



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 89 OF 2013**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**FRANCIS MBOGO WAMBUGU .....ACCUSED**

**JUDGEMENT**

**INTRODUCTION**

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on 20<sup>th</sup> day of April, 2005 at Bahati Estate Area within Nairobi County murdered **JADIEL WAMBUGU MBOGO**.
2. He had initially been charged with the same offence in Criminal Case No. 81/2005 to which he pleaded guilty and was convicted on his own plea of guilty but on appeal the Court of Appeal in Nairobi Criminal Appeal No. 123 of 2012 held that his plea was not voluntary and therefore quashed his conviction, set aside the sentence and ordered for retrial.
3. On 14/8/2013 he appeared before Justice Korir when he was referred for mental assessment with an order that the exhibits in Criminal Case No. 81/2005 where he had been initially tried be released to the DCIO Buruburu. On 30/9/2013 the accused was found fit to stand trial and a plea of not guilty was entered for the same, at this stage of proceedings the accused was represented by Mr. Opollo Advocate who on 12/5/2014 applied to be discharged from representing him and Mr. Mutitu Advocate was duly appointed to replace him.
4. After several false start at the hearing on 12/11/2015 this matter was placed before me for hearing when the prosecution informed the court that one witness who was under protection scheduled to testify was very sick and unable to attend court and the accused further objected to Miss Mwaniki prosecuting the case causing the same to be adjourned until the 20/4/2016 when the trial commenced before me.

**PROSECUTION CASE**

5. To prove its case the prosecution called a total of seven (7) witnesses. It was the prosecution case that the accused was the biological father of the deceased aged ten (10) at the time of his death. The mother of the deceased was called Lydia Wanjiku Ndungu *alias* "Mama Jadiel" and they were all living together in Bahati Estate within Nairobi County though the marriage was not a rosy one.
6. According to **PW1 JULIAN NYAMBURA KAMAU** on 1/4/2005 the mother of the deceased who was her aunt requested whether she could stay with her together with the deceased at Mlango Kubwa Estate since she was having marital problems and had moved out of her house which she consented to. The deceased and his mother stayed with her for two (2) weeks until 17<sup>th</sup> day of April 2005 when they both went to her rural home in Gatanga where the accused was visiting so as to try and resolve their matrimonial disputes. It was her evidence that on 20/4/2005 the accused visited her house and stated that he wanted his wife. When told that she was not staying thereat he demanded for the clothes of the deceased which he was given in a suitcase. That was the first time the accused was visiting her house and he was very angry and kept on calling the name of his wife.
7. According to the witness when told that his wife was not staying there, he stated in Kikuyu language that he wanted her or he was going to hurt a member of the family and that he was a mafia, he proceeded to damage the items in **PW1's** house. On 22/4/2005 the accused returned to her house damaged her window pane while calling the name of his wife. She reported this incidence to Pangani Police Station vide OB No. 25/22/4/05 and did not hear from the accused until 23/4/2005 when she was told that the accused had killed the deceased in Bahati. She proceeded to the scene where there was a big crowd who wanted to lynch the accused who was arrested by the police at the scene where pieces of the body of the deceased were recovered. Under cross-examination she stated that the accused had been married to her aunt for ten (10) years and that she used to hear that the accused used to beat his wife and was a very violent person. It was her evidence that the last time she was with the deceased was on 14/4/2005. In cross-examination she stated that she did not hear of any dispute between the accused and the wife on the paternity of the deceased but the accused used to say that the deceased cannot call another man father because he was his son.

**8. PW2 MICHAEL MACHARIA** testified that on 23<sup>rd</sup> April 2005 at 12.30 p.m. he passed through the house of the accused and there was a foul smell coming therefrom and decided to go and report to the chief but before reaching the chief's place met some ladies who told him that the accused was digging a hole to bury the deceased. In the said group there was the wife of the deceased. He proceeded to the scene with the chief and three AP officers where they found the father of the accused in the compound who told them that the accused was away at the Shopping Center but when the chief broke the door they found the accused cleaning the mess using a towel.

9. It was his evidence that when they asked the accused what had happened he said he had killed the deceased since he was under stress his wife having been confused and introduced to bad habits by a lady called Beth and that he had cut the body into pieces using a panga. In cross-examination he stated that there was no pit dug in the house. He stated that they saw the accused cleaning the floor before he saw them and that the accused told him that he killed the child and put him in the freezer then later on took out the body and cut into pieces. He later on sold the said freezer to someone.

**10. PW3 NAHASON OPIYO** the then area Senior Chief corroborated **PW2'S** evidence that the same went to his office on 26<sup>th</sup> April 2005 with intelligence information that they suspected there was a dead body in the accused house. He proceed to the scene with AP officers where they found the accused semi-naked with a rug on his hand and body wet and when he asked him what had happened he told him that he had killed the child by hitting him on the head with an iron bar and blamed the devil. He found a basin, blood stained panga, wrapped bed sheet and a polythene bag. There were pieces of meat and bones on the floor. They then called the police who came with scenes of crime personnel, searched the house where they found a court file in respect of the accused case at Makadara and arrested the accused. The scene of crime personnel opened the wrapped bed sheet which had parts of human flesh and his skull. There was also a yellow polythene bag with internal organs.

