



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER NO. 14 OF 2012

REPUBLIC.....PROSECUTOR

-VERSUS-

NICASIO MURIITHI MAL.....ACCUSED

JUDGMENT

1. The accused person Nicasio Muriithi Mwai is charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code.**
2. It is alleged that on 13/10/2012 at Kiamuthambi village within Kirinyaga County the accused unlawfully murdered FW.
3. The accused person denied the charge. The trial proceeded and the prosecution called ten witnesses in support of the case.
4. The facts of the case are that the deceased in this case was a child aged about seven years who was the son of Lucy Wanjiru Muriithi (PW-1-) who was cohabiting with the accused as husband and wife. The PW-1- got married to the accused when she already had the child.
5. On 13/10/2012 she left the child at home and went to work. Upon return, she did not find the deceased at home. The body of the deceased was later found in a well. On enquiring from the accused as to what happened, the accused confessed to have killed the deceased allegedly because PW-1- loved the deceased more than he loved him. On the material a minor WK (PW-2-) who was deceased's friend was with the deceased when the accused met them and told PW-2- to go away. The accused told the deceased to cut grass and that was the last time the deceased was seen a life PW-1- denied that they had been playing near the well. The matter was reported to the police. The accused was arrested. However on the date of the burial the accused was released to go for burial. While at the burial he confessed to have killed the deceased. He was arrested by members of the public who escorted him to the police station. A postmortem on the body of the deceased revealed that the cause of death was severe head injuries which was caused by a 3rd party. Doctor Andrew K. Gatungi who did postmortem overruled the possibility of death due to drawing or as a result of a fall, the postmortem form was produced as exhibit-1. The accused was then charged.
6. The accused gave his defence.
7. **The accused stated that on the incident date, he went to his land to put fertilizer. The fertilizer got finished around 12 noon and went to get more at home whereby he met the deceased with PW 2 and DF his nephew. He told D and K to go get leaves for feeding the goats and he went back to the farm with the fertilizer. later, when he went home he heard the deceased was missing and upon conducting a search he was found at a neighbour's well. He has never agreed with PW1 over the deceased. He was called to Baricho police and locked up and later OCS released him saying he was not involved. After the burial he was arrested and charged with the murder. During cross examination, he stated that he told D and the deceased to go fetch leaves and that W was his witness. He denied admitting to PW 1 and PW 7 that he killed the deceased.**
8. **DW 2 – DB, the nephew of the accused. On the incident date, the accused found him with the deceased and W and told him and deceased to get leaves for the goats. W went home and the deceased followed him but when he attempted to follow them the deceased told him to go back. Later, PW 1 asked him about the deceased and he told her what happened.**
9. **A summary of the evidence by the prosecution is as follows:-**

PW 1 – Lucy Wanjiru Muriithi, the mother of the deceased. She had the deceased when she got married to the accused and with the deceased they had one child. She narrated how she left her children to go to work and when she came back she could not trace the deceased. Later, the deceased was found in a well and the accused confessed to having killed him on the basis that she loved the deceased more than him.

PW 2 –WK, a minor and the deceased's friend. He was playing with the deceased on the incident date when the accused told him to go home and told the deceased to cut grass. During cross examination he stated that they did not play around the well where the deceased was found.

PW 3 – Hezlon Mwangi Ngugi, he is a neighbor of the deceased. He was informed that the deceased was missing and suggested they look for him in pond, wells, and pit latrines. Later he heard PW 1 screaming that the body of the deceased had been discovered at Geoffrey Mugo’s well but the accused did not go to the well but went the opposite direction.

PW 4 – Geoffrey Ndama Mugo, he is the accused’s uncle. On the following day he passed the accused’s home and was informed the deceased was missing, he advised them to report to the police and went on his way. On returning, he found a crowd near his well and the body of the deceased was retrieved from inside. The body had a head injury on the left side.

PW 5 – Michael Mureithi, he is the accused’s uncle and a well digger. The accused called him the following day and asked him to remove a water container from Geoffrey Mugo’s well. On reaching the well, he was informed that the deceased was inside and he retrieved him.

PW 6 – Lawrence Kimathi Mwangi, he is the accused’s neighbour. On the incident date he was informed that the deceased was missing. The following day he met with the accused and were advised to look for the deceased in fish pond and wells. They searched in the neighborhood but did not find anything. Thereafter they went to Geoffrey Mugo’s well and saw an object therein and they waited for somebody to go inside. He left and was called that the deceased had been found at the well.

