the accused person was placed on her defense. She maintained her innocence. She had initially told the court that she would call 3 witnesses but after giving her testimony she intimated to court that she no longer wished to call any witness so she closed her defence.

3. The prosecution case was opened by **PW1 Benta Sewe Oginjo** a caretaker at St. [Particulars Withheld] mixed School for the visually impaired children from Nursery to class 8. The witness recalled on oath that on the 27th day of June 2018 at about 8.20pm, she had reported to work at around 7.53 pm and sat at the pavement waiting for children to come from class. When the children were released from class, she proceeded to the Dormitory. Enroute, she met the children's teacher, Madam Getrude Adhiambo Oneya the accused herein, who had been with the said children, returning. They exchanged greetings and PW1 proceeded to the Dormitory for small boys who were heading towards their dormitory. PW1 took the rear route of the Dining Hall while children followed the front route. She arrived in the dormitory and opened it, gave water to the children to wash their feet before they retired to sleep as is the usual practice and that as she was arranging the beds for the children after toileting, she discovered that F, the deceased herein was not among other younger children with whom they always slept together – BO, KO and DL. She stated that FO was the fourth one but she found that he was missing. That she called out his name severally but he did not respond. She then asked the other children who mentioned 'F' FO-who used to aid the deceased F. She therefore went to where F was and asked him where F was and F told her that F was left at the lower classroom, where the children studied from. PW1 advised the children to remain quiet and went to the lower class rooms where preps was held. She opened the door and checked inside the classroom but she did not find F. She returned to the dormitory and asked if F was there but he was not there. She went searching for the deceased from other classes but she did not find him so she returned to the Dormitory and still he was not there. She telephoned their teacher who was on duty Madam Getrude Adhiambo Oneya who had by that time retired to her house which is outside the school compound, who was also a nursery teacher and informed her that F was not with the other children, and that the accused told PW1 that F was there and that even Madam Inviolata had taken him for drugs and porridge.

4. This was about 9.00 pm. PW1 then called Inviolata the teacher who usually gave the sick children drugs and porridge to find out where F was and she told PW1 that she took F and other kids for drugs and porridge and she gave him to CA to take him to the lower classes. PW1 then went to the small Hall where children do the debates and found children inside. She asked them if they had seen F but they told her that F was not with them and directed her to Class 8 where other young children were.

5. That as PW1 was frantically looking for the deceased and going to class 8, she met Mr. Charles Oyenyo, a class 8 teacher at the pavement next to class 8. She entered into the class 8 room and found children there and asked them about F but they denied seeing him. She got out and met Inviolata who had come from her house and she told her that she had searched for F to no avail. PW1 and Inviolata went towards the dormitory and checked everywhere but they did not find the child. Teacher Mildred Onyimbi and Charles Onyeyo joined her for the search in different directions but still they never traced the deceased.

6. Sister Esther Midge the Principal of the School found them still searching for the deceased and asked them what they were looking for and they explained to her about the missing child so she also joined in the search for the missing child.

7. After they failed to trace the deceased, Sister Esther Midge called the Police at Akala Police Station as the school children who could see joined in the search for FO. Police officers arrived in school at around 10.00 pm and joined in the search for the deceased, as PW1 showed them how children slept in the dormitory and how many they were.

8. The police then advised that since it was late, they should go and sleep and start the search the following day. The following morning which was a Thursday, PW1 prepared children who could make it for church service and she went to the dormitory, took pails for porridge and went to the dining hall to serve porridge.

9. That as she was in the dining hall, Jared a security officer called her through the window and asked her about the colour of sandals that the boy had. She told him that the deceased had blue floaters. He went over the window and showed her the sandals from outside the window, and she recognized the sandals. She then checked through the window and saw Jared lowering a ladder into an underground tank for water next to the kitchen.

10. She then heard screams from people and on checking again she saw the body of F besides the water tank. She left the dining and went to the place and saw the body of FO.

11. She stated that she had been with the deceased child on 27/6/2018, prepared him for breakfast in the dining and dressed him in light blue shorts, shirt and the blue sandals with cream / brown handle.

12. She stated that she saw F last at lunch time. He was in weekend dress, navy blue top, v neck, navy blue short with 2 light blue strips. Those are the clothes he wore when he was retrieved from the water tank. She stated that F was a totally blind child and so, at all times he needed someone to guide him although at times they would find their way. (Witness was noted to be gravely sad as she testified and remained silent as she was asked questions by the prosecution.) She stated that there was light in the dormitory and all other places where she visited that night, looking for F.

13. In cross examination by Mr. Mwesigwa counsel for the accused person, PW1 stated that they had never had a case where a child in that institution had gone missing or losing their way to the dormitory. She stated that Security guards did not reach the dormitory and that she had been a caretaker for 14 years and slept with the children in the dormitory. She added that doors to the dormitory were always were closed and keys were kept by the house mother.

14. She stated that they categorized children between nursery, lower and upper primary and that when she I received children that evening, F was not among the children.

