



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 2 OF 2016 (MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

BM.....1ST ACCUSED

DGM.....2ND ACCUSED

SM.....3RD ACCUSED

DGM.....4TH ACCUSED

J U D G E M E N T

1. **BM**, (the 1st subject) , **DG** (2nd subject), **SM** (3rd Subject) and **DGM** (4th accused persons) are all charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that the 1st to 3rd subjects and 4th accused persons respectively jointly murdered **MKN** (the deceased herein), on 28th February 2016 (the material date). They all denied the charge and the matter proceeded for trial. After 4 prosecution witnesses had been heard, the 1st and 3rd subjects absconded and efforts to trace them turned futile forcing this court to proceed with the trial in the absence of the two for the interest of justice.

2. The prosecution called a total of eight witnesses and the evidence was both direct and circumstantial. I will give a summary of what the prosecution witnesses tendered during trial

3. **EKS** (PW1) a father to the 1st subject, **BM**, testified that on 29th February, 2016, while working on his farm harvesting green grams two neighbours walked by and asked him if he had gotten a report and he answered in the negative. He was then warned by the 2 neighbours that they were attending a funeral nearby and that there was a report that once the funeral was over they would come and lynch his son, (**B**) the 1st subject in this case.

4. The witness (PW1) told this court that he was shocked and decided to take the son to Makutano Police Station where he would be safer. He added that when he reached Makutano police station his son (1st subject) was locked up and at the time he did not know why.

5. **SM** (PW2), an in law to PW1 told this court that on 3rd March 2016, the 1st subject's father went to this home and asked him to accompany the two to Makutano Police Station which he did and confirmed that they left **B** (1st subject) at the police station.

6. **MN** (PW3) recalled that on 29th February 2016 while on his way to his farm in the morning, he saw a body of a person on the side of the road. He testified that he went and reported to a Sub-Area Manager and came back with her to check once again and they noticed that it was a girl with injuries on the forehead, neck, and the back. He added that they noticed the hand was still moving and was still alive. He further added that he did not recognize the girl which was exposed from the waist up. He also told this court that he saw some clothes on the ground including a panty. He reported that the Sub-Area took the girl to Kamacabi for treatment and that at that time the girl was unable to talk or communicate. According to him the girl was later taken to Marimanti Hospital and that she died while on the way. He did not know who killed the girl.

7. **JN** (PW4) testified that he was called to identify the body of the deceased who was his daughter on 3rd March 2016 at Meru General Hospital. He told this court that the body had injuries on the forehead, back and cuts on the back and the right side. He was accompanied by **JM** and **KM**. He told this court that he later collected the body for burial after being informed that the girl had died because of cut wounds.

8. He recalled that on 28th February 2016, the material date of the incident, his daughter (deceased) had taken goats to river Mbuku for

watering but that she never came back home forcing him to go around the neighbourhood trying to trace her in vain. He testified that he later heard that the girl was taken from Mbuku River to Hospital. He heard people screaming near the said river and on inquiring, he was told that the girl had been found and taken to Kamacabi Hospital.

9. Elizabeth Waihera Oyiego (PW5) on her part testified that she was a Government Analyst based at Government Chemist in Nairobi. She stated that in regard to this case, she received the following items on 17th March 2016 from P.C Christopher Mosop of Makutano Police Station.

- i. A pant in a khaki envelop marked "A" indicated as belonging to the deceased- MK,
- ii. A vaginal swab in a plastic tube marked "B"
- iii. Some soil in a white paper marked "C" indicating as having been collected from the scene.
- iv. Items D, E, F and G stated to be pubic hairs indicated as belonging to DMG, SMM, BM and DGM respectively.

10. The Government Analyst added that on 4th April 2016 she received additional exhibits from I.P Charles Kyalo of Makutano Police Station. The items she received were as follows:-

- a) Item "M"- blood sample in a test tube marked "M" indicated to belonging to the deceased's mother EG.
- b) Item W - blood sample in a test tube marked "W" stated to belong to BM.
- c) Item X- blood sample in test tube Mark 'X' indicated to belong to DGM
- d) Item Y was a blood sample in a test tube marked "Y" belonging to DGM.
- e) Item Z- A blood sample in a test tube marked "Z" indicated as blood sample of SM.

