



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 85 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

NAHASHON KAREITHI.....1ST ACCUSED

ERASTUS MWENDA KIRIAMA.....2ND ACCUSED

JUDGEMENT

The accused persons Nahashon Kareithi and Erastus Mwenda Kiriama were jointly charged with offence of murder contrary to section 203 as read with section 204 of the Penal code.

Particulars are that the accused persons on the 26th day of September 2013 at [particulars withheld] village Mwili sub-location Nchooro Location in Tigania West District within Meru County jointly murdered M K.

The prosecution called PW1 who said on the material day he together with M and M on 27th September 2013 when they Kareithi burning some leaves in the shamba and A1 explained they were leaves from a mango tree under which he was burning them.

PW1 said that on Sunday he heard his grandmother say that a child had been found buried in the farm of Kareithi's employer. He said that Kareithi's employer is known as Luka and that he was father of M and M. He said the grave where the body of child was removed is same place where Kareithi A1 was seen by them burning leaves. He said that school uniforms the child was wearing were also placed in the grave. He said the deceased was 2nd last born of his father and therefore his uncle. He said the deceased had disappeared from home from Thursday and body recovered on Sunday.

PW3 the father of the deceased testified that when his son went missing, the body was recovered after a dog was seen carrying its hand from land belonging to Kareithi's employer.

PW4 senior Chief of Nchororo location testified that on 29.9.2013 at 1.00 pm he received phone call from Luka Mburugu – PW2 who wanted him to go to his home. That on arrival at PW2's home he found PW2, PW2's wife and 3 brothers plus an employee. That PW2 held the workers hand and proceeded to the farm and showed him a body that had been covered with soil. That PW2 told him to ask the worker A1 what had happened.

PW4 said the worker told him he hit the child with a stick on the head for fetching water in the compound. PW4 said he apprehended A1 and called OCS Tigania and reported after which he escorted suspected to police station using a motorbike as members of public wanted to lynch him. That while at police station A1 mentioned A2 and on return to scene with OCS and police station vehicle A2 was arrested and body removed to the Meru Teaching and Referral Hospital. PW4 said A1 had been employed by PW2 just 2 weeks.

The chief said that if A1 had not confessed having killed the child even PW2 would have been arrested. PW4 said PW2 didn't know a body had been buried at his farm until a dog was seen carrying a child's hand that it was learnt a body had been buried and leaves used to burn the body that had been covered with very little soil.

PW5 the son of PW2 said that on 27th September 2013 he and P K were from school and when they passed through the farm they saw A1 burning leaves and when they asked him why he was burning leaves he said that was nearest place to the mango tree. He said A1 was burning leaves at 4.00 pm when they came from school. He said they left A1 at the farms and went home. That on Sunday his father PW2 noticed foul smell coming from where A1 had been burning leaves. That when A1 was asked he said he had buried a dog. That when PW2 told him to exhume it a body was found belonging to a child. That when chief was called and interrogated A1 he said an avocado fell on the child's head.

PW5 said that he knew the deceased who used to come and fetch water from their home. He said the deceased had been missing from

Friday. PW5 said he didn't see A2 when he saw A1 burning leaves. He said that A2 came to scene when he heard a child's body had been found buried in PW2's farm.

PW6 P. C. Lilian Santai took over from the 2 critical investigating officers who had proceeded on transfer.

PW7 Dr Njeru Nderitu Meru Teaching and Referral Hospital produced post-mortem Report prepared by Dr Guantai. He found fracture n the 2nd to 6th ribs. The right lower limbs were missing in musculature on thigh and leg. That leg was attached by ligaments below the knee. That oral cavity was filled with soil and a cut approximately 8 cm on left parietal region. That body was partly charred on the torso, neck and head. That the gut was missing in its entirety. That the liver had multiple bite marks. The genitalia was also missing. There was fracture of the skull on left parietal region. Dr Guantai concluded that death was caused by blunt trauma to the head.