15. On being asked by the court, PW1 stated that the water tank where the body of F was recovered usually had a hard cover on it, and that the water tank was behind the kitchen. She stated that from the lower classes to the dormitory, the route passes through the dining area towards the dormitory (and the witness wept as she concluded her testimony).

16. **PW2 Inviolata Nyaleso** a pre-school teacher and a school nurse aid at [particulars withheld] school for visually impaired children testified on oath that she started working at the school in September 1989. She had worked there for almost 30 years. **She recalled that on** the 27th day of June, 2018 she reported on duty at 0630Hrs, where she commenced her work as a nurse aid. That at around 1900Hrs she issued medicine to the pupils including FO. That she issued medicine and gave FO porridge including seven other pupils. She thereafter instructed CA to take FO to teacher Getrude Adhiambo Oneya. After finishing her duties, she retired home. It was after taking supper that madam Benta called her and informed her that FO was missing in the dormitory. She then went back to the school and found the house mother searching for the child. That she advised her to go back to the dormitory and check the pupils one by one, and that they did that in vain. They then started searching around the compound and later sister Esther Midge found them and inquired what was wrong. They informed her that F was missing. That as they were searching Getrude the accused herein called her and inquired on what was happening in the school and PW2 informed her and inquired whether the child had been escorted into dormitory but that Getrude Oneya answered that she did not get into the dormitory. That the accused person informed them that she escorted all the children up to near the dormitory. That the accused then came and joined them in the search.

17. **Further testimony by PW2 was that** on the 28th day of June, 2018 she reported on duty at around 0630Hrs and continued with the task of searching for the deceased around the school. That suddenly, Sister Esther Midge called and informed her that she had received information that the slippers the deceased was wearing had been spotted near the underground tank. PW2 rushed to the scene and confirmed that indeed the slippers belonged to the deceased. She then looked for a ladder and somebody climbed down the water tank to check. That Jared Okoth, went down the underground tank and found the body of the deceased inside. That they assisted that he removes the body of the deceased which was lifeless. The accused person had arrived so they lifted the body and placed it on the ground. They then informed Akala Police who immediately came to the scene and investigations commenced.

18. In cross examination by Mr. Mwesigwa advocate, PW2 stated that F was HIV positive so she gave him HIV/AIDS drugs and that he had been on drugs from January 2018. Further, that they had a medical report on F on his health situation. She also stated that CA had low vision but he could navigate his way around very well. She stated that the body of the deceased did not look like it had been in water for a long time and that only one sandal was found.

19. **PW3 SOO** from Umina village a brother to the grandfather to the deceased testified that on 28/6/2018 at 9.00 am he was in the farm when he received a call from St. [Particulars Withheld] School for the blind to the effect that F was dead and that it was a police case. He went to the school with RA the boy's grandmother and on arrival the met a police land cruiser. They proceeded to the head teacher's office of sister Esther Midge and she welcomed them and comforted them, telling them that the body of F had been taken away by the land cruiser on inquiry they were taken to the underground water tank of 3 feet high showed the tank where F's body was found. The witness asked her how the blind boy could have entered the water tank and cover it with a lid and he was informed by the head teacher that the matter was under investigation by the police and the school. They then proceeded to Siaya Mortuary and identified the body for post mortem.

20. **PW4 Dr Biko Opidi** a Medical Officer Siaya County Referral Hospital carried out a post mortem on the body of FO on 28/6/2018. He stated that the body was identified by RA and SO at 6.30 pm. On examination, the body was of a male African race. It had a school uniform. There was faecal matter on the back side of the uniform. The age of the deceased was about 10 years, good physique and good nutritional status.