11. According to the Government Analyst (PW5) Item A- which was a - Panty was upon analysis found to be heavily stained with semen and lightly stained with human blood. The soil (item C) was moderately stained with human blood. The results of the DNA profile generated from semen on item "A", (Pant) matched DNA profile generated from blood sample "Y" - a blood sample from DGM and the probability was 1 in 3.0283X10 which translated to mean that almost one person in the world has that kind of DNA profile.

12. On blood sample on item "M" indicated to belong to EG, the witness concluded that DNA profile generated from soil (Item 'C') and vaginal swab (item 'B' indicated EG was the mother of the deceased. The witness told this court that she prepared the report signed it and tendered the forensic report as P. Exhibit 1.

13. SMM, (PW6) a neighbour to the deceased testified that the all the subjects and accused person respectively were known to her. She testified that on 29th February, 2016 which she stated was a Monday, she was told by one K that someone had been killed and was lying down at her farm. She added that it was around 7 am at the time and that she went to the scene as directed and found a person lying down and when she went closer, she noticed it was a girl lying down with her face facing to the ground and naked from her waist upwards. The witness stated that she was in the company of her husband and K and when they lifted the girl, they noticed that she was still breathing. She also noticed from where she lay a heap of soil partly concealing a light green underpant. As they stood there people started arriving and that the girl was not talking and the witness could not immediately recognize her as her face was covered in blood. According to her, the girl had 3 cuts on the head, and above her eye was stab wound. She further stated that as they tried to help, they began to recognize her as KN and upon recognition, they called their parents and that the mother came and carried her using a boda boda to Hospital at Kamachaabi. She told this court that she got into different boda boda and following them to Kamachaabi Hospital where a victim was referred to Marimanti Hospital.

14. Dr. Jackline Wendoh Kubai, (PW7) testified on behalf of Dr. Paul Ombogo who had performed post mortem examination on the body of the deceased at Meru Level 5 Hospital and later got a transfer to Githongo Sub-County Hospital, told this court she was familiar with his handwriting and signature of Dr. Ombogo and therefore able to give evidence on the findings of post mortem examination carried out on 3rd March 2016. According to the doctor who performed the post mortem the deceased was a female aged about 16 years old and the following observations were made on post mortem examination.

- a) External appearance;
 - i. There was an obvious head crushing injury
 - ii. Ejaculant on vaginal walls
 - iii. Bruises on vaginal region.
- b) Internal appearance;
 - i. Multiple cuts and abrasions on the head. Skull was exposed at the occipital region and there was massive haematoma.

The cause of death according to the doctor was a blunt trauma to the head. The post mortem report was tendered as P. Exhibit 3.

15. The investigating officer in the case, Inspector Kyalo Maeke from Makutano Police Station told this court that a report regarding this case was made on 29th February 2019 and the report received from the deceased father was that his daughter had been defiled by unknown persons. The name of the girl according to him was MKN aged 16 years. The investigating officer saw the girl with a bandage on her head in the company of one SM, the Sub-Area village manager who brought a pant recovered at the scene. He told this court that he took the exhibit and preserved it at Makutano Police Station. According to the investigating officer, the girl had been rushed to Kamasavi (Kamachabi) dispensary where she was given first aid and referred to Marimanti Hospital and decided to book a report at Makutano police Station before proceeding to Marimant Hospital. He further added that the deceased was unconscious, when they took her to the police station and that she later succumbed to the injuries as she was being escorted to Marimanti Sub-County Hospital. The body of the deceased was later taken to Meru level 5 Hospital on 3rd March 2016 where he stated that post mortem examination was conducted on the same day.