When placed on defence A1 in sworn testimony testified that on 27.9.2013 he was at PW2's home where he was employed as casual worker. He said that on material day on Friday he went to fetch grass for cattle when found a dead body at the compound at the cow shade and that it was Erastus Mwenda who was at home. That he found A2 next to the body. That when he asked what had happened A2 kicked him on the chest and he fell. That when PW2 returned at 5.00 pm he was carried to the house and at 7.00 pm PW2 asked him what happened and told him it was A2 who had kicked him. When he asked what A2 had done to the child but PW2 told him to keep quiet.

He said PW2 called chief on Sunday and they were arrested and taken to Tigania where they were charged with murder. He said A2 was his supervisor. He said he recorded statements and explained what happened. A1 said he didn't know who buried the child's body. He said that he had burnt leaves earlier on Monday and not on Friday when he found A2 near the child's dead body. When cross examined by Mrs Mwathe A1 changed and said that he found A2 near the child's dead body at around 1.00 pm near cow shade where he had gone to cut grass. He said the dead body was in school uniform. He said he raised alarm while asking A2 what had happened but A2 kicked him on the chest and he fell. He said that the lay besides the dead body upto 7.00 pm. When PW2 came and carried him to the house. He said that when he woke up he saw M and G. He said it was not true that he went to show PW2 where body was buried.

He said when chief came body was exhumed. A1 said he didn't know body was buried where he was burning leaves. He said he didn't know the deceased.

A2 on the other hand gave sworn statement and said he was away at his place of work on 27th September 2013. He said he used to go to Embu on Mondays and return on Saturday. He said he returned home on 28.9.2013. He said on Sunday while he was visiting his friends he received a call and he was informed their home was under attack. That he rushed back home and met a crowd of people at the farm and their home.

That when he arrived he found a police car. That he also found the chief who asked him where he had been on Friday and he told him he was in Embu. That the chief told him to board the police vehicle and he was taken to police station where he stayed for one week in the cells before he was charged with offence of murder. He said he didn't even know the child he was alleged to have murdered. He said he didn't know A1 prior to this offence. He said he had never worked for Luka. He said Luka is his uncle and that is it Luka – PW2 who brought him up.

In cross examination, A2 said that he knew A1 on their arrest as PW2 said he had employed him one week prior to committing offence. He said when he got to police station and A1 was asked if he knew him, he didn't know even his name. He said he returned home from Embu on Saturday evening. He said when he returned home he went to his house and he didn't know if there was any problem at PW2's home. He said it was not true that he and PW2 planned to fabricate A1. He said he works as a casual.

A2 denied that he was supervising A1. He said he had been working in Embu since he completed Standard 8. He said PW2 doesn't rear chicken. That when A1 was asked if he knew A2 he kept quiet. A1 said he was working with DW3 – Erick Mwititi in Embu and that they travelled together back home on 28th and arrived home between 8.00 p.m and 9.00 p.m.

DW3 – E M testified and supported A2 defence of alibi that he accompanied A2 from Embu on 28.9.2013 where they were working. He said they left their place of work at 4.00 pm and travelled back home. He said when he went to A2's home on Sundays so they could agree on the time to travel back to Embu on Monday he found A2 had been arrested.

DW3 said in 2013 he was 14 years but was doing casual work by then. He said he dropped out of school at Standard 6. He said it is A2 who called him to come and testify. He said they were working for different people in Embu.

In answer to prosecutor's questions he said he didn't know the deceased person. He said he was doing casual work in Embu. He said they usually left Embu at 6.00pm and get home around 9.00 pm . He said he was with A2 throughout on 27.9.2013. He said he didn't know A1. He said he and A2 lived in one rental house.

A1's counsel filed submissions submitting that failure by prosecution to call 2 vital witnesses renders it unsafe to find a conviction based on evidence of the other witnesses. It was submitted that the charge should be dismissed. It was urged that A1 be dismissed.