21. **The** post-mortem changes were: abdomen was distended and rigor Mortis had not set in. The body was less than 24 hours from the time of death to the time of examination. Externally, the clothes were dry, no bruises on the skin, no marks or blood /haemorrhages. There was frothing from the nose, the upper incisors were missing and there was trauma on the jaw and gums. There were no other injuries on the body. There were hyper pigmented lesions on the exposed upper arms and legs. There was also evidence of the HIV management on the deceased. The eyes were white, evidence of his blindness.
22. Internally, the body's respiratory system had - lungs had water - frothy, trachea and airway bones were intact. The heart was normal - cardiovascular system was also normal. In the digestive system, the large intestines were hyper distended, the stomach had food material - porridge and pieces of groundnuts. Other organs like liver and the spleen were normal. Genito urinary system was normal. On the head there was haematoma on the occipital region on the scalp denoting blunt trauma on the head. There was no fracture of the sculp. There was no sign of intracranial haematoma. The brain tissue was normal, spinal cord was normal.
23. The doctor formed the opinion that the cause of death was drowning leading to respiratory failure. He signed the post-mortem form and issued a Death Certificate No. 0763531. He also noted that externally there were blunt trauma at the back of head, missing incisors and injury on the upper jaw. He produced the post-mortem form as exhibit 1.
24. On cross examination by Mr. Oduol Advocate for the accused person, PW4 stated that he did the post-mortem on the body of the deceased FO and that in his view, the cause of death was due to drowning leading to respiratory failure. He reiterated that the deceased was a blind person.
25. **PW5 CA**, a partially blind minor was taken through voire dire examination and stated that he was a class three pupil at [particulars withheld] School. He recalled that on 28/6/2018, he went to the dispensary with his fellow pupils FOO and DO, to take drugs they met another small child called FO and that they took him where other children namely O and S were. PW5 then with his 2 friends went to their Class. He stated that after taking FO to where other children were, he later learnt that F had disappeared and they were looking for him. That they searched for him that night but they did not find him and that later he was found dead in an underground water tank.
26. He stated that at school they have teachers Millicent and Inviolata and that Madam Inviolata was a teacher to F and gave them medicine on that day. He further stated that Teacher Gertrude was also the teacher to FO. He added that on that night when he was with FO, Teacher Gertrude was in class teaching the other pupils and that he saw her when he took F back to class after they had taken their medicine. He stated that after taking FO to class, teacher Gertrude told him to leave him in class and return to his class.(witness identified the accused in court by greeting her and saying he recognized her voice).
27. **In cross examination by Mr. Oduol Advocate, PW5 stated that for the** children who could not see completely they are escorted to the dormitory to sleep. He stated that when he escorted FO, he left him in the company of the pupils and he told Madam Gertrude that he had brought F then she acknowledged him and told PW5 to go to his class. He stated that on that night he was able to see well.
28. **PW6 No. 66783 CPL Simon Lukonyi**, of Scenes of Crime Support System Siaya County, and a gazetted officer vide Gazette No.10284 of 15/12/2016 testified that he was the scene of crime officer in this case. He recalled that on 28/6/2018 at about 10.00am while at Siaya Crimes Office he was requested by Chief Inspector Jared of Akala Police Station to go to [particulars withheld] School for the Blind at Aluor area and attend to an alleged murder scene. On arrival at the school, on the same day they were taken to the dormitory by Sister Esther, and the class teacher Gertrude Oneya was also around. He was shown a closed borehole where the deceased was alleged to have been retrieved from. There was water in the borehole and beside it, there was the body of a young boy. He examined the body which was still fresh without any physical injuries.
29. The body was dressed in a blue short and a blue shirt with a white strip line, with blood oozing from the mouth. He took 5 photographs at the scene which he produced as exhibits showing General view of the body at dormitory side, closed view of the borehole shown by an officer in uniform, big closer full length view of the deceased and a big closer facial view of the deceased for identification purposes. He identified the photographs and certified them as being computer printouts produced under his supervision. He stated that the original films were in his safe custody, not interfered with. He produced the photographs as exhibits together with the certificate as PEX2 (a) (b) (c) (d) and (e), certificate dated 3/6/2019 produced as PEX 2(f).
30. On cross examination by Mr. Oduol Advocate for the accused, PW6 reiterated that he is the one who took the photographs on 28/6/2018 and printed them out on 3/6/2019 but that the date on the photographs is 27/6/2018 because he did not synchronize his camera for the date of 28/6/2019. He also stated that he did not dust the lid of the borehole because it could not be dusted. He denied knowing know who opened the borehole lid as he found it open and the deceased already retrieved from therein.
31. In reexamination by Mr. Okachi for prosecution he stated that he took the photographs on 28/6/2028 but that he had not adjusted his camera to reflect the current date.
32. **PW7, Sister Esther Midge Odipo** the Head teacher of [particulars withheld]School for the blind testified that on 27/6/2018 at about 8.20 pm, she was in the convent and that at about 8.30pm, she was in the school doing her usual supervision when she heard ladies talking at the fence behind class 5 block. They were madam Inviolata class Teacher for PP2 and the school nurse aid and Benta Osewe Onginyo, the house mother of the dormitory where the deceased FO was sleeping. PW7 stated that the ladies appeared to be searching something while calling out the name of the deceased FO saying he had strayed. PW7 told them that the boy could not reach that area. She also joined them searching for the boy as he knew her voice. She stated that there was security light all over the compound therefore she could see very well. She asked them whether they had informed madam Gertrude and if she had handed him to the house mother. She then called madam Gertrude because she was responsible for the children from the classroom until the children are taken to the dormitory and handed to the house parent and that Gertrude was the duty teacher so she was to hand over the children to Benta Osewe.
33. **PW7** learnt that Gertrude did not take the children to the dormitory and that the children had gone to the dormitory on their own and found Madam Benta waiting for them. She stated that FO was a totally blind child and had health complications so he was on drugs, which

required that he was given total support on mobility, special porridge and special drugs.

34. She reiterated that that evening, the teacher on duty responsible for the child from class to the dormitory was Madam Getrude from 7.30 pm until 8.10 pm and expected to hand him over to the dormitory after the child had taken drugs. She emphasized that madam Getrude Oneya did not hand over the child as required.

