



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 55 OF 2015 (MURDER)

CORAM: OUGO J

REPUBLIC.....PROSECUTION

VERSUS

DENNIS ONDERI OGWAGU.....1<sup>ST</sup> ACCUSED

DOUGLAS ZEDEHIAH KENYANYA.....2<sup>ND</sup> ACCUSED

**JUDGMENT**

1. **Dennis Onderi Ogwagu** hereinafter referred to as the 1<sup>st</sup> Accused and **Douglas Zedehiah Kenyanya** hereinafter referred to as the 2<sup>nd</sup> Accused are charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code as per the information dated the 20<sup>th</sup> November 2015. The particulars of the offence are that; “On diverse dates of 7<sup>th</sup> and 8<sup>th</sup> November 2015 at Karda area in Transmara West District within Narok County in the Republic of Kenya, jointly with others not before the court murdered Mercy Nashipai Nasinto.

2. The Accused persons pleaded not guilty to the charge of murder. The 2<sup>nd</sup> Accused person absconded during the trial. The prosecution continued with the case against the 1<sup>st</sup> Accused. The prosecution called 5 witnesses. I will proceed to summarised the evidence adduced by the prosecution. The case was partly heard by Justice Okwany. She heard 2 witnesses PW1 & PW2. I heard the remaining witnesses and the Accused’s defence.

3. **PW1 DON** testified that on the 7.11.2015 his wife sent their daughter the deceased MNN to the shops. She was 8 years old. Their daughter did not return home. They searched for her that night but did not find her. On the 8.11.2015 a Mzee called Moses Salaun found their daughter’s body in the sugar cane farm. The 1<sup>st</sup> Accused is a neighbour and was a suspect.

4. **PW2 Moses Salaun** testified that on the 7.11.2015 PW1 told him that their daughter who had been sent to buy sugar had not returned. He joined them in the search but they did not find the child. The next day at 7am he found the body of the child. He called the chief. She had been strangled with her white purple panty. Police collected the body. He later identified her body during the post-mortem on the 9.11.2015.

5. **PW3 Alfred Chege** testified that on the 9.11.2015 the 1<sup>st</sup> Accused was taken to his office by the Investigating officer (the IO). He was requested by the IO to take a statement under inquiry from the 1<sup>st</sup> Accused because he had shown intention of confession on how he and others committed the offence. He introduced himself as a Senior Superintendent of Police (SSP). He informed the 1<sup>st</sup> Accused that he was inquiring a case of Murder contrary to section 203 as read with 204 of the Penal Code and defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. He informed the 1<sup>st</sup> Accused that there was an allegation that on the 7.11.2015 at around 4.00pm within [particulars withheld] village in Transmara West District the Accused Dennis Onderi Ogwagu jointly with others they defiled and murdered MNN a female juvenile aged 8 years old. He informed him that he had reason to believe that he was connected with the offences or that he had information which may assist him with the investigations. He informed him of his right to call a friend or an advocate before he took his statement. The 1<sup>st</sup> Accused informed him that he did not know anyone within Kilgoris and neither did he know any advocate. He went ahead and administered the usual caution that he was not obliged to any anything unless he wished to do so and that whatever he said would be put down in writing and it could be used as evidence. The accused understood the nature of inquiry and having been cautioned he wished to state what he had to say in Kiswahili. *The 1<sup>st</sup> Accused gave him his full names Dennis Onderi Ogwagu and that he was a farmer area in Nyagweta village in Utabori sublocation Mogenda location division Etago. The 1<sup>st</sup> Accused told him he is married with one child and is aged 24 years. That he was working in Maasai land as a herd’s boy at Kardan for a person called Neune who employed him on the 10/1/2015. That he had worked for the deceased’s father in 2013 but left the said employment there because they used to delay to pay him. On the main issue the 1<sup>st</sup> Accused told him that on the 7/11/2015 he received 4 visitors who were herds boys within*

the said area. They were Makenga Opara, Douglas Mimyanga, Nyakwemba Obare and the last was Evans Ongari. All were from Kisii tribe. After he finished spraying and they decided to go have drinks. He told me that there was no changaa where he was working and they decided to go on the other side Ahero district where there was changaa. They went to a woman called Nyangisa a changaa seller. They took changaa up to 4.00p.m. Makenya was the one buying for them. He had taken 2 glasses and that was enough for him. They decided to leave and go back to their respective homes. On the way at a sugar plantation they met with the girl the deceased MNN. Makenya got hold of the girl and drugged her into the sugar plantation. He pinned her on the grounds and removed her pants and started raping her. He also got hold of the girl's head and he twisted it breaking the neck as she was looking at them. He finished the intercourse and Douglas followed and had intercourse with the deceased. Evans also had intercourse with the deceased after Douglas and finally he also had intercourse with her as the last person. All 4 of them had sexual inter course with the deceased. The 5<sup>th</sup> person refused Nyabuencha Obare refused as he noted that the girl had already died. They hurriedly left the scene to their respective homes. The next day several Masai men went to his house armed and started to beat him. He was lucky that police officers responded and saved from him from the angry members of public. They took him before being called by CID officers from Kilgoris. They took him to hospital where he was treated. The 1<sup>st</sup> Accused admitted he had intercourse with the deceased but did not kill her. He thereafter read the statement to him and invited him to make corrections. The 1<sup>st</sup> Accused had nothing to amend or alter. The statement was given in Kiswahili. He translated the same. The 1<sup>st</sup> Accused gave the statement voluntarily. There was no threats or force used.

6. During cross examination PW3 stated that they were the 2 of them when he recorded the statement. He dubbed the statement but the machine got damaged. He only recorded the statement the IO was to do the arrest of the other persons.

