



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MWELA MUHINDI.....ACCUSED

JUDGEMENT

1. The accused **MWELA MUHINDI** was charged with the offence of murder of **EM** on 23rd January, 2015 at Githurai 45 contrary to **Section 203** as read with **Section 204** of the Penal Code. He pleaded not guilty to the said charges and to prove its case against him the prosecution called and examined a total of nine (9) witnesses whose testimony was as follows:- The deceased who was a pupil in class eight at [particulars withheld] Primary School on the material day together with **PW8 LWN** left school at 4.00 p.m. when the deceased offered to accompany her to the shop where she had been sent by her mother.

2. It was her evidence that they found the shop to which they were sent closed upon which the deceased told her to take her to the accused whom they knew as '**Baba Caro**', which she did. The accused was not surprised to see them and stated that he wanted to see the deceased alone and to accomplish this he gave her Kshs.10 (ten) to go buy '**mutura**'. That was the last time she saw the deceased. As at 7.30 p.m. the sister of the deceased went to find out from her where she was and she told her that she had left him with the accused. In cross-examination she stated that by the time she left the deceased with the accused, the people who were standing nearby had left and that the deceased had informed her that the accused wanted to tell her something.

3. **PW1 AKW** the mother of the deceased testified that on the material day when she came back from work she did not find the deceased and was told by her younger sister to check with **PW8** who was her friend. It was her evidence that **PW8** told her that the accused had called them and thereafter remained with the deceased. She proceeded to the house of the accused who she did not find. She called women from the plot who accompanied her to the accused's place of work but did not find him thereat. She later on together with the women from her plot proceeded to the house of the accused whom they found and confirmed that he had been with the deceased whom he gave ten shillings and left thereby contradicting the evidence of **PW8**. They continued with the search together with women including the wife of the accused.

4. She stated that on their way, the accused called his wife who put him on speaker phone inquiring their whereabouts. They went to the house of a friend of the accused who confirmed that he had seen the accused with two girls. They proceeded to the Chief who summoned the accused but he declined to report to the Chief stating that he was ready to go to jail or commit suicide rather than report to the police. The accused was thereafter arrested. It was her further evidence that the body of the deceased was later recovered at Clay Works not too far from where the accused had been working. She later identified her body for purposes of post-mortem examination.

5. **PW2 CKM** the father of the deceased testified that he was called by neighbours on the disappearance of the deceased and later on took **PW8** to the police station for purposes of recording her statement. At 2.00 p.m. he was informed by the police of a recovery of a body at Clay Works Dam which he identified as the deceased. He confirmed that she had injuries on the neck, stabbed injuries to the eye and next to the body was a cobbler's rug, needle and a black jacket. The deceased only had her top on with her bikers next to the body.

6. **PW4 SGT. MATHIAS MATIVO** was the duty officer at Githurai Kimbo received the report on the missing of the deceased. He later on received a report on the recovery of the body and took her parents to the scene where it was positively identified. It was his evidence that her inner wear and bikers had been removed and placed next to the body. He had earlier on booked the accused at the station with the offence of abduction. **PW6 PC GILBERT TALAM** corroborated the said evidence and stated that he interrogated the accused who denied having been with the deceased. He later recorded the statement of **PW8** who was last with the deceased who confirmed that she had left her with the accused.

7. **PW7 PC ISAAC MUKAMBI** took over the investigations and recorded the accused's statement in which he stated that the deceased had approached him in the morning and told him that she wanted to see him over certain matter after school. At 6.30 p.m. the deceased went to him together with a classmate and was left with the deceased to discuss the issue having given **PW8** Kshs.10/= to go buy '**mutura**'. The deceased later on left him while still arranging his tools of trade. It was his evidence that the accused's account was contrary to that of **PW8**.

He stated that on 24th the body of the deceased was recovered at Clay Works with signs of rape and strangulation.

8. PW3 DR. DOROTHY NJERU conducted post-mortem examination on the body of the deceased who had multiple bruises and abrasions around the mouth, neck, left upper forearm and right upper limbs. There were also contusions on the neck, multiple focal subgaleal haematoma on the head and her hymen was broken. As a result of the said examination she formed an opinion that the cause of death was head and neck injuries due to blunt force trauma with suspected sexual assault. She collected blood specimen and genital swab which were forwarded to **PW5 HENRY KIPTOO SANG** for analysis who found that the vaginal swab was not stained with semen but was moderately stained with human blood whose DNA profile matched that of the deceased. **PW9 INSP. NICHOLAS WAMBULU** processed the scene and took photographs thereof which were produced as exhibits.

9. When put on his defence the accused denied the commission of the offence and stated that on the material day two ladies whom he knew as neighbours went to his place of work and he gave each Kshs.10/= (ten) to buy 'mutura' and they left him. He went home at 7.30 p.m. when the mother of the deceased and a group of ladies went to his place looking for her and confirmed having seen and given the deceased Kshs.10/= to buy 'mutura' and did not see her thereafter. At 12.00 four neighbours went to his house and informed him that he was wanted by the chief where he was asked of the whereabouts of the deceased and denied having been with her after she had left his place of work.