PW 7 – Benson Wachira Mbogori, he is the deceased’s grandfather. He was living in Mpeketoni and was called on the incident date and informed that the deceased was missing. The following day, he was informed that the deceased had been found at Geoffrey Mugo’s well. As they were proceeding with funeral arrangements, the accused called him aside and told him the devil had caused him to murder the deceased.

PW 8 – Dr. Andrew K. Gatangi, he prepared the post-mortem report and in his opinion the cause of death was severe head injuries inflicted by third party and not by a fall.

PW 9 – Inspector Kiprop, the Investigating Officer. He was told by the OCPD to go to Baricho police station where the accused was held following recovery of the deceased. He collected accused and brought him to Kirinyaga police station for further investigations. He was released to attend burial and then arrested by members of public following his confession. The accused admitted killing the deceased.

PW 10 – Dr. Thuo, examined the accused and found him fit to stand trial.

10. From the evidence none of the prosecution witnesses gave an eye witness account as to what actually happened. The prosecution relied on circumstantial evidence.

11. The prosecution also relied on the evidence by witnesses that the accused confessed to have committed the murder.

12. The issue for determination is whether it is the accused who caused the death of the deceased with malice aforethought.

13. Circumstantial evidence can form a basis of conviction. For the court to rely on circumstantial evidence to convict, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. It is evidence that relies on an inference to connect it to a conclusion of fact. The circumstantial evidence can be from facts, events, observation from which the court will draw conclusions and inferences of guilt of an accused person. The prosecution bears the burden to prove the facts upon which the court will rely on to draw an inference of guilt.

In SAWE –V- REP[2003] KLR 364 the Court of Appeal held.

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

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7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

The evidence must be strong and go beyond mere suspicion.

In ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

14. The evidence which was tendered before this court is that the deceased was retrieved from a well. However the prosecution called PW-8- Dr. Andrew K. Gatangi. He is the one who conducted the Postmortem on the body of the deceased. According to Doctor Gatangi the deceased had multiple (eight) cuts on the scalp. There was very deep penetrating injury to the forehead into the brain (cause by heavy object). Circular hole in frontal bone 3x3C.M Bone missing, damaged brain tissue, issuing laceration would 15 Cm long across the frontal bone. Tongue protruding out of the mouth. The cause of death was severe head injuries (inflicted) wounds by 3rd party. The doctor ruled out the cause of death was a result of falling in the well and found that the wounds were inflicted by 3rd party.

15. This means that the deceased was thrown in the well after the injuries were inflicted on him. This was meant to conceal the facts that the deceased had sustained the injuries before being thrown in the well and make it look like the injuries were as a result of falling in the well. The evidence of the doctor has demonstrated that the injuries which lead to the death of deceased were caused by a 3rd party. The issue which arise is whether it is the accused who cause these injuries.

16. The evidence is that PW-1- who is deceased mother left the deceased at home with her father-in-law and went to do casual jobs. On returning home she did not find the deceased. On enquiring the father-in-law told her that the child was with accused. She went home but accused was not there. The accused then came and on being asked said the child was with his grandfather. He enquired from a friend of deceased who told her that the accused had chased him and he left the accused and the deceased. K is PW-2-. On confronting the accused on what K had said, the accused said he had sent deceased to fetch leaves for the goat.

17. This evidence shows that the accused was with deceased before he went missing. After the body was recovered the accused was arrested then released. He went home and met PW-1-. He told PW-1- that he was responsible. He told her he had killed the deceased and she should forgive him. PW-1- said she would inform her father. Her father came and accused told him he was responsible for the death of deceased and wanted to be forgive. The PW-1's ones father called the father of accused and the accused repeated the same thing.

18. After the burial of deceased, some youths wanted to lynch the accused but he was shielded by the Chief. He was asked why he killed the deceased and he said it is because PW-1- loved the boy more than she loved him(accused).

19. The evidence by PW-2- testified that he was the deceased on the day he went missing when they met the accused. The accused ordered the deceased to go and cut grass. PW-2- left the accused with the deceased. Later the mother of deceased went and asked him where deceased was and he told her he had left him with accused. PW-2- testified as he was with deceased that day they did not play near the well.

20. PW-3- on the other hand told the court that the accused did not appear bothered when the child was found in the well and he (accused) did not go to the well.