35. PW7 further stated that FO was traced on 28/6/2018 in an underground water tank, and that after the incident she inquired from Getrude who admitted failing to accompany children to the dormitory. She identified stated that Getrude who had been in the school from 2004, while PW7 had been in the school from 2005.

36. On being cross examined by Mr. Oduol Advocate, PW7 stated that her duties in the school entail supervision and that on 27/6/2018 she did her supervision work well. She stated that their boreholes were always secure as they have covers. She however stated that she did not go round to check on their state that day as she was with teachers. She stated that visually impaired children were always assisted by those who are partially blind and that guiding is one of the recommended means of mobility.

37. She stated that the deceased was admitted in the school in January 2017 but he reported in September 2017 as a total blind child. She stated that she found out that madam Benta was at the dormitory by 8.00 pm so all the children found her therein. She stated that many children told her that when they went to the dorm that evening, they were not accompanied by Getrude and that they found Madam Benta. She stated that she investigated CA and other children whom they went to take drugs with and he told her that he handed over FO to madam Getrude at about 7.30 pm when classes were beginning. She added that when she called Getrude, she came and become part of their search team for the deceased.

38. In reexamination by Mr. Okachi, PW7 stated that when the search started, Getrude was not in the school compound and that she did not know why Getrude did not respond immediately she was informed of the missing child.

39. **PW8 No. 233895 CIP Jared Nyaosi** and the Officer in Charge of Akala Police Station and the investigating Officer in this case testified that on the 27/6/2018 at 2000 hrs, he was at Akala Trading Centre when he received a telephone call from the Head Mistress Aluor School for the visually impaired children. She told him that one child FO was missing and wanted police assistance. PW8, together with 3 other officers proceeded to the scene and were informed that the child was around. They searched in the whole school compound until 11pm in the night but they did not trace the child so they retired until the following morning on 28/6/2018 at 7.30 am when they received another report from Headmistress that the child had been spotted and retrieved from an underground water tank which had water in it. PW8 inquired how they spotted the body and they told him that the watchman spotted his sandals near hence they searched the tank and saw the body inside.

40. PW8 then informed scenes of crime Officer from Siaya Police Station who went and photographed the scene. That they saw blood oozing from the child's mouth. They removed the body to Siaya County Referral Mortuary for post-mortem and recorded statements from witnesses of how the pupil moved, the nurse who attended to him, other children, how the child was handed over to the teacher on duty and how he was never seen thereafter. He also interrogated Getrude Adhiambo who was the teacher on duty and she confirmed receiving the child and escorting them after class, to the dormitory where they were to sleep and left them. He stated that as the child was blind, he needed special care so he could not be left on his own. He stated that the accused person should have escorted the child and hand him over to the dormitory matron. Further, that the accused person failed to explain how the child disappeared and found himself in the water tank that is why she was charged with the offence, adding that she never handed the visually impaired child to another person in authority to care for the child. He identified the accused person in the dock.

41. On being cross examined by Mr. Oduol counsel for the accused, PW8 stated that in their search for the deceased, they never searched around the underground tank but that in its vicinity and that they never saw the child. Neither did they suspect the child to be in the tank. He denied noticing the presence of sandals near the water tank and that it was in the morning when the watchman noticed sandals and they checked in the water tank. He stated that the tank was very secured as it had a metal cover which cannot be lifted by a sick person, but that it had no padlock.

42. On being placed on her defence, the accused person elected to give sworn testimony. She did not call any witness. She testified as DW1 and identified herself as Getrude Adhiambo Oneya. That she worked at St. [Particulars Withheld] School for the visually impaired as an Early Childhood Development Education (ECDE) Teacher but since this case was initiated against her, she was at home.

43. The accused person recalled that on 27/6/2018 at about 7.57 pm while she was working at the [Particulars Withheld] school, she was in the classroom with all the other children when C went and told her that Madam Inviolata had sent him to collect the deceased FO to escort him to get his medication at the sick bay. I was in class with all the other children. That C brought back the deceased and they stayed in class up to 8.10pm when she escorted the children up to the dormitory. That the children were in a group. She stated that F was being guided by FO and that she saw them entering the dormitory then she rushed back to check whether the girls had reached their dormitory. On her way, she met the house mother Inviolata Nyaleso and told her that the children had gone to the dormitory and were waiting for her. That when she found the girls already gone to the dorm, she left the school for her house which was outside the school compound. That she passed through the gate where she found John Aremo and Jared Okoth, the guards who opened for her the gate and they told her that the outside gate was open so she passed through and went to her house. That on reaching her house, she stayed for a while then a neighbor called her. She went to her neighbour's house and while there, she received a phone call from Benta Sewe Onginya saying F was missing. That she told her that may be F was lost somewhere and that he would be found because even the previous week he had gotten lost.

44. That the accused then went to house and at 9 pm she received another call that the boy had not been traced so she went to school. That on her way, the head teacher called her and the accused responded that she was on her way to school. That on reaching the school, she joined the search for the child F.