SUBMISSIONS

10. At the close of the defence case it was submitted by Mr. Oundo on behalf of the same that he had explained why he gave the girls money as they were his children's friends. It was submitted that the specimen collected from the deceased did not reveal any connection with him. It was submitted that the man who was working with the accused who could have assisted the court in establishing the truth was not called having recorded his statement. He submitted that the case was not proved beyond reasonable doubt since the accused had not been placed at the place of murder and his *alibi* was never dislodged.

11. On behalf of the prosecution, Mr. Okeyo submitted that the accused was placed at the scene through the evidence of **PW8** and that the accused was the last person seen with the deceased while alive. By separating the two girls, it indicated that he had a hidden agenda. It was submitted further that **PW8** was not under any mistaken identity on the accused whom she knew very well.

ANALYSIS AND DETERMINATION

12. To sustain a conviction on a charge of murder contrary to **Section 203** of the **Penal Code** the prosecution is under both evidential and legal duty to prove beyond any reasonable doubt the following ingredients of the offence:-

a) The fact and cause of death.

b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.

c) That the said unlawful act of omission or commission was committed with malice aforethought as defined in Section 206 of the Penal Code.

13. The fact and cause of death of the deceased was proved through the evidence of the following witnesses:- **PW2** her father who went with **PW4 SGT. MATHIAS MATIVO** to the scene where the body had been recovered in the company of **PW6 GILBERT TALAM** and the scene of crime officer **PW9 INSP. NICHOLAS WAMBULU** who took photographs thereat. **PW1** the mother attended and identified the body to **PW3** for purposes of post-mortem examination. The cause of death was established through the evidence of **PW3 DR. DOROTHY NJERU** to be head and neck injuries due to blunt force trauma with suspected sexual assault as confirmed through her broken hymen. She produced her post-mortem report to support her findings. The aspect of sexual assault was proved through the evidence of **PW5 HENRY KIPTOO SANG** a government analyst who examined the vaginal swab and confirmed that the blood stains thereon belonged to the deceased thereby confirming forceful sexual attack. I therefore find and hold that the fact and cause of death was proved beyond reasonable doubt as unnatural and unlawful.

14. On whether the said death was caused by the accused person, the only evidence tendered by the prosecution linking him with the offence was that of **PW8 LWN** a minor aged fifteen (15) years old at the time of trial and about twelve (12) as at the time of commission of the offence, whose evidence was that on the material day the deceased accompanied her to the shop where she later on left her with the accused whom she had indicated wanted to see her. The accused in his defence confirmed having been with the deceased and **PW8** both whom he gave Kshs.10 to buy 'mutura' but denied seeing them thereafter.

15. It therefore follows that the prosecution case against the accused is based purely on circumstantial evidence. The law on circumstantial evidence was stated by the then Court of Appeal for Eastern Africa in **REPUBLIC v KIPKERING ARAP KOSKE & ANOTHER [1949]**¹⁶ EACA 135 thus:-

“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution. It is a burden which never shifts to the party accused.”

16. The Kenya Court of Appeal adopted the above in the case of **SAWE v REPUBLIC [2003] eKLR** where the Court adopted the above and added that:-

“There must be no other co-existing circumstances weakening the chain of circumstances relied upon.”

17. This Court in the case of **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR** added its voice to the authorities thereon by stating as follows:-

*“22. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions. See **NAVANEETHA KRISHNAN v THE STATE BY INSPECTOR OF POLICE – SUPREME COURT OF INDIA, CRIMINAL APPEAL NO. 1134 OF 2013.**”*

18. The following circumstantial evidence were adduced by the prosecution:- That the accused gave **PW8** Kshs.10 to go buy ‘mutura’ thus leaving him with the deceased. According to the evidence of **PW8**, the deceased had told her that the accused wanted to see her. She knew the accused very well as “**Baba Caro**” who gave her Kshs.10 first as if chasing her away so as to remain with the deceased. The accused in his defence confirmed that the two girls passed through his place so as to buy for them something. In his statement under inquiry he indicated that the deceased had earlier approached him for discussion on some issue to which he advised her to see him after school thereby corroborating the evidence of **PW8**. This therefore brought the accused’s case within the doctrine of last seen in the company of the deceased which the Supreme Court of India in the case of **BODH RAJ BODHA v STATE OF JAMMU AND KASHMIR [2002] 8 SCC 45** had this to say:-

“The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”

19. I am satisfied through the evidence of **PW8** whom I found very reliable and consistent that the accused was the last person seen with the deceased for which he should have offered some explanation as to what happened to her. This evidence is corroborated by that of **PW1** the mother of the deceased who went to the house of the accused immediately she realized that the deceased was missing and did not find him. She proceeded with a group of women to his place of work and found him missing therefrom too. It is only when they went back to his house from his place of work that they found him. The accused is silent on where he was between the time he was left with the deceased and when he got home. Having been placed as the last person with the deceased, **Sections 111 and 112** of the **Evidence Act** came into operation as regards him.

