REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 87 OF 2009

REPUBLIC…………………………….PROSECUTOR

VERSUS

JOHN KIOKO MUSEMBI…...………………..ACCUSED

JUDGEMENT

Introduction

John Kioko Musembi faces two charges of murder. The particulars of the two charges show that the said murders were committed between 13th and 18th September 2009 at an unknown time at Keekonyoike Location within Kajiado District of Rift Valley Province (as it was then). The victims of the two murders are **M. K** a boy aged about 4 years and **I. K** a girl aged about 2 years. Both are children of the accused and **V. N**. (PW6).

The accused pleaded not guilty to the two counts of murder on 14th October 2009 necessitating the hearing of this case. The prosecution called 14 witnesses who testified in support of its case. The accused testified under oath as the only witness for the defence. He is represented by Mr. Wachira, advocate.

Background

My reading of the court records reveals that the proceedings in this case commenced in October 2009. I inherited the case on 18th May 2015. Due to the delay in concluding this case, it is prudent for me to explain the reason why it has taken six (6) years to determine it**.** The court file record reveals three major reasons for this delay. Firstly, the prosecution was faced with serious challenges in availing the witnesses to court. This is evidenced by numerous adjournments on that account alone. Secondly, the first advocate appointed by the court to represent the accused withdrew from representing the accused with permission of the court on 13th October 2010. This was one year after the case was brought to court. The advocate cited misunderstandings between him and his client the accused on the manner the defence should be handled. Thirdly, the judge handling the matter, Honourable Mr. Justice Ombija was not on duty from 6th March 2013 to 12th November 2013. The said judge, upon resuming the proceedings, later recused himself from handling this case on 18th February 2014. It is worth noting that since 2nd May 2012 when witness number seven (7) for the prosecution testified to the time Justice Ombija disqualified himself on 18th February 2015, almost three years down the line, no witness testified. It is a regrettable state of affairs and going by the dictates of the Constitution to dispense justice expeditiously, it seems that in this case the accused and the family of the deceased have been denied justice to the extent of the delay in the

conclusion of this case.

Prosecution case

The prosecution presented a case that was beyond belief. It is also a bizarre case. On 13th September 2009 around 9.00am, the accused visited his mother in law **J. N** (PW3) at her home in Isinya, Kajiado. That September of 2009, the accused was estranged from PW6, his wife of four years. PW6 is the daughter of PW3. The accused and PW6 are the parents of the two children who are the deceased in this trial. According to PW6 she fled their matrimonial home in Mbooni that September 2009 during her husband's absence and went together with their two children to live with PW3 her mother at Isinya.

On that morning (13th September 2009) PW3 received a telephone call from the accused. It seems the call was about the accused visiting PW3. She told the accused to wait at Isinya Bus Stop. PW3 sent **M. K** the little boy and one of the victims in this trial and Rita Kaluki Ndambuki (PW5) to go to pick the accused from the bus stage. PW5 did not know the accused and the purpose of sending her with **M. K** was to have **M. K** identify his father. The two went and picked the accused and took him to PW3's house. The accused was served with tea and later on that day he was served with lunch.

The evidence shows that after lunch the accused left to go to the shops allegedly to buy credit (airtime) in the company of the two children. They never returned that day and according to the prosecution case, the children were never seen alive again. The clothes they had been wearing when last seen alive were found on 17th September 2009 at [particulars withheld] area in Keekonyoike Location Kajiado. Also found at the same area were human remains of a leg and skull both said to belong to a child.

The manner in which the human remains were found is bizzare and horrifying. Elizabeth Tibongo (PW13), a resident of Isinya, spotted her dog eating what looked to her like meat. She approached the dog to identify what type of meat it was eating and found out that it was a human leg of a child. She decided to bury the leg in her shamba to stop the dog from consuming it as she sought help. She then telephoned the Chief Mr. Moses Mure ole Serekuru (PW7) and reported to him. She sat near the "grave" to prevent the dog from removing the leg. PW7 reported the matter to the police and in their company they visited the scene. With help from neighbours PW13 found children's clothes and shoes at what she described as a dry water pan outside her homestead. She also found a human skull of what was said to be of a small child. The police collected the remains and the clothes.

The accused was arrested by John Ngamwa Muya (PW4) and one Francis Ndolo (not a witness) on 18th September 2009 at Ongata Rongai area and handed over to police at Ongata Rongai Police Station. He was later transferred to Isinya Police Station. After the investigations were completed, the accused was charged with these offences.

Defence case

The accused testified on oath. He denied going to visit PW3 at Isinya or taking the children away. He told the court that as far as he is concerned he left his family at home in Mbooni in early September 2009. He denied he had separated with PW6. He said his mother in law PW3 ought to know what happened to the children. He said he never went into hiding but that he had been at Ongata Rongai where he lives and works. He told the court that PW3 had gone to see him at Mbooni to send him to her family to ask them to give her a piece of land where the accused could build a house for her but he refused to go since such issues are handled by elders; that he told PW3 he would buy her a piece of land but PW3 refused insisting that she wanted land from her ancestral home. He told the court that he had attempted to talk to his family after learning that they were at Isinya with PW3 but he could not get through to his wife's number and PW3 would not allow him to speak to the children through her phone. He said that PW3 called him at around 6.00pm on 13th September 2009 to ask him where the children were claiming it was him who had picked the children. He denied having picked the children or knowing where PW3 lived.