45. She stated that there were two groups searching the lower and the upper parts of the school. That they searched for the deceased until police officers from Akala Police Station arrived and helped in the search until midnight but they never succeeded in getting him. That the

police called off the search and the housemother told her to spend the night in the school but she declined because she had not locked her house door. That her house is 200m from the school. That the following morning at 6am she went to school and found the watchmen still searching for the child and she joined them in the search. That all over a sudden John told her that they had been told to take the ladder and check a certain place. That she followed them and on reaching the underground water tank which was open, one of the child's floaters (sandals) was in the water tank. The watchman placed the ladder inside and went with the spot light and saw the child. Madam Inviolata told him to remove the body which he did and placed the child's body outside the water tank and people started crying. That the Headmistress came running and quarreled her over her carelessness, saying that the accused had killed the deceased yet her own children were getting well. That she told Sister that she could not kill the child and explained to her that she had left the child going to the dormitory that she did not know what could have happened to him.

46. That after a while, police officers arrived from Akala Police Station and interrogated the accused and she explained to them how she took the pupils up to a certain point where she could see them going into the dormitory, left them and went to the girl's dormitory so she did not know who could have killed him. That she then recorded her statement with the police and the police left but that on the 2/7/2018 at 3 pm, they were in a school meeting in a hall when she was called by Sister, the head teacher to the office and on reaching there she met the Officer in Charge of Akala Police Station and other police officers from Akala police station who told her to go and help with investigations into the death of the child. That they escorted her to her house to pick her jumper and they proceeded to the police station where she was interrogated and she told them exactly what she had told the court.

47. Later she was taken to Bondo Court and charged before this court with the present offence. She urged the court to help her get the truth.

48. On being cross examined by Mr. Okachi, the accused stated that the deceased FO was her pupil. She confirmed that on the 27th June 2018 from 7.30 pm to about 8.15pm she was in school and that Classes ended at 8.10pm. She stated that she was with FO that evening and night. She stated that CA is visually impaired but can see a little and that C went for FO from class, took him to the sickbay and returned F to her, she further stated that she did not hand over FO to any person in particular.

49. The accused person further stated that the underground water tank was between the dormitory and the dining and that it is raised and has a metal lid but has no padlock. She said that she saw it that evening and that it was closed so it did not pose any danger to the child because it was always closed. She further stated that she saw the children entering their dorm as she left, but she did not know how many they were. Further, that F was guiding the child, and that F is also a child, classmate of F and he is partially sighted. She stated that she would call F as her witness.

50. The accused further stated that she knew that F had a tendency of straying in the compound in the evenings but that she also knew that he needed special care and attention because of his visual impairment. She stated that FO was a responsible person but he was not given the responsibility by the school to guide F.

51. She further stated that Madam Benta Sewe was in charge of the Boy's dormitory and conceded that she did not hand over the children and specifically, FO to Benta Sewe. She stated that she did not have anything to show that she ensured that all the boys (children) were safely received by the dorm mother before she left.

52. She stated that some places in the compound are dark, while others have enough light, and that from the dining to the dorm there was light. She denied a suggestion that F disappeared when he was in her custody.

53. On being shown a photograph of the water tank, (PEX 2(c)), the accused person stated that it is raised about 2 meters high and stated that an adult can open when standing but a young child cannot open it when standing on the ground because the cover which is metallic is also heavy. She stated that FO must have been lifted or assisted to get into the water tank.

54. On being reexamined by Mr. Oduol Advocate, she stated that she was hurrying for the girls that is why she did not hand over F and others to the dorm mothers. She stated that she did not reach the dorm but not because she had any ill motive. That she was only rushing for the girls. She stated that FO has a passion for other visually impaired children so she left him to guide FO.

55. On being asked by the court, referring to exhibit Ex 2 (a), the accused stated that she stood near the septic tank and let the children go. That the water tank is near the white tent on the left side where the man in white shirt is standing and that even if the child lost his way, he could not have jumped into the water tank. That he must have been lifted and thrown into the water tank.

56. The accused person closed her defence case and her counsel filed written submissions on 16th January 2020.

SUBMISSIONS

57. Counsel for the accused filed written submission urging this court to acquit the accused person and contending that the prosecution had not proved the charge of murder against the accused person beyond reasonable doubt. Further, that albeit the accused person does not deny that the deceased was found dead, she was not responsible for his demise as she handed him over to the dormitory before retiring to go and check on the girls. Counsel submitted that there was no certainty on the time of the death. Further, that the prosecution relied on circumstantial evidence as there was no direct evidence linking the accused to the offence, which circumstantial evidence was not sufficient to sustain the conviction of the accused person for murder of the deceased. Counsel further submitted that the prosecution had not proved any malice afterthought against the accused person. He cited several decisions and concluded that the prosecution failed to prove their case against the accused person beyond Reasonable doubt.

