



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CRIMINAL CASE (MURDER) NO. 31 OF 2015**  
**(Formerly Nakuru HCCRC No. 38 of 2013)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PAUL SENDEU KARUBWARI.....ACCUSED**

**J U D G M E N T**

1. **Paul Sendeu Karubwari** is charged with Murder contrary to Section 203 as read with 204 of the Penal Code. In that on the 10<sup>th</sup> day of April, 2015 at Kojong'a village within Narok County, he murdered **Titayua Punyua**. He denied the charges and was represented by Mr. Owuor.
2. The prosecution called 12 witnesses. The prosecution case was as follows. The Accused was a resident of Kojong'a where the deceased minor also resided with her grandmother **Napolos Kunyua (PW1)**. The deceased was aged about ten years and was the son of **Sonkoi Punyua (PW2)**.
3. On the morning of 10<sup>th</sup> April 2014 the deceased was out herding cattle in the company of **Tayio Kutasur (PW4)**. At lunch hour, the deceased left **PW4** and returned home for lunch.
4. **PW1** was attending a function at the local school headed by **Tarakwei Rotiken (PW9)**. She kept an eye on her home which was about 200 metres away because she had put out some maize to dry. Presently she saw the Accused in the compound. He proceeded to pour water that was stored in a plastic barrel identified as Exhibit 2 and chasing the deceased around the compound. **PW2** informed some persons including **PW9** and **PW4**. **PW9** called **Jackson Lemontui Suji (PW5)** asking that he proceeds to the home to make inquiries.
5. **PW5** did not go directly, but **PW4** when subsequently approached by **PW1** accompanied her to the homestead. The maize had been scattered at the home. Some of it was missing and a search ensued. Before long, screams were heard at the home as the body of deceased had been found hanging by a rope in the kitchen. Many people flocked to the scene including **PC Kuse (PW10)** of Kojong'a Police Post after being notified. The police visited the scene and arrested the Accused from members of the public.
6. The OCS Ntulele Police Station **Assistant SP Karanja, (PW11)** with **Corporal James Waiganjo (PW8)** and **Corporal Kiilu (PW12)** of Scenes of Crime on learning of the incident also proceeded to the scene, arriving at about 7.30pm. The body was photographed, but as **PW12** explained during the trial, the photographs were damaged while being processed in Nairobi.
7. Police recovered at the scene the sisal rope with noose on which the minor hang (**Exhibit 1**), the water

barrel (**Exhibit 2**) and remaining grains of maize. The body was taken to the mortuary. On 11/4/2013, **Dr. Titus Ngulungu (PW7)** conducted the post mortem examination. His conclusion was that death was caused by asphyxia through manual strangulation.

8. Upon being placed on his defence the Accused elected to make a sworn statement. He called his father **David Maiyuru (DW1)** as a witness. The Accused's defence is to the effect that he resided at Kojong'a. That on the material date between 8.00am and noon or 1.00pm, he was in a shamba with his father and another man harvesting potatoes. Breaking up for lunch he went home and later to a *busaa* drinking den one kilometer from home, meeting **PW5** on the way there as the latter drove his cows home. At 6.00pm he was arrested at the *busaa* den. He denied committing the offence.

9. There is no dispute that the Accused was a resident of Kojong'a and well known to the grandmother of the deceased (**PW1**) and other villagers who testified. The cause of and death of the minor on the material date is not in dispute. The court must determine whether the Accused, of malice aforethought inflicted the fatal injuries on the deceased.

10. The prosecution evidence against the Accused is primarily circumstantial, and tending to place him at the scene of the murder on the material date and time. In the case of **Kipkering Arap Koskei -Vs- Republic [1949] 16 EACA 135** the Court of Appeal for Eastern Africa stated:-

**“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”**

11. These principles were further expanded when the same court, in **Simoni Musoke -Vs- Uganda (1958) EA 715** adopted a further principle based on The Privy Council's decision in **Teper -Vs- Regina [1952] 2 ALLER 447** to the effect that:

**“It is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”**

12. In the present case, 3 witnesses including **PW1, PW3** and **PW5** assert the presence of the Accused in the compound of **PW1**, or its environs on the material date. The incident happened in daytime.

13. **PW1** maintained in her evidence that she saw the Accused from the school which is almost 200 metres from the home, and she gave a description of his conduct as follows:-

**“.....at about 1.00pm I was at a school meeting at Kojonga.....we were having the closing day. While at school, I saw the Accused walking around my compound. I could see the house closely because we neighbour the school. I could see clearly. I could see because I also kept a look out..... The Accused was pouring water from my water can (plastic barrel (exhibit 1). I decided to ask others to join me. A boy called Taiyio accompanied me home. We looked around but did not find the Accused. We tried to follow him. But did not find him. We returned.....Yes I saw the Accused pouring water from my jerry can. The jerry can was at rear of the house....”**

14. When pressed during cross-examination **PW1** stated that:-

**“Yes I saw the Accused in boma and came (home) to inquire. I saw him at the home from where I was at the school. I did see him chase the child and then pour water from the jerry can.”**

When asked why her statement did not containing allegations of the chase she replied:-