In consideration of the evidence and submissions made by the prosecution's witnesses as well as the accused persons and A2 witness, the issues for this court to determine are:-

- i. The act of murder (Normal referred to Actus Reus)
- ii. Whether the act of murder was unlawful

iii. Whether the unlawful act and/or omission was actuated with malice aforethought

iv. Whether the unlawful act and/or omission was actuated by malice aforethought by the accused persons.

The onus to be establish the ingredients of murder and prove them beyond all reasonable doubt lies on the prosecutions. In regard to the 1st ingredient whether there was death, the prosecution witnesses as well as accused persons admit there was death despite the fact that post mortem report was not produced and the Investigating officer didn't testify. **In the case of Ndungu vs Republic [1985]KLR 487** the court of Appeal held that even where post mortem report is not produced a conviction can still be found if where death is clearly in the hands of an accused person. In the case of **R.V.S Smith (1959) 2 ALLER 193** – it was held that death can be inferred by way of evidence.

In this case, PW1 and PW5 said they were from school when they found A1 burning leaves under a mango tree in the farm of PW2. They said PW2 employed A1. They questioned A1 and he said that was nearest place to the tree where he could burn the leaves. There is the narrative that some foul smell made PW2 ask A1 where it was coming from and that A1 said he had buried a dead dog. There is a claim that when A1 was made to dig alleged grave the body of the missing boy was found. There is also the narrative that a dog was seen carrying the hand of the missing child and that A1 led PW2 to where he had buried the missing child in a shallow grave. A1 said that he found A2 near the body of a dead boy on Friday at 1.00 pm A1 also claimed that he found A2 near the dead body. He said in examination in chief that PW2 found him at scene at 5.00 pm and took him to the house. PW1 and PW5 said they found A1 at 4.00 pm burning leaves at the place where the child's body was exhumed from a shallow grave. It can't be possible that PW2 again came to find him at 5.00 pm having fainted after being kicked by A2 at 1.00 pm. PW1 was related to the deceased child and could not have fabricated A1 if it is true that PW2 and A2 were the ones involved in the murder.

From the post-mortem Report, the pathologist observed that there was soil in the thoracic cavity and 2nd to 6th ribs on both sides exposed with multiple fractures. The right lower limb had missing Musculature on the thigh and leg which were attached by shreds of ligament below knee.

The child's oral cavity was filled with soil. There was 8 cm cut on the left parietal region and the body was charred partially over the torso, neck and head. The child's gut was missing in its entirety. The liver had multiple bites, marks, external genitalia was missing. There was fracture of the skull on left side – parietal region extending to occipital region.

From the injuries ascertained by the doctor, the parts of the body targeted by assailant and nature of injuries suffered by the minor deceased person, this court finds that the assailants aim was to ensure that the deceased died. The assailant filled oral cavity with soil to ensure that breathing was obstructed. The body was mutilated and it could not have been possible that even if the body was not buried in a shall grave the child could have been rescued.

A2 raised a defence of alibi and he brought Dw3 to support his defence that he was in Embu on the material day and he returned home on Saturday after the deceased went missing. PW1 and PW5 said they didn't find A2 at scene where A1 was burning leaves under the mango tree. A2's defence of alibi is therefore reasonable and without further evidence from the prosecution this court finds that he has dislodged claim by A1 that he was found near the child's dead body. This court finds that evidence against A1 has been proved beyond all reasonable doubt. This court finds A1 guilty and he is convicted under S. 215 C.P.C. A2 is acquitted under S. 215 C.P.C

HON. A.ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON THE DAY OF 7th FEBRUARY 2019

In the presence of:-

C/A

State:-Mrs Mwathi for state

Accused 1:- Present in person

Accused 2:-Present in person

Mr Omari Advocate for A1

Ms Muna Advocate for A2

HON. A.ONG'INJO

JUDGE

Mrs Mwathi

I don't have accsed persons past records. He can be treated as 1st offender.

Accused in Mitigation

Um unwell . I have family issues.

Order

Mention 28.2.2019 for victim impact statement.

HON. A.ONG'INJO

JUDGE