58. The Prosecution did not make any submissions.

DETERMINATION

59. I have considered the evidence adduced by the prosecution witnesses, the exhibits produced and the evidence adduced by the accused person in her defence. The main issue for determination in this case is whether the prosecution proved their case against the accused person beyond reasonable doubt to warrant a conviction for murder.

60. Section 203 of the Penal Code provides that:-

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

61. Section 206 of the Penal Code on the other hand sets out the circumstances which constitute malice aforethought. In light of the above provisions, the prosecution in this case must prove:-

- a. The death of the deceased and the cause of that death;***
- b. That the death of the deceased was caused by an unlawful act or omission;***
- c. That it is the accused herein who caused the death of the deceased either an unlawful act or omission and;***
- d. That in unlawfully causing the death of the deceased, the accused had malice aforethought.***

62. The main issues for determination are:

- a. Was there proof of the death of the deceased and its cause?***
- b. Was it the accused who cause the death of the deceased?***
- c. Was malice aforethought proved on the part of the accused?***
- d. What orders should the court make.***

63. On proof of the death of the deceased and its cause, this is not disputed by both the prosecution and the defence. The death of one FO was proved by post-mortem report produced in evidence as exhibit 1 by Dr. Biko Opidi who confirmed that the body of the deceased was identified by RA and SO. The doctor opined that the cause of death of the deceased was asphyxia (drowning) that caused respiratory failure. He issued a Certificate of Death No. 0763531 to that effect.

64. The exact time of the death of the deceased, according to the Doctor, was less than 24 hours as at the time of postmortem. From the evidence adduced by the other prosecution witnesses, it would appear that the child vanished from the custody of the accused person between 8.15pm and 9.00pm of the 27th day of June, 2018 and his body was retrieved from the underground water tank near the dormitory where the children slept in the early morning of 28th June 2018.

65. The prosecution's case is that the accused person was the last person in charge of the deceased child right from the classroom that night shortly before she took the children to the dormitory to sleep and that she did not hand him over to the housemother. The accused person too in her defence admits that she did not hand over the children to the house mother. She says that she was in a hurry to go to the girls' dormitory hence she stood at a distance as the children proceeded to their dorm then she turned back and met their house mother Benta and told her that she had escorted the children and left them entering the dormitory. That later she received information that the deceased child was missing.

66. Indeed, as to how and at what exact time the deceased found his way into the underground tank remains unknown. There was no eye witness to give an account on what exactly happened that led to the death of the deceased; that is who sunk him into the underground tank leading to the drowning and in turn failure of the deceased respiratory system hence causing his death.

67. The prosecution's case which is premised on setting out together pieces of certain events that happened prior to the death of the deceased child. Those chain of facts are what are before the court for consideration as evidence connecting the accused person with the death of the deceased. In other words, there being no eye witness, the prosecution relied entirely on circumstantial evidence to establish a prima facie case against the accused person.

68. PW2 Inviolata Nyaleso told the court that on the 27th day of June, 2018 she reported on duty at 0630Hrs, where she commenced her work as a nurse aid. That at around 1900Hrs she issued medicine to the pupils including FO. That she issued medicine and gave FO porridge including seven other pupils. She thereafter instructed CA to take FO to teacher Getrude Adhiambo Oneya. After finishing her duties she then retired home. It was after taking supper that madam Benta Ojingo called her and informed her that FO was missing in the dormitory. She then went back to the school and found the house mother searching for the child. That she advised her to go back to the dormitory and check the pupils one by one, they did that in vain. They then started searching around the compound and later sister Esther Midge found them and inquired what was wrong. They informed her that F was missing. She inquired whether she escorted FO to the dormitory in which Getrude Oneya answered that she did not get to the dormitory. That the accused person informed them that she escorted all of them near the dormitory. That the accused then came and joined then in the search.

69. That on the 28th day of June, 2018 she reported on duty at around 0630Hrs. She then commenced searching the boy around the school. That suddenly, Sister Esther Midge called and informed her that she heard that the slippers the deceased was wearing had been spotted near the underground tank. She rushed to confirm if the slippers belonged to FO. That she confirmed indeed they belonged to the deceased. She

then decided to look for a ladder and somebody went in to check. That Jared Okoth, went down the underground tank where it was discovered that the body of the deceased was inside. That they assisted him in removing the body of the deceased which was lifeless. They then informed Akala Police who immediately came. We humbly urge the court to exercise extreme caution in reception and reliance into this evidence as in our view it is unsafe so solemnly rely on it without any other corroboration from the prosecution witnesses.

70. In his testimony PW5 CA a child of 15 years was taken through a thorough *voir dire* examination and upon the court being satisfied that the minor was intelligent and understood the meaning of telling the truth, he was sworn. He stated that on 27th June, 2018 at around 8pm he had gone to take medicine at the sick-bay together with FO and DO. He also indicated to the court that he can slightly see. That they met FO at the dispensary.

