



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**(CORAM: D.S. MAJANJA J.)**

**CRIMINAL CASE NO. 20 OF 2018**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**CALEB OGIMA ELIKANA.....1<sup>ST</sup> ACCUSED**

**PETER OKINDO OROKO alias**

**OKINDO NEHEMIAH OTONGO.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. **CALEB OGIMA ELIKANA** and **PETER OKINDO OROKO alias OKINDO NEHEMIAH OTONGO** (“the accused”) were charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. According to the information dated 18<sup>th</sup> September 2018, they with others not before the court murdered **CHRISTINE NYABURI ISAYA** (“the deceased”) on 16<sup>th</sup> April 2018 at Chitago Sub-location, Boige Location in Etago Sub-County of Kisii County.

2. The prosecution case was founded on circumstantial evidence. In order to prove that the accused murdered the deceased whose body was found dumped in a forest, the prosecution marshalled 6 witnesses. The accused gave sworn testimony and called 3 witnesses.

3. According to the evidence, the deceased was about 11 years old. She used to visit her aunt, Durusila Kemunto Aminga (PW 1) at Ekona in the evening to collect milk. PW 1 recalled that on 16<sup>th</sup> April 2018, the deceased came to her place at about 4.30pm, collected the milk and left for home at about 5.00pm. At about 6.00pm, the deceased father, Isaya Onyango Nyangweso (PW 2) called her to inquire where she was as she had not arrived home.

4. PW 2 testified that when he returned home at 6.00pm, he inquired about the deceased since she was not at home. He called PW 1 who told him that the deceased had left her place with the milk. He waited for a while before going Ekona to look for her but without success. When he returned home he requested his wife to raise alarm to see if the deceased would turn up that night but she did not. PW 2 further testified that on the next morning, villagers gathered at his home to start looking for the deceased. He was later informed that the deceased’s body had been found.

5. A cousin to the deceased, Douglas Mokoro Osoro (PW 3), testified that on 16<sup>th</sup> April 2018, at about 3.00pm, he was weeding maize in his shamba when he saw five people among them the first and second accused. One of the five people, David Nyabuto was holding a child as they went uphill. He proceeded with his work until about 6.30pm. As he was leaving the shamba, he saw the accused go into a thicket and come out and as he got closer he heard a child shouting, “*Mama, mama*”. He recalled that both accused went into the thicket where they threw the child. He saw one of the other people give the 1<sup>st</sup> accused a metal rungu. As they left the place coming towards where he was, he heard the 2<sup>nd</sup> accused tell the 1<sup>st</sup> accused that he only got Kshs. 5,000/= of the Kshs. 100,000/= that had been given for the task. They started quarreling and at this point he decided to run away.

6. As he reached the road, PW 3 met two other people and as he was talking to them, the 2<sup>nd</sup> accused started throwing stones at them. He ran towards the 2<sup>nd</sup> accused’s shamba but the 2<sup>nd</sup> accused caught up with him and demanded to know where he was from and threatened to cut him with a panga. The 1<sup>st</sup> accused intervened and told the 2<sup>nd</sup> accused to leave him alone. The 2<sup>nd</sup> accused told him if he revealed anything about what he had seen, he would kill him. The accused left him as he proceeded to his home. At about 9.00 pm, he heard his mother asking

his wife about the deceased. At about 10.00pm, he heard noise from outside and when he went out he found both accused along the road. When he saw them he feared and went back home. After getting up in the morning at about 7.00am, he found people being summoned to go to PW 2's home to commence the search for the deceased. He recalled that while on the way, both accused followed him.

7. As the group dispersed into search parties, PW 3 explained that he could not disclose what he had seen the previous day since the 2<sup>nd</sup> accused was holding a knife close to him. He decided to go home and while at home he wrote a note naming those he had seen with the deceased. After writing the note, he proceeded to Nyatuoni where he threw the note on the ground so that it would be read. The letter was picked up by a young boy who alerted the people present who started reading it. Since the note disclosed where the deceased's body was, the group proceeded there. In the meantime, the accused, who were named in the note, heard their names and decided to run away. PW 2 recalled that one of the people named in the letter was killed by the mob. PW 2 further testified that on the same evening, when he went to Ekona to buy drugs, he found the 2<sup>nd</sup> accused who warned him to take care of himself. He returned home and on the next day, police officer came to him home and they proceeded together to Nyamarambe Police Station where he recorded his statement.