Submissions

At the close of the defence case, counsel for the accused Mr. Wachira submitted that there is no dispute that the accused was married to PW6 and that they had the two children, victims of the murder in this trial; that it is not disputed that there had been some misunderstanding between the accused and his mother in law, PW3; that the accused was living in Ongata Rongai while his family was living with PW3 at Isinya and that it was not disputed that some human body parts, a skull and a leg, were recovered.

Counsel submitted that there is dispute as to whether the accused visited his mother in law at Isinya on 13th September 2009. Counsel stated that the defence maintains that the accused did not visit his mother in law; that the prosecution must prove beyond reasonable doubt that the accused was at the scene of crime; that he was the last person to be seen with the children alive; that the evidence of PW3 who is the only person who said the accused took the children with him is not corroborated; that the prosecution did not prove the alleged telephone calls and text messages from the accused to PW3 on where to find the children and this omission creates serious doubts which ought to be resolved in favour of the accused.

Mr. Wachira further submitted that there is no evidence of the post mortem report to confirm that the body parts belonged to the two children as no identification was done on them; that the prosecution has the burden to connect the body parts with the children by DNA evidence; that there is no evidence to show that the two children died; that the motive on the part of the accused for the two murders has not been established and that the clothes collected from accused’s house and which he was alleged to have worn when he took the children away were not subjected to forensic examination to connect the accused with the murders.

The identification parade is also disputed by the defence for the reasons that the witnesses who identified the accused had seen him at Ongata Rongai Police Station prior to the identification parade. Mr. Wachira urged the court to acquit the accused due to the existing doubts in the prosecution case.

On the opposing side, the prosecution counsel, Ms Macharia, submitted that the prosecution has proved the case to the required legal standard. She submitted that the prosecution has presented evidence of four witnesses who identified the accused as the person who visited PW3 and took the two children away; that PW3 and PW5 identified the clothes the two children were wearing when they left which clothes were found at the scene; that the accused had telephoned PW3 and told her where to find the children and this is the same place where the body parts were found; that the prosecution has proved that by visiting PW3 and taking the two children with him, the accused intended to kill them; that there is circumstantial evidence proving that the accused was the last person to see the children alive and that accused’s evidence that he did not visit PW3 is a mere denial.

Ms Macharia further submitted that the prosecution has proved death occurred even though no post mortem report was produced; that the recovery of human remains and the clothes the children had been wearing proves that they were killed. She asked the court to find that the prosecution has proved the case beyond reasonable doubt and convict the accused for murder.

<u>Analysis and determination</u>

The crime of murder is committed when a person with malice aforethought causes death of another person by an unlawful act or omission (see section 203 of the Penal Code). From this definition for a person accused of murder to be convicted of the crime there must be proof that he/she caused the death of the deceased with malice aforethought by an unlawful act or omission. The onus rests with the prosecution to proof beyond reasonable doubt the following:

(a) The death of the deceased occurred and the cause of that death;

(b) That the accused committed the unlawful act or omission which caused the death of the deceased; and

(c) That the accused possessed malice aforethought.

I have certain limitations in determining this case because I did not have the advantage of observing the seven witnesses who testified before I took over these proceedings. These seven witnesses are H N K (PW1) who was called by **J. N** (PW3) on 13th September 2009 to go to PW3's house to see PW3's son in law; P N (PW2) who was informed by PW3 at 8.00am on 13th September 2009 that her (PW3's) son in law would be visiting later that day; accused's mother in law, PW3; J N M (PW4) who went to PW3's house to see the visitor (the accused); R K N (PW5) who was sent with **M. K** to go to Isinya Bus Stage to pick the accused and take him to PW3's house; **V. N** (PW6) the accused's wife and the mother of the two children and M M S (PW7) the Chief of Keekonyoike Location. Observing a witness testify is crucial because a witness's demeanour is relevant to the trial. However, I have carefully read the evidence adduced by the seven witnesses and will be considering it in detail alongside that of the seven witnesses who testified before me.

In determining whether the ingredients of murder have been proved beyond reasonable doubt, I will also determine the following disputed facts: whether the accused person visited PW3 on 13th September 2009 and whether in the course of that visit he went away with his two children. Hand in hand with this last issue is whether the accused is the last person to be seen the two children alive.

On the issue as to whether the accused visited PW3 on 13th September 2009 and took away the two children, I will consider the evidence of the witnesses who said they saw him at PW3's house on that day and compare and contrast it with that of the accused in his defence that he did not visit his mother in law. Firstly, there is the evidence of PW1, H Z. Her testimony on this issue is captured thus:

> **"I remember 13th September 2009. I was in the house at Isinya. My neighbour, a lady by the name of N called me. She told me to come and see my in-law who is married to my daughter. I found the in-law taking tea. We exchanged pleasantries. He told me he is Kioko. Food was prepared and we ate. I then left about 1.00pm to go to my vegetable business."**

PW2's evidence is that on the same date, PW3 called her on phone to inform her that her (PW3's) son in law was visiting her that day and invited PW2 to grace the occasion. PW2 did not make it to PW3's house because of other engagements.