**11. PW5 MARY MUKONYO NDUNGU** stated that his sister the mother of the deceased called her on phone and requested her to take her to the village for a discussion with the accused which she agreed to and went with her together with her two children and the deceased. The talk did not take place as the accused did not turn up with his parents so they agreed that the deceased would be left at her place since he was age mate of one of her child until 19<sup>th</sup> of April 2005 when the accused went to her place and left with the deceased in his motor vehicle. She then called the mother of the deceased and informed her, after about thirty to forty minutes she confirmed to her that the accused had gotten to her house with the deceased but she declined to open for them so he went away with the child, and that was the last time he was seen alive until after when she informed her that it was being said that the accused had killed him. It was her evidence that the accused had a good relationship with the deceased.

**12. PW6 CORP. WILSON TENAI** was instructed to retrieve the original police file which he did and confirmed that the exhibits in respect thereof had been produced in the original trial which were reproduced by counsel before me. He confirmed having not conducted any investigations in the matter, but took the accused for mental assessment where it was confirmed that he was fit to stand trial. **PW4 DR. PETER MURIUKI NDEGWA** stated that on 3<sup>rd</sup> of May 2005 he conducted postmortem examination on the body of the deceased which had been dismembered into a total of twenty nine (29) small pieces and formed an opinion that the cause of death was dismembering done by a sharp object. In cross-examination he stated that he did not know whether the body was dismembered after or at the time of death.

**13. PW7 DR. JOHN MAINA MBURU** produced report on the accused person prepared by Dr. Kamunge JW and certified by Dr. Jumba as a true copy confirming that the accused was in a stable mental condition.

#### DEFENCE CASE

14. When put on his defence the accused gave unsworn statement and stated that on 9/4/2005 he left his wife and child at home and when he returned back on 19<sup>th</sup> April 2005 he found the items in the house had been taken away. He then heard people entering his house from the front door while he was at the backyard door who then removed something wrapped in a bed sheet. When they asked him what it was he told them that he had gone on a safari and had just returned. They then told him that there was a child who had been killed in the area. He told them that he had left the child with the mother before he was arrested and charged.

#### SUBMISSIONS

15. At the close of the defence case the state through Ms. Wegulu relied upon their submissions at the no case to answer stage and stated that the prosecution had proved its case beyond reasonable doubt. The defence through Mr. Wakaba filed final submissions and stated that there was contradictions in the testimony of **PW2** and **PW3** who were the only witnesses who went to the scene. He submitted that whereas they conceded to the production of exhibits based on the 2005 case, this being a fresh matter, the prosecution had the burden of proving the relationship between the exhibits to this case and how they were collected. It was submitted further that the body of the deceased could not be identified. It was submitted that most of the prosecution evidence was hearsay based on the information received from third parties who were not called to testify.

#### ANALYSIS AND DETERMINATION

16. To sustain a conviction on a charge of murder the prosecution is required to prove beyond any reasonable doubt the following elements of the offence of murder as per **Section 203** of the **Penal Code**:-

- a. **The fact of death and cause thereof.**
- b. **That the said death was caused by unlawful act of commission or omission on the part of the accused persons.**
- c. **That the said unlawful act or omission was committed with malice aforethought.**

17. The prosecution case against the accused herein is solely based on circumstantial evidence. There is no direct eye witness who saw the accused person kill the deceased. The only two eye witnesses called by the prosecution visited the scene when it was all over. I must however state that circumstantial evidence still remains the best evidence as was stated by the Court of Appeal in **SAWE v REPUBLIC [2003] eKLR**.

**“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 hypothesis than that of his guilt. There must be no co-existing circumstances weakening the chain of circumstances relied upon . . .”**

18. The Supreme Court of India in the case of **KRISHNAN v THE STATE REPRESENTED BY INSPECTOR GENERAL OF POLICE [2008] 15 SCC 430** observed as follows:-

**“This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following 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 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; and**
- (iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”**

19. The fact of the death of the deceased was confirmed through the evidence of the following witnesses:- **PW1, PW2 and PW3** all who went to the house of the accused where the body of the deceased was retrieved. **PW4 DR. PETER NDEGWA** confirmed the cause of death to be dismembering done by a sharp object. Whereas the accused has submitted that there was no DNA analysis conducted to identify the deceased from the circumstantial evidence tendered herein, I am satisfied and find that the fact of the death and cause thereof was proved beyond any reasonable doubt.

20. On whether the said death was caused by unlawful act of the omission or commission on the part of the accused, the evidence on record is that the accused person was the last person to have been seen with the deceased alive. On 19<sup>th</sup> April 2005 he proceeded with the deceased according to the evidence of **PW2** to the place where his wife and the mother of the deceased was staying who confirmed that the accused had reached her place with the deceased but she did not open for them. The next time the accused was seen was when **PW2** and **PW3** went to his house where the body believed to be that of the deceased was found cut into small pieces and he “confessed” to the two witnesses having killed the deceased.