**“I was not asked if I saw the child being chased when I wrote statement. The school is close to my home and the school is above my home – about 80 – 100 metres (points to a building at lower level about 100 metres from court house). I could see clearly. The Accused escaped when he saw us.”**

15. In his evidence the Accused confirmed the proximity between the school identified by **PW1** and her home, stating however, that it was possible to see the home from the school but not people at the home. It seemed, from the evidence by most villagers that the Accused had the reputation of a habitual thief. However it also appears that **PW1** had been certain she had seen the Accused at her home as she immediately informed **PW4** and **PW9**, the latter who also informed **PW5**. I believe from the vantage point she described, **PW1** could see clearly and recognize the Accused

16. Subsequent to what she saw, **PW1** went to fetch **PW4** from the pastures to accompany her home thereafter. **PW4** said he had parted with the deceased at about 12.30pm. It would appear that shortly before this, **PW3** had met the Accused leaving the home of **PW1** and seen him run into the maize plantation close by.

17. On entering the kitchen **PW3** spotted the child, just as **PW1** and **PW4** returned home from pursuing the suspected maize thief. **PW4** said that when he rushed back to the home a second time, she found **PW3** and others screaming and he too saw the body.

18. In his defence the Accused did not specifically deny meeting **PW3** at **PW1**'s even though his defence was that at the material time he was at the shamba. He conceded however that he met **PW5** driving his cattle home as he allegedly walked from his (Accused's) home to the *busaa* place. Now the home of the Accused and **PW1**'s was in the same direction. According to **PW5** the meeting was before 2.00pm, the latter being the time when **PW5** got home and heard wailing. Much earlier – about 1.00pm **PW1** had notified **PW5** of the Accused's presence at her home.

19. Seemingly **PW5** did not question the Accused when he met him later in the village even though the two men exchanged greetings. He said he knew the Accused was a habitual thief but he noted nothing in his possession at the time. The last person to see the deceased alive was **PW4**. He said the deceased left for home at 12.30pm. The accounts of the prosecution eye witnesses taken together give credence to the evidence by **PW1** and **PW3** that the Accused was not at the shamba at the material time but prowling at **PW1**'s home. Further **PW1** maintained she saw him chase the deceased within her compound.

20. In his defence the Accused said that he left the shamba at 1.00pm, but his father **DW1** said he left the shamba at noon. Despite the evidence by prosecution witnesses to the contrary, the defence did not put a suggestion to them that the Accused was at the shamba at the time in question. The Accused admitted, despite the witnesses agreeing he was a habitual thief, that he had no differences with them, **PW1** and **PW3** in particular. There was also a halfhearted attempt by the defence to suggest that the deceased may have hanged himself.

21. However on the evidence by the scene visiting officers (**PW11** and **PW12**) the deceased's body dangled low with the feet close to the floor, almost touching it. The rope was secured in the roof of the kitchen. They said he was a young boy of about 10 years. Besides the bruises around the neck that were evidently caused by the pressure of the noose, there were other injuries, seen at the scene by **PW11** and at the post mortem examination by **PW9**.

22. The post mortem form (**Exhibit 4**) described a large bruise at the right side of the face and head measuring 40 x 30mm and another bruise to the back measuring about 15 x 10mm, a large scalp bruise at the front of the head measuring 50 x 40mm all consistent with blunt force trauma. These injuries could not have been self-inflicted. Much less the possibility that the child could have strangled himself to death on a loosely hanging rope that was secured on roof rafters.

23. Besides, **PW4** had just parted with the deceased who had no injuries or discernible reason for suicide. I believe that the suicide theory does not stand scrutiny. Obviously, the Accused's presence at the home

was not for good. He was feared in the neighbourhood for his thieving ways. Some of the maize **PW1** had spread outside the home had been stolen and could not be traced. It seems that the motive of the Accused's intrusion on **PW1's** home was theft.

24. Possibly, the deceased appeared home at the wrong time and surprised the Accused who attacked him and tied him by a rope in the house to give the appearance of suicide. (**PW1** identified the rope as one used to tether goats at the home, hence its availability). He then escaped with part of **PW1's** maize, and barrel the latter which was later discovered in a thicket minus the water.

25. The proven facts point consistently at the Accused as the person who murdered the deceased in order to make good his intention of stealing from the home. There are no factors that tend to negative such a conclusion in the circumstances of this case. The intention to cause death or grievous harm can be inferred from the fact that the child sustained fatal injuries and that the Accused's intrusion into the home was evidently for unlawful purposes. Thus, in accordance with Section 206 of the Penal Code malice aforethought is established.

26. Regarding motive the court stated in **Libambula -V- Republic (2003) KLR 683** that:-

**“We may pose, what is the relevance 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 Evidence Act Cap 80 Laws of Kenya.**

**Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime.**” (emphasis added)

27. I find that the prosecution has proved its case beyond any reasonable doubt. The Accused's mere denial has been displaced. I do find him guilty as charged and will convict him accordingly.

Delivered and signed in Naivasha this **18<sup>th</sup>** day of **July, 2017**.

In the presence of:-

Mr. Koima for the DPP

Mr. Owuor for the Accused

Accused – present

C/C - Barasa

**C. MEOLI**

**JUDGE**