16. On 29th February, 2016, the investigating officer further testified that he visited the scene in the company of a police driver and drew a rough sketch on what he found at the scene. He saw blood stains at the scene which was a base of a seasonal river which was dry at the time. He further stated that he was a trail of blood which led him to the area where the body was eventually found lying in the morning of 29th February 2016.

17. The investigating officer told this court that BM, the 1st subject herein was brought to the station by his father and according to the investigating officer, BM reported that he had quarrelled with the deceased on 28th February 2016 over Kshs.100/- which the deceased alleged that BM had stolen from the deceased's father's home. The investigating officer briefed that a statement was taken by Inspector Ekirapa in the presence of SK who was a relative to the subject. According to the investigating officer the subject confessed that after the deceased hit him with a stick, he took a stone and hit the deceased on the head and that when she fell down he ran away for about 150 metres and stopped. He soon thereafter witnessed DMG, DM and SM go to where the deceased lay before pulling her to where she was later found and defiled her. According to the confessionary statement, SM removed the girl's pant and DGM started defiling her and when he saw what was happening he went away and ran home. He was later on 3rd March 2016 told his father what had happened and the father took him to Makutano Police Station for safety where he was locked up.

18. The investigating officer further testified that he managed to arrest the 3 other suspects on 6th March 2016 with the assistance of a police officer named P.C Mosop and that they later escorted the suspect to Marimanti Principal Magistrate's Court where he obtained an order to extract DNA samples from all the 4 suspects and that he later escorted them to Embu Level Five Hospital where the exercise was undertaken in the presence of relatives of the suspects.

19. The investigating officer later collected a vaginal swab of the deceased done at Meru Level Five Hospital during post mortem examination. He informed this court that he had collected some blood stains from the soil/sand at the scene and put it in a khaki envelope and put the pant handed over to him by a village elder, sealed it in a plastic container upon which he prepared an exhibit memo which he gave P.C Christopher Mosop to take it with all the samples collected to Government chemist for forensic analysis. The investigating officer then produced the pant (P Exhibit 2) - a green and red coloured flowered pant. He also tendered a rough and fair plan- of the scene (P. Exhibit 4a and 4 b) respectively and gave measurements in P Exhibit 4c.

20. The witness (PW8) clarified that he took the soil sample at the scene on 29th February 2016 when he visited the scene, while the vaginal swab was taken on 3rd March 2016. The samples at Embu from all the 4 suspects taken on 10th March 2016 which shows the date on the 1st exhibit memo dated 29th February, 2016 was erroneous. He clarified that memo and sample were taken to Government Chemist on 17th March 2016 and further clarified that when the police officer presented the first samples he was told to collect additional samples which were blood samples from the deceased's mother and the blood samples of 4 suspects. He told this court that the samples were collected on 2nd April 2016 and stored at Gatunga Model Hospital until 12th April, 2016 when he took them personally to the Government Chemist in Nairobi where it was received on 14th April 2016. He told this court that the 4 suspects were connected to the death of the deceased and that is why he preferred the charges and that the statements of BM was key as it provided crucial leads in the investigations.

21. When placed on their defence, DGM, the 2nd subject herein stated on oath that he is a form 4 student at [particulars withheld] Boys Secondary School. He told this court that on 28th February 2016 he was herding goats in the company of his cousin DG- 4th accused herein and that they took their goats for water at River Mbuku where they met the deceased who was watering her goats. He testified that they greeted her and left her as she also headed home. The 2nd subject further testified that after around 200 metres from the river, they met BM the 1st subject armed with a machete and that he told them (2nd and 4th subject and accused respectively) that he (BM) was looking for a lost calf. They then left and that the following day the mother of the deceased came and inquired from them if they knew that someone had been killed at Mbuku River. He added that he went to the scene in the company of deceased's father and one JN but found that the girl had been taken to Kamasabi Dispensary. The following day on 1st March 2016 at around 5 am, the subject told this court that the deceased's mother came and informed them that the girl had passed away and that BM was responsible. He also stated that on 6th March, 2016 at 5pm the police came and arrested him before escorting him to Makutano Police Station where he wrote a statement and told the police everything he knew. He denied killing the deceased. He told this court that the deceased was a girl friend and they were in a relationship. He further stated in cross-examination that S M, the subject at large was also at the scene of crime on the material date and that he had earlier sent SM to the home of the deceased and requested her over phone to meet him at the river which they did at around 5 pm.

