



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 12 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

E N I.....ACCUSED

JUDGMENT

1. E N I (“Accused Person”) faces a murder charge brought under section 203 as read together with section 204 of the Penal Code.
2. The details in the Information is that the Accused Person murdered M N (the “Deceased”) on the night of 8th and 9th January, 2015 within Kiambu County.
3. The Prosecution called eight witnesses to prove its case. In summary, it is alleged that the Accused Person was an estranged partner to R N, the mother of the Deceased, who testified as PW1. It was claimed that he was left in the custody of the Deceased and that was the last time the Deceased was seen alive: her body was found a day later stuffed in a green bag inside her mother’s house. The Prosecution brought evidence aimed at linking the Accused Person with the death of the Deceased.
4. R N is the estranged partner of the Accused Person. The Deceased was her child. She was six years old at the time of her death. R has two other children with the Accused Person.
5. R testified as PW1. She told the Court that on 09/01/2015 the Accused Person went to her house. They were not living together anymore due to what she described as the Accused Person’s violent tendencies. She had moved to her own house with her three children.
6. On that evening, the Accused Person went to her house. R testified that the Accused Person was visibly drunk when he arrived. He picked up a quarrel with R. Fully aware that such quarrels usually ended up with the Accused Person beating her, R decided to excuse herself from the house and go spend the night at her friend’s house in the next plot. Her children were already asleep. She assumed nothing untoward will happen to her children and that the Accused Person would most likely just fall asleep.
7. R testified that the Accused Person called her to tell her that he was with the Deceased. Hence, when R went back home in the morning – after a detour to look for a school for the children in the morning – she was not too worried when she did not find the Deceased home.
8. At around 10.00 am R told the Court that the Accused Person called her and asked her where she was. When she confirmed that she was home, the Accused Person told her to go to the kids bag and get some money. He told her that he was with the Deceased at his home in Embu. R says she called the Accused Person’s mother and told the mother to tell the Accused Person to return the child because she needed to go to school.
9. Later, R says that the Accused Person called her and he sounded annoyed. R says that the Accused Person kept saying illogical things like that there was Kshs 3 million in the children’s bag. When he kept calling, R stopped picking up his calls that day.
10. R testified that at some point in the evening she picked up his call and the Accused Person told him if she (R) was nice to him he would disclose where the child’s body was. A little later, after R bathed her two younger children, she went to pick up the bag where she kept their clothes to get a change of clothes. R says the bag seemed heavier than usual. R says she panicked and ran out to call one of her neighbour. She immediately suspected that this was her child’s body inside the bag. The neighbour also refused to open the bag. Eventually, R called her aunt, M W who agreed to open the bag. After getting out a few clothes she rushed out and said that she had seen a leg of a child inside the bag.
11. At that point, the three women together with one Patrick Njuguna decided to go report the matter at Ndumberi Police Post from where they were referred to Kiambu Police station. At the Police Station, a Policeman (Sgt. Osodo) was assigned to them and they went together to R’s house.