8. A young boy, Brian Akuma (PW 5) stated that on 17<sup>th</sup> April 2018, he was playing on the road when he saw people coming from Etago and going to Ekona saying that they were looking for the deceased with whom he used to attend school with. He saw PW 2, whom he knew as Daddy, who told him to pick up a piece of paper. When shown the note written by PW 2 produced in evidence, he confirmed that it was the one he was shown by PW 2.

9. The investigating officer, PC James Michuki (PW 6), testified that on 17<sup>th</sup> April 2018 he received information that a young girl had been murdered at Etago area. The Commanding Officer ("OCS"), Etago Police Station had already visited the scene and taken the body to Tabaka Hospital Mortuary. The OCS informed him that a handwritten note had been dropped explaining the directions where body was and the names of suspects. He was also informed that one of the suspects was lynched by members of the public. He took the statements of the key witnesses. By the time he arrived there, the 1<sup>st</sup> accused was already in custody as he was hiding from the irate mob. He was able to locate PW 3 who was referred to as Daddy and who admitted that he is the one who had written the note naming the suspects. He organized for the postmortem to be done on the deceased's body.

10. In his sworn defence, the first accused (DW 1) testified that on 16<sup>th</sup> April 2018, he left home very early to go and work for one Stella Mokebo who had called him to assist in plucking tea. As he proceeded to work, he met his cousin Shem Abel. They walked for a while and parted ways. He arrived at Omugumo Coffee Factory at about 8.00am where he worked until 6.00pm before leaving for home. On the way he met Jared Akuma who gave him a lift on his motorbike and dropped him along the way. Before reaching home he passed by Peter Mauti Onyango's kiosk where he met Shem Abel and about five other people. They took tea, listened to the 7.00 pm news and left for home where he arrived at 8.00 pm.

11. DW 1 further testified that as he was sleeping, he heard people talking on the road. He got up to find out what was happening. He found a crowd of people talking about a missing child. He followed the group to PW 2's home where they were informed that the deceased had gone to collect milk and did not return. He went back home and on the next day at about 7.00 am, Douglas Makori (PW 3) called him and told him he wanted some iron sheets. He came to his home and collected the iron sheets. When he went to the road side where the crowd had gathered and was informed that the child had not been found. He also went to the kiosk where he found people talking about the child. Thereafter he proceeded to PW 2's home where he found the deceased's mother in his compound. They spoke and he informed her that he too was shocked about what happened. At that time one Oyugi Nyangweso accused him of killing the child. When he confronted him about the allegation, he was informed that a handwritten note had been found naming him as a suspect in the killing of the deceased. At that time people had started raising alarm and he was informed by his brother that Nyabuto had been killed and that he should seek safety. He decided to run towards the sugarcane plantation and as people followed him as he ran into a neighbour's house.

12. The 2<sup>nd</sup> accused (DW 2) testified that he used to cut sugarcane in Transmara and on 16<sup>th</sup> April 2018, he left home at about 4.00am to go to work. He worked until 1.00pm. He returned home at about 3.00pm and since he was feeling unwell, he took medicine and slept. He told the court that he did not leave his house until the next morning when he heard that his name was on a list of people who are alleged to have killed the deceased.

13. Mauti Onyango (DW 3) testified on behalf of DW 1. He testified that on 16<sup>th</sup> April 2018, DW 1 came to the at about 6.00 pm to take tea amongst other customers and he was present during the 7.00 pm news on radio. Thereafter everyone left for their respective homes. Shem Songoro Nyagosia (DW 4) also testified that on the evening of 16<sup>th</sup> April 2018 in the evening at about 6.00 pm, he was at a kiosk at Nyatuoni when he DW 1 taking tea. He recalled that they remained there until about 7.30 pm.

14. DW 1's brother, Brian Omwoyo (DW 5), testified that on 16<sup>th</sup> April 2018, he had gone work with his brother. They arrived home at about 3.00 pm as DW 2 was feeling sick. DW 2's wife, Karen Okindo (DW 6) testified that on 16<sup>th</sup> April 2018, he had gone to work. He came home at 3.00 pm. He was not feeling well so he went to sleep. He never left the house that night.

15. Counsel for the 1<sup>st</sup> accused filed a list of authorities citing the following decisions; **Republic v G. N. K. NRB HCCR No. 57 of 2011 [2017]eKLR**, **Wang'ombe v Republic [1976 – 1980] 1 KLR 1683** and **Ssentale v Uganda [1968] EA 365** to support of his contention that the accused had raised a credible alibi defence which the prosecution had failed to disprove hence the accused were entitled to an acquittal.