7. PW4 Doctor Mutai Kiplangat Titus testified he conducted a post mortem on the body of MNN on the 8.11.2015 at 8am at ST. Joseph's Missions Hospital in Kilgoris. The body was half naked with blood oozing from the vagina. On external appearance there was inner clothing tied around her neck. She had a jacket sustained with mud. She was a female African about 8 years old with good nutritional status. She was 105 cms. The body was cold and well preserved about 2 days after death. On the external appearance the body had minor bruises and forehead, mud stains on face, hands, inner pant tied around the neck. The abdomen was descended, mud was in the mouth and blood stains in the private parts. There was fluid oozing from her nostrils. On the respiratory system the trachea was occluded and it was a sign of upper airway obstruction. The lungs were hyper inflated, the chest cavity was intact. On the cardio system the heart was normal but there haemorrhage due to perineal tear. The external organ was distended. There was bleeding from the vagina, a deep tear which extended to the abdomen. The hymen was broken the urinary bladder and kidney appeared normal, the head too. There was no significant findings on the other organs. He formed the opinion that the cause of death was cardio respiratory arrest secondary to suffocation from the upper airway obstruction which was strangulation and haemorrhage secondary to sexual assault.

8. PW5 Cpl. Shaban Chiringa testified that on the 8.11.2015 whilst on duty at Transmara DCIO's office he got a report of a body of a juvenile half naked. He rushed to the scene and found the body of MNN within the sugar plantation. On her neck was an inner pant. He was informed that the suspect was escorted to the APs camp. He collected the suspect the 1st accused after they removed the body. Upon interrogation the 1<sup>st</sup> Accused confessed and Mr. Alfred recorded his statement. The 1<sup>st</sup> Accused was thereafter charged. PW5 produced the deceased's clothes, shoes the inner pant and the inner pant of the 1<sup>st</sup> Accused which had blood stains. He did not forward the 1<sup>st</sup> Accused's inner pant to the government chemist as it was soaked with his own blood too after being beaten by members of the public.

9. The 1<sup>st</sup> Accused gave an unsworn statement. He testified that on the date he was arrested he woke up and went to the shamba. It was a Sunday. Then he went to the market to sell clothes. While selling clothes he saw askaris who arrested him. He asked them why and they told him he would know ahead. He was taken to Kilgoris police station. He stayed there for a month and one week. He does not know the child who died.

10. At the close of the defence case Mr. Sagwe for the 1<sup>st</sup> Accused submitted that the accused should be acquitted as the prosecution had not proved their case beyond reasonable. That the 1<sup>st</sup> Accused was not aware why he was arrested. That none of the prosecution witnesses pointed a figure at the 1<sup>st</sup> Accused person or found him in the act. That the 1<sup>st</sup> Accused was arrested on suspicion. The Prosecution relied on the evidence on record.

11. 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. The prosecution is required to prove that the fact of death of the deceased and the cause of death; that the accused committed the unlawful act or omission that led to the death; and that the accused committed the unlawful act or omission with malice aforethought.

12. There is evidence on the fact and cause of death. PW1 and PW2 found the deceased dead after she went missing after being sent by her mother. PW5 collected the body and a post mortem was done on the body by PW4 who testified that the cause of death was cardio respiratory arrest secondary to suffocation from the upper airway obstruction which was strangulation and haemorrhage secondary to sexual assault.

13. The evidence that connects the accused to the death of the deceased is the statement of inquiry which PW3 wrote after being taken to him by PW5. The said statement states how the deceased was killed. The said statement was admitted into evidence without any objection. The statement is a statement under inquiry and is what the prosecution states was the accused's confession. Section 25 A (1) of the Evidence Act Cap 80 of the Laws of Kenya ( the Act) provides that:

*"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice."*

14. The Court of Appeal in Criminal Appeal no. 73 of 2007 **Douglas Sila Miutuku & 2 others vs. Republic** held as follows on a 'statement under inquiry', 'Statement under inquiry on the other hand is in form of an inquiry into an alleged crime when the police believe that the suspect may be connected with the crime or has useful information regarding it. It follows that a statement under inquiry precedes the taking

*of statement under charge and caution.'*

**15.** In **HCCRC No. 8 of 1999** Justice Nambuye (as she then was) held as follows on the Charge and Caution Statement and the Statement Under Inquiry; “ *The Statement has to meet certain qualifications before it can be acted upon to support a conviction and these are...it must be true..It has to fully corroborate and so it can only be true.*

**16.** PW1 and PW2 did not witness the murder. They found the deceased's body after she was murdered. The only evidence that links the accused to the murder is that of PW3 who took the Statement under Inquiry. This statement was not followed by a Statement under Charge and Caution. It was not corroborated. It cannot be used as evidence to convict the 1<sup>st</sup> Accused of the alleged murder. From evidence adduced the 1<sup>st</sup> Accused was a suspect. He remains a suspect. The prosecution had the duty to prove their case beyond reasonable doubt, the prosecution has failed to do so. The evidence adduced by the prosecution cannot sustain a conviction. Thus the 1<sup>st</sup> Accused Dennis Onderi Ogwagu is acquitted of the charge of murder, he is free to go unless lawfully held.

Dated signed and delivered at **Kisii** this **7<sup>th</sup>** day of June **2019**.

**R.E OUGO**

**JUDGE**

**In the presence of;**

**1<sup>st</sup> Accused In person**

**Mr. Sagwe Absent**

**Mr.Otieno Senior Prosecution Counsel Office of the DPP**

**Ms. Rael Court Clerk**