22. DGM, the 4th accused herein on his sworn defence stated that he was a student at [particulars withheld] Secondary School and in Form III. He testified that on the material date (28th February 2016) he was at home with his brother AN digging a trench and that they did the work upto 2pm when they decided to drive the goats to the river for water. He added that he met the 2nd subject, DM on the way also driving his goats to Mbuku River where they met the deceased. According to him, the deceased and M walked some distance away and began chatting though he did not tell what the topic of discussion was. He added that after watering their respective flock of goat, each drove his flock to their respective homes and they met BM (1st subject) on the way. According to 4th Accused, BM had a panga on his hand and

that he told them he was looking for a calf. The left him and proceeded to their respective homes. He added that the following day he learnt through other students in school that the deceased had been defiled and killed. He added that he was arrested on 6th March 2016 and told to record a statement which he did. He denied being involved with the killing of the deceased.

23. This court had considered the overall evidence adduced herein. I have given the 4 persons charged with the murder herein the above descriptions owing to the demands of the Children Act and the fact that before the trial herein began this court thought it wise to refer the persons charged for age assessment which was done at Chuka County Referral Hospital on 22nd March 2016 with following results;

- (i) BM - 16 years old
- (ii) DGM - 17 years old
- (iii) SM - 17 years old &
- (iv) DGM - 18 years old

In view of the age assessment, the 1st to 3rd persons charged are referred to as 1st to 3rd subjects respectively while the 4th person charged DGM is referred to as the 4th accused. Having highlighted the basis for the different descriptions assigned to the persons charged and murder in this case, this court notes that in a charge of murder the prosecution as a matter of law are required to prove the 3 necessary ingredients and connect them to the accused persons beyond reasonable doubt for a charge of murder to be sustained. The ingredients or elements are as follows:-

- (i) The death of the deceased.
- (ii) *Actus Reus*- that the accused committed the unlawful act that cause the death of the deceased.
- (iii) *Mens rea*- that the unlawful act was driven by malice aforethought.

24. (i) The element of death of the deceased:

There is no dispute that MK, a girl aged 16 years at the material time is dead. Her body was identified by her father, JN (PW4) in the company of other persons on 3rd March 2016 at Meru Level 5 Hospital where post mortem was conducted. The post mortem report was tendered by Dr. Jackline Wendoh Kubai (PW7) as P. Exhibit 3 which indicated beyond doubt that MKN died and Dr. Paul Wamboga issued a death certificate serial No.xxxxxx to certify the death of the deceased. With the death certificate, post mortem report and the witness' accounts it is beyond doubt that the prosecution in this trial established that MK died.

25. (ii) The element of 'actus reus' and whether the 1st, 2nd and 3rd subjects and 4th accused respectively unlawfully caused the death of the deceased.

The prosecution's case on this criminal element is purely based on circumstantial evidence against the 1st, 2nd and 3rd subjects and 4th accused respectively. The prosecution's star witness on this score has to be Inspector Kyalo Maeke (PW8) who in my view did his job meticulously and tried to connect the pieces of evidence together that in the end pointed at the 1st, 2nd, 3rd subjects and 4th accused respectively.

26. On the crucial element of *actus reus*, the State is relying on circumstantial evidence to prove that the 3 subjects and 4th accused person are jointly connected with the unlawful acts that caused the death of the deceased. The evidence on this regard is both the forensic evidence tendered by Elizabeth Waithera Onyiego (PW5), the Government Analyst from Government Chemist and the evidence tendered by Charles Maeke Kyalo (PW8) the investigating officer especially in regard to confessional statement made by the 1st subject (BM).