71. He testified on that night he saw people searching where FO could be. He also helped in searching in vain and then went to sleep. That FO was later found in the underground tank dead. When asked whether the accused person on that day was with FO, he indicated that the teacher was not with FO. When asked as at the time he took FO to the rest, whether Madam Getrude Oneya was present, he responded that it was her day to teach and she was present, and that after taking FO to class, the accused person told her to go back to his class.

72. According to the defence, the accused person did not murder the accused or through her acts of commission or omission and that the same has not been proved either to the standard beyond reasonable doubt.

73. The question is whether the prosecution have proved beyond reasonable doubt that it was the accused who caused the death of the deceased child by acts of omission or commission. There being no eye witness to this case as earlier stated, the question is ***whether there is sufficient circumstantial evidence to the place the accused at the scene.*** The accused person's counsel submitted that the prosecution's case against the accused person was purely circumstantial to the extent that none of the prosecution's witnesses who testified witnessed how or by whose acts the deceased died. That is the undisputed position in this matter. That being the case, for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the alleged offence.

74. In **ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990** the Court set out the following yardstick for circumstantial evidence:

“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.”

75. The prosecution is obliged in all criminal cases to prove its case against the accused person beyond any reasonable doubt. It must also prove that the accused person caused the death of the deceased and or that it was the negligent acts or omission by the accused person that caused the deceased's death and that the accused had the necessary motive to cause death or grievous harm to the deceased.

76. The accused person contends that the prosecution's case was full of gaps and was not exclusively consistent with the assertion that the accused person committed the murder. To explain the same, the defence took issue with the timelines in which the incident is alleged to have occurred. It was submitted that the time frame as stated by the various prosecution witnesses ranges between 7.30pm of the 27th day of June, 2018 and the dawn of the 28th day of June, 2018 at about 5.00pm at [Particulars Withheld] School for the Visually Impaired; and that these happenings also took place when the accused person had left the school and retired to her home. Further, that as to whom the custody of the child (the deceased) was last still remains unclear. The accused contends that the child was in the custody of the accused person, who in turn set him and the rest of the children to go to the dormitory to sleep under the guidance of FO a child. She maintained that at the dormitory the child was now in the custody of the house mother who is said to have been late that day.

77. The accused person's counsel relied on **MUSILI TULO V. REPUBLIC, CR. APP. NO. 30 OF 2013**, where it was observed that to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else, without any reasonable doubt.

78. Counsel contended that similarly, in the present case and evidence, it is entirely circumstantial, and 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. That there must be no other co-existing circumstances weakening the chain of circumstances relied on. That the burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused. We submit so in this present case.

79. it was submitted on behalf of the accused person that the prosecution's evidence in this matter did not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction and or finding of guilt on the part of the accused person and that the evidence before the court is purely suspicion which, however strong cannot sustain a conviction. Counsel relied on **SAWE -V- REP [2003] KLR 364** where the Court of Appeal held:

“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. 4. ... 5. ... 6. .. 7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”[emphasis added].

80. It was further submitted that the evidence as adduced and in support of the prosecution’s case had broken chains of events that cannot link the accused alone to the death of the deceased. Accordingly counsel urged the court to find that the prosecution’s case is bereft of merit, hold no guilt on the part of the accused person and that the evidence tendered by the prosecution falls short of the required standard of proof beyond reasonable doubt. He urged court to acquit his client.

81. I have considered the evidence adduced by the prosecution witnesses and I agree with the submissions by the defence counsel that the evidence adduced against the accused person is purely circumstantial. Further, I am in agreement that there is no direct evidence linking the accused person with the death of the deceased FO.

82. However, the evidence as adduced clearly points to the accused person as the person who was last seen with the deceased child. In addition, there was evidence that the deceased child was a totally blind child who needed special care and had to be guided throughout.

83. Further, there was evidence from the accused herself that indeed she was expected to hand over the child to the house mother, PW1 at the dormitory but that on that material night she escorted the children and left them at a distance to the dormitory then she returned as she was in a hurry going to check on the girls. Further, the accused person herself stated that when she was called and informed about the missing child on the material night, she told her caller who was PW1 that F was there and that he may have strayed as he had previously strayed but was traced.

84. This was at night and as the accused person had knowledge of the disability of the child and his tendency to stray, the most prudent thing to do would have been to ensure that the child and all the other children were handed over to their housemother in the dormitory before she left. Instead, what clearly emerges from the evidence adduced by the prosecution witnesses and as confirmed by the accused person is that she was in a hurry so she left the children at a distance to go to the dormitory on their own. From the chain of events, it did not take long before the housemother noticed that the deceased child was missing from among the children and upon making frantic searches and calling out his name, the child did not respond. She then called the accused person and notified her of the missing child upon which the accused stated that the child Fredric was there and that as he was fond of straying he would still be found.

