REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 66 OF 2012

REPUBLIC…………………………………………………………PROSECUTOR

VERSUS

SIMON SARUNI………………..………..…….…………………………….. ACCUSED

JUDGMENT

The accused **SIMON SARUNI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

> ***"On the 13th day of August 2012 at Olopito area in Narok North District within Narok county murdered LEMASHON NCHOE"***

The accused pleaded **'Not Guilty'** to the charge. His trial commenced on 27/2/2013 before Hon Lady Justice Hellen Omondi who heard the evidence of the first (5) witnessed. Following her transfer to Bungoma High Court, I took over the case and heard the evidence of the remaining two (2) witnesses. A total of seven (7) witnesses testified in this case.

At the outset I wish to state that it is regrettable that the trial of the accused has been pending since September, 2012 a period of close to 4½ years. This is even more regrettable given that at the time of his arrest the accused was a minor. Several factors contributed to this delay in concluding this matter expeditiously. Firstly much time was spent trying to locate the accused's parents to no avail. Secondly several months elapsed while the parties were pursuing a plea bargain agreement. This too fell though and the trial eventually proceeded.

PW1 MPELIANI OLE NCHOE was the father of the deceased. He told the court that the deceased was aged 4 years. **PW1** told the court that he had employed the accused as his herds boy. On 13/8/2012 **PW1** came home from work and to his surprise his son did not rush out to meet him as was normal. Upon enquiring **PW1** was told that the child had gone out with the accused.

PW2 LINET NCHOE the deceased's mother told the court, that on the material day she took lunch with the accused and her children. Her son **'Lemashon'** thereafter went out with the accused to graze the cattle and to take them to the river to drink. The accused later returned without the child. When **PW2** enquired where the child was the accused told her that a cow had pushed him in to the river.

PW1 and **PW2** then mobilized friends and neighbours to held search for the missing child. They went to the river but failed to find him.

The next day on 14/8/2012 the body of the deceased with his head partially severed was found in the forest. The accused was taken to the police station where he was detained and was eventually charged with this offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed on to his defence. The accused opted to make an unsworn statement in which he denied any involvement in the murder of the deceased. This court must now analyze the evidence on record and determine whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal Code, Cap 63 Laws of Kenya defines the offence of murder as follows

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

The prosecution therefore is required to adduce evidence to prove beyond reasonable doubt the following four ingredients of murder.

1) Proof of the fact of death

2) Proof of the cause of death

3) Proof that the deceased died as the result of an unlawful act or omission on the part of the accused

4) Proof that said unlawful act or omission was committed with malice aforethought.

PW1 and **PW2** both parents of the deceased told the court that the body of their 4 year old son was found partially decapitated in a forest **PW5 PC SAMBU** confirms that he went to the scene and recovered the dead body of the child with a deep cut on the neck. The two parents gave the name of their deceased child as **'Lemashon Nchoe'**.

Evidence regarding the cause of death was tendered by **PW6 DR. TITUS NGULUNGU** a consultant pathologist attached to PGH – Nakuru. **PW6** told the court that he performed the autopsy on the body of the deceased on 16/8/2012. He stated that the body had a deep moon shaped incision on the front of the neck which incision severed all the great neck vessels. **PW6** opined that the cause of death was **"massive haemorrhage due to a sharp force trauma to the neck involving the neck vessels".** There is therefore no doubt that the deceased met his untimely death due to being cut on the neck.

Having so proved the fact as well as the cause of the deceased, death the prosecution must go further and adduce evidence to prove that it was the accused who by an unlawful act or omission caused the death of the deceased.

There was no witness who saw how the deceased met his death. Nobody saw the accused assault or cut the deceased on the neck. The prosecution seeks to rely on circumstantial evidence to prove their case. It is alleged that when the deceased was last seen alive he was in the company of the accused. **PW2** the deceased's mother told the court that her child left to accompany the accused to the river to water their livestock. The boy was never seen alive again.

In order for circumstantial evidence to suffice as proof of guilt that evidence must point directly at the accused and none other as the perpetrator of the offence. Further the evidence adduced must form the only possible explanation of how the deceased met his death.

In the case of **KARIUKI KARANJA Vs REPUBLIC [1986] KLR,** the court held that

> ***"In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must***

be incompatible with the innocence of the accused and incapable upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution".

Likewise in **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009]eKLR,** the Court of Appeal sitting in Kisumu held as follows:-

"It is settled law that when a case rests entirely upon circumstantial evidence, such evidence must satisfy three tests

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

(ii) Thos circumstances should be of a definite tendency unerringly pointing towards the 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"

As stated earlier the prosecution sought to implicate the accused in this murder on the basis that the deceased was last seen in his company. Upon returning to the home without the child the accused explained that the boy had been pushed into the river by a cow. The body of the deceased was found in a forest the next day with his head cut off.

There is nothing to negate the accused claim that the child fell into the river. Nobody was at the scene and nobody saw what actually happened to the child. The possibility that the deceased may have managed to climb out of the river and been killed by another attacker after the deceased had left the scene has not been ruled out.

PW2 told the court that when the accused returned from the river he had in his hand a panga on which she noted a spot of blood. This statement of **PW2** is contradicted by **PW5** **'PC Sambu'** who stated

"I suspected he (accused) washed the panga after the act as it did not have blood stains".

The panga was not taken to the government chemist to determine the origin and source of the blood stain (if any) found on it. It has not therefore been proved that the panga which the accused had was the murder weapon.

The deceased was evidently murdered and his head was cut off. The post –mortem report indicates that the cause of death was **'massive haemorahagge'** which means massive blood loss. In such a situation it would be expected that some of this blood would have gotten onto the hands clothes or the person of the killer. No blood stains were seen on the person or clothes of the accused.

There was evidence from **PW7 CHIEF INSPECTOR BERNARD NJERU** that he recorded a statement from the accused in which the accused confessed to having killed the deceased. The accused through his lawyer **MS ABUGA** objected to the production of that alleged confession. The court directed that a trial-within-a trial be conducted to determine the admissibility of the statement. Due to the failure by the prosecution to avail the key witness during the trial-within-a trial this alleged confession was never produced as an exhibit. Thus there exists no evidence to show that the accused in any way admitted or confessed to this crime.

The fact that the deceased was last seen in the company of the accused is not in itself sufficient to impute guilt on the part of the accused. The two were seen heading towards a river. The river and indeed the forest where the body of the deceased was eventually recovered are public places. Any villager within the area had access to these locations. The accused was not the only person who had access to the river. The

possibility that some other person may have attacked and killed the deceased has not been ruled out.

On the whole I find that the prosecution case is full of gaps. The evidence is not cogent. The circumstantial evidence does not point exclusively at the accused as the perpetrator of this offence. I grant the benefit of doubt to the accused and I acquit him of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 7th day of April, 2017.

Ms Chemngetich for Mr. Wambeyi

Mr. Chigiti for State

Maureen A. Odero

Judge