21. This therefore brought the case herein within the scope of the doctrine of “last seen” which placed a statutory burden upon the accused to discharge a rebuttable presumption that having been the last person with the deceased before he died, he should explain how he died as stated in **Sections 111 (1) and 119 of the Evidence Act** which provides as follows:-

**“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**

**Section 19 The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of the natural events, human conduct and public or private business in their relationship to the facts of the particular case”**

22. In explaining this doctrine Lesiit J. in the case of **REPUBLIC v EKK [2018] eKLR** quoted the Nigerian court case thus:-

**“43. Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of **MOSES JUA v THE STATE (2007) LPELR-CA/IL/42/2006**. That court, while considering the ‘last seen alive with’ doctrine held:**

**"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the**

deceased.”

23. The Supreme Court of India in the case of **MOHIBUR RAHMAN AND ANR. v STATE OF ASSAM (2002) 6 SCC 715** held that the circumstances of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.

24. It is not in doubt that the accused was the last person to had been seen with the deceased who had been left by his mother with **PW5** on 17<sup>th</sup> April with the consent of the accused upto 19<sup>th</sup> April when the accused left with the deceased, that was the last time the deceased was seen alive. When put on his defence the accused stated that he had left the child with the mother on 9<sup>th</sup> April and came back on 19<sup>th</sup>. I have contrasted this to the evidence of **PW5** and the evidence of **PW1** that the accused went to her house on 20<sup>th</sup> April 2005 while very angry and took away the clothes of the deceased only to return back on 22/4/2005. I find and hold that there is enough evidence placed before the court placing the accused as the last person seen with the deceased before he met his death.

25. The accused was on either 23<sup>rd</sup> or 26<sup>th</sup> April 2005 found in his house by **PW2** and **PW3** where the body of the deceased was found dismembered into pieces and was subsequently arrested and charged with this offence. There is no reason for disbelieving these two witnesses. I therefore find and hold that the prosecution proved beyond reasonable doubt that the death of the deceased was caused by unlawful act on the part of the accused person as all the circumstantial evidence including the panga, blood stain room and basin and water used by the accused to clean the murder scene pointed to the accused to the exclusion of any other person.

26. Whereas it was submitted by the accused that there were contradictions between the testimony of **PW2** and **PW3**, I have taken note of the fact that the offence herein was committed in the year 2005 and the said witnesses testified before me in the year 2017 – 2018 almost thirteen (13) years from the said date and there is possibility of memory fading. The general thread in their testimony remains that on 23<sup>rd</sup> April 2005. **PW2** a retired police officer reported to **PW4** on the intelligence he had received and he proceeded to the scene together with **PW4** where they met the accused and his father both of whom they knew very well. It was their evidence that they found the accused cleaning the scene where the accused admitted to having killed the deceased. Any contradiction in their evidence was of minor nature that did not go to the root of the prosecution case.

27. The final issue to determine is whether the said act was committed with malice aforethought which is defined in **Section 206** of the **Penal Code** as follows:-

**“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 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. Intention to commit a felony.”**

28. As per the evidence of **PW1** when the accused visited the house, he demanded for the clothes of the deceased and the whereabouts of his wife and threatened to harm a member of his family if his wishes were not met. He went back to the house of the witness on 22<sup>nd</sup> April 2005 while visibly very angry and demanded for the whereabouts of his wife at the time when he had taken custody of the deceased. The body of the deceased was thereafter found in the accused house at the time when he was staying alone his wife and the mother of the deceased having moved out together with the deceased, cut into twenty nine (29) small pieces. The murder weapon a panga was found at the scene and according to the witnesses the accused had earlier hit the deceased on the head with an iron bar and kept the body in the family freezer.

29. In **REPUBLIC v TUBERE S/O OCHEN [1945] EACA 63** the then Court of Appeal for Eastern Africa stated:-

**“That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it is used and the part of the body injured.”**

I have looked at the postmortem report, the nature of the injuries inflicted upon the deceased and the manner in which the same was executed. It is clear that the accused intended to cause the death of the deceased and find and hold that the accused had the necessary malice aforethought when he caused the death of the deceased.

30. According to the evidence of **PW1** as corroborated with **PW5** the marriage between the accused and the mother of the deceased was falling apart and the accused was not happy with the turn of events and therefore went out to kill the deceased so as to stop the same whom he considered his son from calling someone else father. It is therefore clear that the accused planned and executed his ill design against the innocent child. I therefore find and hold that motive was established as stated in the Court of Appeal in the case of **LIBAMBULA v REPUBLIC [2003] KLR 683** thus:-

**“We may pose what is the reassurance of motive here? Motive is that which makes a man do a particular act in a particular**

**way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”**

31. Having looked at the evidence tendered before me by the prosecution, the accused defence which has not raised any doubt in the prosecution case, it is clear that all circumstances necessary to find the accused guilty existed. I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person and find the same guilty as charged and convict him accordingly.

**DATED, SIGNED and DELIVERED at Nairobi this 20<sup>th</sup> day of November, 2018.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

Mr. Okeyo for the State

Mr. Wakaba for the Accused

Accused present

Court assistant Karwitha