85. The accused conceded in her testimony that she was expected to have handed over the child to the dormitory mother. Although there is no evidence that the accused actually killed the deceased child, but there is sufficient evidence adduced by the prosecution witnesses that the accused was the person in authority over the deceased child that particular material night and was therefore expected to take care of the child who was totally blind, by ensuring that the child was handed over to the house mother. The accused person owed the child a duty of care, but she breached that duty of care and acted recklessly and negligently in handling the child with special needs. I am satisfied that the prosecution have proved beyond doubt through circumstantial evidence and by the accused person’s own testimony that the accused person and no other person was the person responsible for handing over the deceased child to his house mother that very night and that she did not hand him over as she left him with other children near the dormitory and returned to the girl’s dormitory. The child was never seen alive again.

86. Albeit the watchmen who retrieved his body from the water tank were never called as witnesses, the evidence on record is clear that they only assisted in retrieving the body after seeing the child’s sandal outside the water tank and on checking inside and in the presence of the accused they saw the deceased.

87. The watchmen from the evidence on record did not see the deceased being thrown into the water tank. Further, albeit F was not called as a witness, there was no evidence on record as to the age of F who was also a child and who was under no duty to lead the deceased child to the dormitory at night noting that the said F was also partially blind.

88. Therefore, on whether malice aforethought as proved on the part of the accused? In **REPUBLIC V MICHAEL MURIUKI MUNYURI [2014] eKLR** relied on by the accused person’s counsel, malice aforethought as set out under section 206 of the Penal Code was slated to be constituted in the following terms:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

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.

89. The general principle is that malice aforethought is the deliberate nature to cause great grievous harm or death. In law the intention to kill or cause grievous harm or death or an attempt to act in a manner that creates likelihood of death or grievous harm. In the case of **ERNEST ASAMI, BWIRE ABUANG ALIAS ONYANGO VS REPUBLIC, NAIROBI COURT OF APPEAL NO. 32 OF 1990** where the court inferred malice aforethought when considering of the brutal killing of the deceased which was well calculated and planned by the defendant. The meaning of intention in this case seemed to involve conscious acts implemented to seek or achieve a definite result of causing death or grievous harm.

90. In this case, the prosecution has not shown beyond reasonable doubt any particular reason why the accused person would eliminate the

deceased child. I find and hold that malice aforethought was not proved.

91. Therefore, whereas there is no evidence that the accused person had any malice aforethought to kill the deceased child, and whereas there is no eye witness to the killing of the said child and whereas there is no direct evidence to prove that the accused person acted either alone or in concert with others to eliminate the deceased child, there is sufficient evidence proved beyond reasonable doubt that the accused person Getrude Oneya owed a duty of care to the child FO and that she absconded that duty of care and failed to deliver the child to the housemother before leaving. She left the child who had a special need and whom she had knowledge or reason to believe that he could stray because of his disability, in the company of other children and as a result the said child did not find his way to the dormitory with others and as a consequence of that omission, the child was found drowned in an underground water tank. In my humble view, therefore, the accused person is guilty of unlawful omission.

92. An **“unlawful omission”** is defined under section 202 (2) Penal Code as an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

93. This court’s understanding of this definition is that the prosecutor who bears the burden of proving a criminal case against the accused person beyond reasonable doubt must, in a crime of manslaughter, prove that the deceased died as a result of unlawful act or omission and that the appellant is responsible for the unlawful act or omission causing the death.

94. Under English law, where a person causes death through extreme carelessness or incompetence, gross negligence is required. In **R. vs. Bateman 19 Cr. App. R. 8 the Court of Criminal Appeal** held that gross negligence manslaughter involved the following elements:

a. The defendant owed a duty to the deceased to take care;

b. The defendant breached this duty;

c. The breach caused the death of the deceased; and

d. The defendant's negligence was gross, that is, it showed such a disregard for the life and safety of others as to amount to a crime and deserve punishment.

95. A teacher in the position of the accused person, in my humble view, is in *loco parentis* of children placed under her care. The accused herein had a duty of care towards the pupils who have special needs like the deceased child, when controlling the children, the accused had a duty to act like the parent when protecting the special student child from foreseeable injury or harm. The standard of care is that of a reasonably careful parent and the degree of care depends on the factors such as the age of the child or the condition of the child and in this case the child was totally blind.

96. Legally, while not bound by parental responsibility, teachers must become as any reasonable parent would do in promoting the welfare and safety of children in their care.

97. Accordingly, I find and hold that whereas there is no evidence of malice afterthought against the accused person whom I find not guilty of the offence of murder, I however find and hold that the accused person Getrude Adhiambo Oneya is guilty of the offence of manslaughter through acts of unlawful omission.

98. I therefore invoke section 179 of the Criminal Procedure Code and find the accused person **Getrude Adhiambo Oneya Guilty of Manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict her accordingly.**

99. A copy of this judgment shall be given to the County Director Children’s Services and County Director of Education to disseminate the message to all schools in the county to beware of their role as children’s custodians.

100. Orders accordingly.

Dated, Signed and Delivered at Siaya this 6th Day of May 2020 via skype.

Accused was in court precincts as she was on bond.

R.E. ABURILI

JUDGE