27. According to PW5, as per her forensic analysis captured in the analyst report (P. Exhibit 1) the pant (P. Exhibit 2) heavily stained with semen showed upon DNA analysis that the semen stain matched DNA profile generated from DNA profile of blood taken from the 4th accused – DGM. The opinion of the expert was that the DNA analysis was foolproof and conclusive enough because according to her the probability of the Match (1 in 3.0283X10) which means only person in the world with that kind of DNA profile exist and that person is the 4th accused herein.

28. I have considered the evidence tendered by the investigating officer (PW8) and in particular the confession or the statement under inquiry made by the 1st subject upon arrest. The investigating officer told this court that the 1st subject told him that he quarreled with the deceased over 100/- and in the process he hit her on the head with a stone making the deceased to fall down. When the deceased fell down, the 1st subject perhaps out of fear/shock on what he had done ran away but did not go far but stopped at some distance about 150 metres away from where he saw the 3rd subject (SM) and DGM (4th accused) drag the deceased from the spot she had fallen towards the river. He then saw the 3rd subject remove deceased's pant before the 2nd subject started defiling her. That fact in my view shows that both the 2nd subject and 4th accused gang raped the deceased because when the pant was recovered and taken for forensic analysis, it clearly pointed to the 4th accused, the oldest among the assailants.

29. In their defence both the 2nd subject and 4th accused squarely placed themselves at the scene of crime at the material time and place. As a matter of fact in his defence, the 2nd subject DMG under cross-examination told this court that it is him who asked the 3rd subject to go and

ask the deceased to meet him at the river that material date. He told this court that he sent the 3rd subject and when the 3rd subject communicated with him that he had found the deceased at home, he talked to her using M's (3rd subject) phone and told this court;

“ I was able to communicate with her over phone and we agreed that we meet at the river. We met at the river at 5pm. I was with my cousin DG (M- 4th accused).”

30. There is no doubt judging from the statements of defence by both the 2nd accused subject and 4th accused in this court that all the 3 subjects and 4th accused respectively were at the scene of crime on the material date and it is clear that they were there (River Mbuku) for much more than just water their flock of goats and/or that much more definitely took place.

31. I have looked at the statement under inquiry (P. Exhibit 5 a and (b) and though the statement was contested, the undeniable fact is that the statement really provide links to the jigsaw puzzle of who murdered the deceased in this case. While it is true that BM, the subject who confessed bolted in the cause of trial and is still at large, this court has considered the evidence tendered by his father EKS (PW1) and finds that his action of taking his son to the police rather face mob justice (which is quite common in that area) is consistent with the culpability of BM (1st subject). By running away from custody together with SM they could only be demonstrating that the old adage that the guilty ones are always afraid.

32. I have closely looked at the sketch map, (P. Exhibit 4 a and 4b) drawn and tendered by the investigating officer (PW8). The map shows a rough and fair sketch of the scene of crime which is near a seasonal river as this court was told. The deceased had taken her father's goats for watering at that river as per the evidence of her father (PW3- JN). At that river she was met by the 3 subjects and 4th accused as per the statements of defence of both the 2nd subject and 4th accused respectively. The 2nd and 4th accused in their own account found the deceased at river Mbuku (the scene of crime). The 1st subject statement under inquiry states that she had an altercation with the deceased and he struck her with a stone. As per the doctor who performed post mortem examination, of deceased the cause of death was a blunt trauma to the head. I have looked at that post mortem report (P. Exhibit 3) and the doctor found an ***“obvious crushing head injury.”*** The injury was caused by a stone thrown at her by the 1st subject - BM. I also find the doctor's observations i.e

“ Ejaculants found in the external and within the vaginal area” quite telling.

This clearly shows that the deceased after being hit on the head by the 1st subject as per the confessionary statement (P. Exhibit 4 (a) & b), fell down and the 4th accused defiled her in the company of both the 2nd and 3rd subjects respectively. That in my considered view is the only irresistible conclusion or inference that can be drawn from the fact presented before me during the trial. The 2nd, 3rd subjects and 4th accused in turns defiled the deceased this aggravating her situation even further.