20. The other circumstantial evidence linking the accused to the offence is the apparent cozy relationship between himself and the deceased who was at the time a child of tender age whom according to his evidence wanted to discuss certain issue with him while according to **PW8** the same had told her that the accused wanted to see her. The accused was very eager to give the two girls Kenya shillings ten (Kshs.10/=) allegedly because they were his children’s friends while according to **PW8** the intention was to remain with the deceased alone as at the time when he was closing his business and he succeeded in doing so. There is also the remark of the Chief upon his arrest that he had not left his habits pointing out that he was a known predator of minors.

21. The other chain of events linking and joining the circumstantial evidence herein is the conduct of the accused of calling his wife who was with **PW1** and the group of women while on their way to the Chief’s place to find out where they had reached together with the confirmation by one **Nicholas** a friend of the accused to the mother of the deceased that he had seen him with the girl, thereby contradicting his evidence in defence. There is further the conduct of the accused in declining to go to the Chief’s office when called upon to record a statement and threatening to go to his rural area rather than report to the police and in declining to open the door when the group went back to his house to effect arrest and instructing the wife to say he was not at home thereby confirming a guilty mind.

22. The accused was further placed at the scene through the evidence of **PW2** the father of the deceased whose evidence which was not challenged by the defence in cross-examination was that amongst the items found at the scene was a rug used by cobblers and a cobbler’s needle. The other link joining the chain of the circumstantial evidence linking the accused to the offence is the motive of the offence. According to the evidence of **PW5 HENRY KIPTOO SANG** whereas the vaginal swab from the deceased was not stained with semen, it was moderately stained with human blood whose DNA profiled matched those of the deceased. The deceased was found half naked with her underwear and bikers at the scene next to the body confirming that the deceased was a victim of sexual assault. **PW3 DR. NJERU** confirmed that the deceased hymen was broken and she had stool coming out of her anus. When contrasted by the action of the accused of remaining behind with the deceased having separated her from **PW8** the only conclusion is that she was a victim of sexual assault at the hands of the accused who took advantage of the trust placed upon him by the minor and the power of his money to assault her sexually.

23. I have weighed the accused evidence against that of **PW7 PC ISAAC MUKAMBI** the investigating officer herein and in particular the accused’s accounts under inquiry and his evidence before the court and find and hold that the accused’s defence is a sham and no plausible explanation has come from him rebutting the strong evidence against him. I am not persuaded by the submissions of the accused that failure of the prosecution to call one **NICHOLAS MWEU WAMBUA** who was allegedly with him is fatal to the prosecution case, his evidence having been covered by **PW1** the mother of the deceased who stated that he confirmed that the accused was with the deceased as at 6.00 p.m. Having been placed at the scene through circumstantial evidence it is clear that his *alibi* defence was dislodged by the prosecution. I am therefore satisfied and hold that the death of the deceased was caused by an unlawful act on the part of the accused.

24. The final issue for determination is whether the act was committed with malice aforethought which is defined under **Section 206** of the **Penal Code** and confirmed by T.W. Cherere J. in the case of **REPUBLIC v HENRY OBISA AUKO [2018] eKLR** as follows:-

“18. Malice aforethought was defined in the following cases;

(a) NZUKI v REPUBLIC [1993] KLR 171 where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused:-

- intention to cause death,

- intention to cause grievous bodily harm,

- where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

(b) In the case of DANIEL MUTHEE v REPUBLIC Criminal Appeal No. 218 of 2005 (UR) cited in the case of REPUBLIC v LAWRENCE MUKARIA & ANOTHER [2014] eKLR, Bosire, O’kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:-

“When the Appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 of the Penal Code.”

25. Having looked at the post-mortem report, the photographs taken from the scene and the evidence of the government analyst confirming sexual assault on the deceased who was then aged eleven (11) years and since the dead tells no tale, I am satisfied that the accused with the intention to commit a felony or in the process thereof caused the death of the deceased either to conceal his action or to effect them thereby establishing beyond reasonable doubt malice aforethought.

DISPOSITION

26. Having taken into account the evidence tendered before the court both by the prosecution and defence and by reason of the matters stated herein, I am satisfied and hold that the prosecution proved its case against the accused beyond reasonable doubt and in line with the principles set out in the case of **SHIVAJI SAHEBRAO BOBADE v STATE OF MAHARASHTRA 1973 CriLJ 1788** where the following was made:-

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

27. I accordingly find the accused guilty of murder contrary to **Section 203** of the **Penal Code** and hereby convict the same. It is so ordered.

Dated, signed and delivered at Nairobi this 12th day of June, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Oundu for the Accused

Accused present

Court assistant- Karwitha