12. Back home, some young men helped the Policeman remove the body from the bag. It was a green bag which was produced in Court and R identified it.
13. When the body was removed, it had a belt around the neck. The belt was also produced in Court and identified by R.
14. R's aunt, M W, testified as PW2. She confirmed to the Court that R went to her house on the night of 09/01/2015 at around 9:00pm and told her about the call she had received from the Accused Person. She accompanied R to her house where R pointed to a big green bag on the bed. She identified the bag in Court as the same one R had earlier identified. M testified that she started removing clothes from the bag until she saw a human leg of a child protruding. M told the Court that R started screaming. At that point, they decided to report the matter to the Police. Her remaining testimony was literally the same as that of R. She also identified the belt which was found around the Deceased's head.
15. Hannah Wangui was the third woman who was with R when she made the sordid discovery. She testified as PW3 and her testimony mirrored that of R and M. She also identified the green bag and the belt.
16. M M M is R's uncle. He testified as PW4. He testified to receiving a call on 10/01/2014 at around 7.00 Am in the morning. The call informed him that something terrible had happened at home. He went straight home. On getting there, he told that N had been killed. Upon being told that the body had been taken to the City Mortuary, he proceeded there. While there, he was shown the body of the Deceased. He testified that he saw the belt around her neck and he identified the belt in Court. He also identified the body to the Pathologist for autopsy.
17. Dr. Dorothy Njeru, a pathologist working for the Ministry of Health stationed at the City Mortuary testified as PW5. He testified that he performed autopsy on the body of the Deceased on 16/01/2015 at the City Mortuary and at the request of Sgt. Philip Osodo from Kiambu Police Station
18. The body was identified to Dr. Njeru by M M M (PW4) and an uncle, D G. Dr. Njeru testified that he found the body of a female child aged about 7 years. The body was dressed in a pink T-shirt and showed early features of decomposition. Externally, Dr. Njeru noted that the Deceased had darkening of the eyes also defined as bilateral periorbital ecchymosis. She had a black leather belt on the neck. Beneath the neck, she had injuries causing contusion of the tissues beneath the ligature mark.
19. Internally, Dr. Njeru found that the Deceased had injuries in her reproduction system. The hymen was broken and there was a tear and lacerations on the vagina. She also had multiple injuries on her head – causing diffuse subgaleal haematomata and with bleeding into the substance of the brain. The doctor concluded that the cause of death was a head injury due to blunt force together with asphyxia due to ligature strangulation and suspected sexual assault. The doctor produced the Post-Mortem Examination Report which he filled as an exhibit in the case.
20. The doctor extracted some specimens from the body including High Vaginal Swab and nail clippings of the Deceased. These were sent to the Government Chemist. They were compared with blood specimen drawn from the Accused Person as well as blood stains found on a pink T-shirt and White Vest which were found inside the bag where the body of the Deceased was found. Elizabeth Onyiego, a Government Chemist who testified as PW8, produced a report in Court analyzing these items. She found no semen in the High Vagina Swab and did not, also, find any traces of the Accused Person's blood or DNA on the items recovered from the body of the Deceased. As such, the tests done were not conclusive in connecting the Accused Person to the murder of the Deceased.
21. The Policeman who accompanied R and her colleagues back home was Sgt Philip Osodo. He testified that he received some members of the public at around 11.00pm on 09/01/2016 who reported about an incident at Ndumberi. He accompanied the reportees to the scene. On arrival, Sgt. Osodo testified that he entered a certain house which was one-roomed made out of iron sheets. He saw some clothes on the bed. There was also a green bag made of synthetic material on the bed. Inside it were clothes and it was heavy. He was told that inside it was a child who was found dead inside.
22. Sgt. Osodo testified that with the help of some people, he started removing clothes one after the other until they got the lifeless body of a child. The girl had a black belt on the neck.
23. The clothes next to the body had some blood stains. He inquired what might have happened but the mother of the deceased told him that the father of the child was left in the house the previous night after they had quarreled and the mother decided to go sleep with a friend; that when she came back the following day she did not find the child and all efforts to trace her were fruitless.
24. Sgt. Osodo retained the green bag and a pink T-shirt and White Vest which were soaked in blood as evidence. He sent the latter two items together with a belt tied around the neck of the Deceased to the Government Chemist for analysis.
25. Thereafter Sgt. Osodo arranged for the body to be moved to the City Mortuary where Dr. Njeru performed autopsy. Sgt. Osodo, then, started looking for the Accused Person using the contacts he had received from R. He was eventually able to trace him to Embu using his mobile phone signals. He liaised with the Police there and the area Chief and on 17/01/2015 he received word that the Accused Person had been located at Ishiara, Embu. Sgt. Osodo travelled there and brought him to Kiambu.
26. The arresting officer was Administration Police Constable John Katende who is attached to Kanyambora AP Post, Mbeere North Sub-County in Embu County. He testified as PW6. His testimony was that they received word about a murder suspect who was a fugitive hiding in their area. APC Katende, then, went with the Area Chief and a colleague until Kavengera area. They found the Accused Person there. He was in a certain boma. He was pointed out to APC Katende by the Area Chief who knew him. APC Katende and his colleague arrested him and took him to Kanyambora AP Post. They then handed him to Ishiara Police Post from whence Sgt. Osodo picked him up.
27. When placed on his defence, the Accused Person flatly denied the charge in an unsworn statement. He told the Court that he knew

nothing about the case. He said that on the day the Deceased is said to have died, he had gone to the home of R (PW1) but neither she nor her children were there since R had gone to her home to deal with a succession case the family had. He says he slept there then went to work and then proceeded to Embu. He says he was going to Embu because his cousin had been involved in a road accident and he wanted to visit him. He was then arrested while there yet he says he knows nothing about the killing of the Deceased.

28. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

29. To successfully obtain a guilty verdict in a murder charge, the prosecution, therefore, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

30. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or
- 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; or
- c. Intent to commit a felony; or
- d. 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.

31. In the present case, there is no doubt that the Deceased died. Her body was found in the green bag which was produced in Court. Dr. Njeru performed autopsy on the body and at least five other witnesses (PW1; PW2; PW3; PW4 and PW7) saw the dead body of the Deceased. Dr. Njeru concluded, upon examination of the body, that the cause of death was a head injury due to blunt force together with asphyxia due to ligature strangulation and suspected sexual assault. There can be no question that the *actus reus* was proved beyond reasonable doubt.

32. The second question the Court must answer, then, is whether there is an established link between the Accused Person and the death. It is true that in this case there is no eye witness to the killing of the Deceased. The evidence available is one of circumstantial evidence. However, as the Court of Appeal has noted several times, circumstantial evidence is, often, the best evidence available. In ***Neema Mwandoro Ndurya v. R [2008] eKLR***, for example, the Court of Appeal cited with approval an English Case, ***R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20*** where the court stated that:

Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.

33. In ***Joan Chebichi Sawe versus Republic [2003] eKLR*** the principles that guide the Court in evaluating circumstantial evidence were laid out in three tests as follows:-

- a. *The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
- b. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*
- c. *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.*

34. Earlier on, ***Kipkeriing Arap Koske versus R. [1949] 16 EACA 135***, long considered a locus classicus on this issue, had compressed the principles into two thus:

- (a) *The inculpatory facts must be incompatible with the innocence of the accused.*
- (b) *The facts must be capable of no other conclusion or explanation except the guilt of the accused.*

35. However, as several Courts have pointed out, even where the Court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. As the Court of Appeal remarked in ***Simon Musoke versus Republic [1958] EA 715*** while citing ***Teper versus R. [1952] AC 480*** before drawing the inference of an Accused Person's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

36. This is the standard I am required to apply in this case to determine if a nexus beyond reasonable doubt has been established connecting the Accused Person to the murder of the Deceased. The real question here crucially turns on the credibility of PW1: if the Court believes that she did, in fact, leave the Deceased in the custody of the Accused Person on the night in question, in the absence of reasonable explanation, adverse inference would be drawn against the Accused Person.

37. Taking all the circumstances of this case into consideration, I am persuaded that PW1 told the truth. She was candid and straightforward in her narrative and all her actions add up and comport with the narrative. On the other hand, the narrative by the Accused Person had no inherent plausibility that it is possibly true. It is not only an afterthought that only surfaced when the Accused Person was put on his defence; but the other circumstances tend to establish PW1's narrative as the more probable one.

38. Hence, the evidence on record puts the Accused Person in the house of PW1 on the night in question. He was left in custody of the Deceased. The Deceased's lifeless body was later found inside a bag in the house where the Accused Person was left with the child. The Accused Person has not given any explanation at all about what happened. Having had the opportunity and having been left in the custody of the Deceased who was a minor, in the absence of any other plausible explanation, it must be assumed that the Accused Person committed the act of murder. That assumption is strengthened by the post-incident conduct of the Accused Person: he inexplicably fled to his rural home in Embu and otherwise remained a fugitive until he was arrested. Additionally, the Accused Person made a number of phone calls to PW1 which are incompatible with innocence.

39. It is, therefore, this Court's considered opinion that all the elements of murder have been established against the Accused Person. Consequently, I find and hold that the Accused Person, E N I, is guilty of the murder of M N contrary to section 203 as read together with section 204 of the Penal Code and convict him accordingly.

40. Orders accordingly.

Delivered at Kiambu this 22nd day of November, 2018.

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JOEL NGUGI

JUDGE