33. The 2nd subject claimed that the deceased was an acquaintance or girlfriend and a neighbour whom she used to help each other with farming and other activities but the actions of 2nd subject and 4th accused to the deceased to me appears to have been anything but friendly. They (2nd and 4th accused) were the last persons seen with the deceased. On the following morning the deceased found lying down defiled and unconscious. The Sub-Area Manager – Mitambo Nkaratu (PW3) told this court about the state she found the deceased. She was found lying down half naked with her panty underneath where she lay. That panty (P.Exhibit 2) was tendered in evidence and I observed visible stains which included visible blood stains. This is an indication that she was defiled and since D.N.A analysis indicated, the person who defiled her was definitely the 4th accused, and the 2nd subject having conceded his defence that he was in the company of the 4th accused on that material date at the scene of crime, the provisions of **Section 10 Evidence Act** applies. The Section provides as follows:-

“Where there is reasonable ground to believe that two or more persons conspired together to commit an offence or an actionable wrong, anything said, done or written by any of such persons in reference to their common intention, after the time when such intentions was first entertained by any of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”

Further under **Section 21** of the **Penal Code**, the law provide as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such nature that its commission was probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence.”

The 2nd subject stated that at all times during the interaction with the deceased he was with the 4th accused persons and from those facts, it follows therefore that both the 2nd subject and 4th accused harboured a common purpose/intention to defile the deceased. I find that going by the chain of events told by the prosecution witness (PW3 and PW8) and corroborated by own accounts by the 2nd subject and 4th accused respectively the only inference I can make is that the prosecution has established the element of *actus reus* (the unlawful act that cause death) and connected it with both the 2nd subject and 4th accused respectively. The connection in my view is beyond reasonable doubt given the circumstances. The actions of the 2nd subject and 4th accused as I have stated aggravated the situation of the deceased.

34. On the element of *mens rea*, I am also satisfied that that ingredient also obtains from the circumstances of this case. The provisions of **Section 206** of the **Penal Code** provides as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any of or more of the following:-

(a) An intention to cause death of a person or do grievous harm to any persons, 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 harm is caused or not or by a wish that it may not be caused."

The 4th accused person certainly was not the one who hit the deceased on the head with a stone but he was the one who dragged the deceased from where she had fallen (after being struck with a stone on her head) with the help of both the 2nd and 3rd subjects to where they probably defiled her in turns hence the explanation about the pant found heavily stained with semen and some blood stains. The doctor who performed post mortem examination on the body also noted;

"Ejaculants in the external and within the vaginal vault", and further noted "bruises around the genital region,"

This clearly demonstrates that the persons who took part in the defilement were not only more than one but they all cared less whether their actions further aggravated already as dire situation. In my view all the subjects herein and the 4th accused respectively harboured intention of causing harm and/or knew that what they were subjecting her to harm or indifferent to what their actions would cause. There is no other explanation from their heinous action for certain. And it is for that very reason that I find that the element of malice aforethought has been proved as against them.

In concluding I find that the prosecution has through circumstantial evidence which I have already observed, were painstakingly and meticulously put together by Inspector Kyalo Maeke (PW8), the investigating officer in this case established a case beyond reasonable doubt against all the 3 subjects and the 4th accused respectively. Having gone through the evidence on the whole I have no doubt in my mind that both the 2nd subject and the 4th accused are together and two other subjects not before court guilty for causing the death of the deceased herein. They are hereby found guilty and convicted accordingly.

Dated, signed and delivered at Chuka this 23rd day of July, 2019.

R.K. LIMO

JUDGE

23/7/2019

Judgment signed, dated and delivered in the presence of Kaaria for 2nd subject and 4th accused respectively and Momanyi for State.

R.K. LIMO

JUDGE

23/7/2019

Court:

Sentence on 25/7/2019. For now both accused to remain in custody.

R.K. LIMO

JUDGE

23/7/2019