16. Counsel for the 2<sup>nd</sup> accused filed written submissions in which he attacked the reliability of PW 3's evidence. He doubted whether PW 3 had authored the note implicating the accused as a handwriting expert was not called to confirm he had in fact written it. He also argued that it would have been impossible for PW 3 to see the accused and the deceased who were 150 meters away from where he was. He pointed out that there was no proof of bad blood between the accused and the deceased family and in any case the evidence on record was that one Oyugi had threatened to harm PW 2 or his family members and that he was never arrested. He submitted the 2<sup>nd</sup> accused's defence was clear and believable and urged the court to acquit him.

17. The offence of murder is defined in **section 203** of the **Penal Code** as follows, “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” From this definition the three ingredients of murder which the prosecution must establish beyond reasonable doubt are the fact and the cause of death of the deceased; that the cause of the death of deceased was a direct consequence of the accused’s unlawful act or omission and that the unlawful act or omission was committed with malice aforethought.

18. The fact and cause of death was established by Dr. Steve Onsase Omwoyo (PW 4) who conducted the post mortem on the deceased’s body on 23<sup>rd</sup> April 2018 at Tabaka Mission Hospital. He observed that the deceased had facial puffiness with a blue cloth tied around the neck. There was a cut scalp wound on the parietal region which upon internal examination revealed a skull fracture and inter-parietal bleeding in the brain. He concluded that the deceased had died from a head injury following assault and strangulation.

19. The key question is whether the accused committed the unlawful act which caused the death of the deceased. An overview of the case presented by prosecution is that the deceased was last seen with the accused persons and other suspects before her body was found dumped in a shamba the following morning. PW 2 testified that the last time he saw the deceased alive was when he sent her to collect milk from PW 3 at around 4.00pm. PW 3 recalled that he saw the deceased in the company of the accused and three other people heading towards a thicket at about the same time the deceased had been sent to collect milk. That he heard a child crying out and saw the deceased dumping her body. When he went to the scene on the next day, he recognized the deceased whom he had seen on the previous day.

20. The prosecution’s case is dependent on the veracity of PW 3’s statement, who placed the accused persons at the scene of the crime. The 2<sup>nd</sup> accused was doubtful that PW 3 had been able to make out the people he saw at his distance. Although the incident took place in the late afternoon or early evening, this court is duty bound to interrogate the circumstances of identification especially where the case turns on the identification of a single witness (see *Abdalla bin Wendo and Another v Reginum [1953] 20 EACA 166* and *Roria v Republic [1967] EA 583*). Some of the factors that the court may take into account is assessing the evidence include the length of time the witness had the accused under observation; the distance at which the observation was made, the nature of the light and whether the observation was impeded in any way (see *R v Turnbull [1976] 2 All ER 549* and *Wanjohi & 2 Others v Republic [1989] KLR 415*). In *R v Turnbull (Supra)*, the court observed that, “Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.” (see also *Anjonomi v Republic [1980] KLR 57*).

21. In his testimony, PW 3 stated that he was related to the 1<sup>st</sup> accused and that they came from the same area with the 2<sup>nd</sup> accused hence this case was of recognition of persons well known to him as opposed to the identification of strangers. The 1<sup>st</sup> accused also confirmed that he was familiar with PW 3 in cross examination. Since the incident took place in daylight and the accused and PW 3 were known to each other, I am satisfied that the conditions prevailing were conducive for positive identification.

22. PW 3 testified that he saw the accused persons with the deceased about 150 meters away in the company of the deceased and that they also saw him. He later on observed them at a closer proximity dumping the body of the deceased after he had heard her calling out. Any doubts as to their identity must have been eliminated when he met the accused persons soon after he saw them dispose of the body and they threatened him to keep mum as they assumed that he had seen them kill the deceased having spotted him in the vicinity earlier. According to PW 3, the 1<sup>st</sup> accused would have cut him with a panga had he not been dissuaded by the 2<sup>nd</sup> accused. PW 3 testified that initially he was not certain about the identity of the deceased but he must have put two and two together when he heard that she had gone missing and was warned by a signal from the accused person not to speak out. The inevitable conclusion is that PW3’s failure to immediately report the incident or inform the crowd about what he had seen and his initial denial that he had written the note implicating the accused was driven by fear of what would befall him if he divulged what he had witnessed. PW 3 was able to confirm the identity of the deceased when he arrived at the scene where he had seen the accused dump her body and recognized her as she was his cousin.