21. PW-4- testified that deceased was removed from his well.

22. PW-5- testified that on 14/10/12 the accused called him at 9.00 am saying he wanted him to remove a gallon in a well. PW-5- told the accused he does not work on Sundays. The accused called him again at 10.30 am telling him to go and remove a container from the well. PW-5- asked the accused if he had permission from PW-4- the owner of the well to draw water and he said yes. The accused called him again and he told him he would charge Kshs 500/-. The accused agreed. PW-5- went and the mother of accused told him there was a child in the well. He removed the child but the accused who had told him to go and remove the container was nowhere.

23. PW-7- testified that the accused confessed to him that he is the one who killed the deceased and said the devil had caused him to murder. The accused pleaded for forgiveness.

24. From an evaluation of this evidence, it is clear that the accused was the last person to be seen with the deceased when he was still alive. The accused after the deceased disappeared, there is an inference that he was aware as to where the body of deceased was and called PW-5- a wells digger to remove the body pretending that it was a container which was in the well. The accused was nowhere when PW-5- went to the well. The accused confessed to have killed the deceased.

25. This evidence when taken together form a complete chain which justify the drawing of an inference that the accused murdered the deceased. The facts are incompatible with the innocence of the accused.

26. The prosecution established that the accused had a reason to murder the deceased as he was not his biological child and that PW-1- had loved the child more than he loved him. The evidence of PW-8- proves that the cause of death was severe head injury inflicted by 3rd party. It was pre-medicated murder disguised as a fall in a well.

On the issue of malice aforethought

Section 206 of the Penal Code:-

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) 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;

(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 bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

In Dickson Mwangi Munene & another v Republic [2014] eKLR

The Court of Appeal stated;

As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which is the *mens rea* of the crime of murder.

In a charge of murder, it must be shown that the accused’s conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The *mens rea* of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter.

27. The medical evidence has proved the severe injuries on the deceased were inflicted by a 3rd party. The circumstantial evidence tendered before this court point to the accused as the only person who inflicted the injuries on the deceased and put him in a water fall then tricked a witness (PW-5-) to go and retrieve the body pretending what was inside was a water can.

28. The conduct of the accused show beyond any reasonable doubts that he was the one who caused the death of deceased.

29. Coupled with this is the fact that the accused admitted that he is the one who was responsible for the death of the deceased. There were three incidents where accused confessed to have caused the death of the deceased. I will summarize them. PW-1- stated that on 17th when accused was released and came home at 4.00 Pm,

“He told me there was something he wanted to tell me. We went inside the house. He then told me he was responsible. He told me he had killed F and that I forgive him. I asked him how he killed him but he started crying saying that he wanted forgiveness.”

30. This evidence was not challenged in cross-examination. PW-1- maintained that the accused confessed to have killed the deceased.

31. The 2nd incident was given by PW-7-. He stated as follow:

“He (accused) told me that he wished to tell me something but he was apprehensive. He told me he wanted to tell me a bad thing. I urged him to tell me what it was. I moved with him inside for privacy to his house. My daughter followed us. We entered their home. He then told me – “Mzee haya mambo yako huku ni yangu.” I asked him what he meant and he said that it was the issue concerning the murdered child. I asked him if he was responsible for the murder and he said that the devil has caused him to murder. He told me he was asking for forgiveness.”

32. According to PW-7- he asked accused if he could share the information with any member of his family and he said he could share with his father. The accused called his father and in his presence repeated –

“haya mambo yako huku ni yangu.”

33. These utterances by the accused are confessions which were made to private persons. The witnesses gave evidence of what they perceived. **Section 63 of the Evidence Act Cap 80** provides that – **“All facts except the contents of a document maybe proved by oral evidence”**.

Section 63 1 & 2 thereof provides –

“Oral evidence must be in all cases be direct evidence.

For the purpose of sub-section,

(1) Direct evidence means

(a) With reference to a fact which could be seen, the evidence of a witness who says he saw.

(b) With reference to a fact which could be heard, the evidence of a witness who says he heard it.

(c) With reference to a fact which could be perceived by any other sense or in any other manner a witness who says he perceived it, by that sense or that manner - -----“

34. The witness testified what the accused told them. It was direct evidence based on what accused told them. It is not hearsay. It is direct evidence and therefore it is admissible under the section.