23. The accused complained that the handwritten note produced and written by PW 3 was not examined by a handwriting expert thus it could not be conclusive said that PW 3 had written it. **Section 70** of the **Evidence Act** provides that:

*If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.*

24. PW 6 testified that he searched PW 3’s house and confirmed that the letter had been written on a paper which had been plucked from a book in PW3’s possession. There was no objection to the production of the note or any suggestion that it was not written by PW 3. PW 3 stated that he wrote it and took it to Nyatuoni where it was picked up PW 5 who confirmed that PW 3 told him to pick up the note he had left. The veracity of the note is confirmed by the fact that the deceased’s body was found in a thicket. Moreover, even without the handwritten, the evidence of PW 3 establishes that the accused are the one who took the child to the thicket where she was found dead.

25. The accused raised alibis asserting that they were nowhere near the scene of where the deceased was being assaulted and her body dumped when PW 3 allegedly saw them with the deceased. Both accused testified that they were both at their places of work on the material day. The 1<sup>st</sup> accused was at work the whole day and he returned to Ekona that evening whereupon he took tea at DW 3’s kiosk with DW 4 and then went home. The 2<sup>nd</sup> accused went to work but returned home early because he was unwell. His testimony supported by DW 5 and his wife DW 6 is that he did not leave home.

26. The principle established by the cases cited by counsel for the 1<sup>st</sup> accused; *Ssentale v Uganda (Supra)* and *Wang’ombe v Republic (Supra)*. In *Saidi s/o Mwaka Wanga v Republic [1963] EA 6*, the East Africa Court of Appeal held as follows

*An accused person putting forward an alibi as an answer to a charge made against him does not in law thereby assume any burden of proving that answer and if the accused adducing evidence of an alibi introduces into the mind of the court a doubt that is not unreasonable then the court must acquit him.*

27. The 1<sup>st</sup> accused testified that he was at DW 3's kiosk at the material time but DW 3 could not recall the identities of the other customers he had served on that day and did not state the peculiar circumstances that would have enabled the 1<sup>st</sup> accused out of all the customers he served that day. This could also be said of DW 4 who did not name any other customers that were served at the kiosk. From the evidence of PW 1, PW 2 and PW 3, the child must have disappeared between 4.00pm and 6.00pm hence the testimony of DW 3 and DW 4 was not useful in displacing the evidence of PW 3 placing him at the scene of the incident. Although PW 3 testified that the 1<sup>st</sup> accused was his uncle, the 1<sup>st</sup> accused denounced PW 3 as a thief. I find this allegation spontaneously conjured this to discredit PW 3 as this was not suggested to him in cross-examination.

28. As for the 2<sup>nd</sup> accused, his claim that he was sickly and was at home at the material time is similarly rejected when weighed against the totality of the prosecution's case. The testimonies of DW 5 and DW 6 though admissible, are taken with a pinch of salt as they are naturally expected to give evidence that would exonerate their brother and husband respectively. On the other hand, no reason emerged from the evidence why PW 3 would have implicated the 2<sup>nd</sup> accused in the murder of the child.

29. The accused pointed out that the prosecution had not ruled out the possibility that the murder had been committed by *Oyugi*. PW 2 had admitted on cross-examination that *Oyugi* had threatened to burn him up a month prior to the death of the deceased. He however testified that *Oyugi* had apologized saying that he was intoxicated at the time he had made the threats. Nothing emerged from the evidence that the said *Oyugi* had been present at the scene when the deceased was killed and there was therefore no reason for the prosecution to charge him with the offence or exonerate the accused.

30. From the foregoing, I find that there were no other co-existing circumstances that would weaken the chain of circumstances relied upon by the prosecution to prove that the accused persons killed the deceased. For these reasons, I find and hold that the accused committed the act that inflicted the fatal injuries on the deceased causing her death.

31. Lastly, the prosecution needed to prove that the offence was actuated by malice aforethought. PW 3 testified that he heard the accused quarrelling about money, the insinuation being that the accused were hired to commit the offence. If this was the case, nothing was placed before the court to state by whom and why they were hired to kill the deceased hence, the court can only speculate on their motives. However, according to **section 9(3)** of the *Penal Code*, motive is irrelevant in proving the commission of murder.

32. **Section 206(a)** of the *Penal Code* provides that malice aforethought includes, "*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.*" I therefore find that the prosecution proved malice aforethought as the strangling of the deceased and the infliction of the head injury which caused the skull of the young girl to fracture was meant only to cause her death or grievous harm.

33. I find that the prosecution has proved that the offence of murder beyond reasonable doubt. I therefore find the accused **CALEB OGIMA ELIKANA** and **PETER OKINDO OROKO alias OKINDO NEHEMIAH OTONGO** guilty of the murder of **CHRISTINE NYABURI ISAYA** and I convict them accordingly.

**DATED and DELIVERED at KISII this 20<sup>th</sup> day of MAY 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Okemwa, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.