35. The conduct of the accused amounts to a confession.

Sections 25A and 26 of the Evidence Act provides:-

(1) “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.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

26. Confessions and admissions caused by inducement, threat or promise.

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

36. The section is in furtherance of **Article 49 of the Constitution** which provides for the rights of an arrested person and the principle in criminal justice that an accused person is presumed innocent and until proved guilty and does not bear any burden to prove his innocence. The accused has a right to remain silent and not to give incriminating evidence. **Article 49(1)(a) (ii), (b) (d) of the Constitution** provides:-

“(1) An arrested person has the right—

(a) to be informed promptly, in language that the person understands,

(ii) the right to remain silent; and

(b) to remain silent;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;”

37. It must therefore be concluded that the confessions which are referred to are confession which are made by accused person to the police or to persons in authority. They do not relate to the confessions made by an accused to a private person. The safeguards under the sections is to protect rights of accused while held in custody from being forced, threatened or intimidated to admit crimes.

38. The issue of confessions made to a private person as to whether they are admissible or not were considered by the Court of Appeal in the case of **Sango & Another –v- Republic C.A. Malindi Cr. Appeal No. 1/2013** where the appellants had contended that confession to private citizens are not admissible because under **Section 25 of the Evidence Act** confessions as a general rule are not admissible.

The Court of Appeal stated:

Sango & Another –v- Republic C. A. Malindi No. 1 of 2013

“In our view that contention is not correct, and subject to the normal safeguards a confession to a private citizen is admissible and maybe proved in evidence against the accused person. The same argument was presented and rejected by this court in **Mary Wanjiku Gitonga –v- Republic Cr. Appeal 83/2007**.

In the case the appellant in that appeal was charged with murder of her husband. The High Court admitted in evidence confession made by the appellant to her brother regarding the killing of the deceased. On appeal the admission of the confession

was challenged. This court held firstly that the statement was admissible under Section 63 of the Evidence Act as direct evidence of what witness heard and secondly that to treat such statements as inadmissible would be enlaying the provision of Section 25A of the Evidence Act beyond reasonable limits.”

In parvin Singh Dhalay –v- Republic –Court of Appeal –

39. The court accepted the principle that a confession can be made to a private citizen and noted that in that appeal the confession in question was made to person who were not in authority.

The court further stated –

Nothing in Evidence Act prohibits an accused person from voluntarily making a confession to a private citizen.

Peter Murphy in his book A Practical Approach to Evidence Blackstone Press 2nd Edition 1985 Page 2001 states:-

“A confession like any other admission, may be made orally, in writing, by conduct or in any way from which a proper inference may be drawn adverse to the matter.

Usually, confessions are made to police officers, or other Investigators as a result of interrogation but maybe equally made to the victim of an offence, a friend, or relative or any other person.”

40. From the foregoing, though confessions are not admissible unless they are made before a Magistrate or a police not below the rank of an Inspector of Police in the presence of a 3rd party of accused person, it is clear that confessions made to private persons are admissible in evidence. The court is therefore free to accept the evidence and determine its credibility and whether it would rely on its just like any other evidence adduced before it.

41. The submission by the defence that the confession is not admissible is without merits.

42. Having considered the evidence on the confession which I find is consistent with PW-1’s evidence being corroborated by PW-7- there is truth in the evidence, the evidence is credible. It is proved beyond any reasonable doubts that the accused confessed to have committed the offence.

43. The accused gave a sworn defence. He testified on that day when deceased went he went home and met the deceased and other children. The defence confirms the testimony of PW-2- that indeed he had gone home and met the deceased and after that deceased disappeared only to be retrieved from a well a day later. The fact that he looked for the child does not mean he is not the one who had killed the child. The accused in his defence did not deny that he confessed to have committed the murder to PW-1- and PW-7-. He did not allege any grudge with PW-1- & -7- and it is therefore safe to rely on their testimony.

44. The accused admitted that he is the one who called PW-5- to come and remove a can from the well. The witness called by the accused , DW-2- confirms that accused had gone home that day and met the deceased. I find that the defence of accused is a sham.

In Conclusion:-

Having analysed the evidence I find that the prosecution has tendered circumstantial evidence which when taken cumulatively form a complete chain which leads to only one inference, that of guilt of the accused. The prosecution proved malice afore thought. The injuries inflicted on the deceased leaves no doubt that the person inflicting the injury intended to cause the death of the deceased. The accused confessed to have committed the offence.

1. Mens Rea

Section 203 of the Penal Code.

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Section 204 of the Penal Code.

Any person convicted of murder shall be sentenced to death.

45. I find that the prosecution discharged the burden to prove that it is the accused who caused the death of deceased with malice aforethought. I therefore find him guilty as charged and I convict him. He will be sentenced under **Section 322(2) of the Criminal Procedure Code.**

Dated at Kerugoya this 11th Day of July 2019.

L. W. GITARI

JUDGE