There is the evidence of PW3 who is the main character in this trial. She testified as to how she received a call from the accused and how she told him to wait at Isinya Bus Stop. She testified that she sent PW5 and M. K the little boy to go and pick the accused. She told the court that after the accused arrived he was served with tea and later with lunch and then he left with the two children allegedly to buy air time but did not return.

The other witness to mention meeting the accused at PW3's house is J N, PW4. He said that he went to PW3's house around 12.30pm on 30th September 2009 (this seems to be an error since PW4 talks about the events of 17th and 19th September 2009 when he was shown a text message by PW3 allegedly sent by the accused and when he took part in arresting the accused respectively). PW4 said he had not met the accused before that date.

On her part PW5 R K confirmed what PW3 told the court that she (PW5) was sent in company of M.K to Isinya Bust stage to pick PW3's son-in-law. She identified the accused as the person she picked and took to PW3's house.

I have considered this evidence together with that of the accused who told the court that he never went to PW3's house because he did not know where she lived in Isinya. I find that I am not able to believe him. I have no reason to doubt the evidence of three witnesses who told the court that they met the accused on 13th September 2009 when the accused was visiting PW3. The evidence of PW2 also confirms this fact although he did not go to PW3's house. PW3 had invited him and had informed him that her son-in-law was visiting that day. It is my finding that the accused visited PW3 as evidence shows. His evidence on this issue is a mere denial and I hereby reject it.

Did the accused take his two children away with him during that visit? As submitted by Mr. Wachira, the only direct evidence on this issue came from PW3. The other witnesses including H Z, PW1, P, PW2, John N, PW4, R, PW5 and the mother of the children V.N, PW6 were not present and only received information from PW3 that the accused had taken the children away. PW3 said the accused took the children with him to go to the shops to buy mobile phone air time and when he delayed in returning she called him. PW3 said that the accused denied he had been at PW3's house or that he had taken the children away. This is evidence of a single witness. This court must consider the same with a lot of caution. In doing so, I have considered the evidence of the other witnesses mentioned above who received the same information from PW3 and assisted PW3 in reporting the matter to the police. I have noted that the mobile phone call data from both PW3's phone and that of the accused was not adduced in evidence. This court cannot therefore test the veracity of the evidence that the accused told PW3 through calling or sending text messages where to find the children. Despite this omission, it is my finding that I have no reason to doubt PW3's evidence that the accused took the children with him. I have cautioned myself on the dangers of relying on the evidence of a single witness on a fact but I have considered the evidence of the other witnesses who said that PW3 told them the accused took the children with him. The finding of this court on this issue therefore is that the accused took the children with him. The issue that remains to be resolved is what his intention in taking the children with him was or what happened to those children after he left with them.

On the issue of the disputed identification parade, it is my view that this was not necessary for PW3 and PW6 since they knew the accused as son-in-law and husband respectively. R took part in the identification and her testimony should not be disputed since she did not accompany the arresting party to Ongata Rongai. However, my finding on the matter is that the accused was seen at PW3's house by three witnesses whose evidence on the matter is credible.

Coming back to the ingredients of murder, the first issue to consider is whether the death of the two children has been proved beyond reasonable doubt. The evidence presented to court on the issue as to whether the death of the two children occurred, who caused that death and whether that person possessed malice aforethought is circumstantial. All the evidence on record shows that the accused took the children with him and they were never seen alive again. The clothes they had been wearing were recovered near the homestead of E T, PW13 on 18th September 2009 four days after they went missing.

Death of a victim in a murder trial and the cause of that death are proved by evidence establishing that the death of a human being (the deceased) actually occurred. The evidence required to prove the death is usually the post mortem report given by a pathologist. There are however circumstances where the cause of death is too obvious to require medical evidence as it was stated by the Court of Appeal in **Ndungu Vs Republic [1985] KLR 487** where the court stated at p. 493 that:

> **"…in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crashed, where the cause of death would be so obvious that the absence of a postmortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced."**

This case has presented very serious challenges to me. I have agonized over it and have spent sleepless nights on how to resolve it. The reason for my agony is because the prosecution did not call evidence of a pathologist to produce a post mortem report to show the cause of death. Neither did the prosecution produce evidence establishing whose remains (skull and human leg) were those recovered near the homestead of PW13 and whether they were remains of one child or two. While evidence of PC Martin Muthengi, PW8 and PC Edward Maringa, PW9 show that the remains were preserved at Kajiado District Hospital Mortuary, there is no other evidence to show what became of those remains. This court was not told whether any post mortem examination was carried out on the remains or whether the remains were surrendered to the family of the two children for burial. As far as this court is aware the whereabouts of those remains is unknown.

I have carefully examined the photographs produced by CIP Mwangi, PW12. The photos, produced as

exhibits 4(a) to 4(x) all inclusive, show the clothes and safari boots which were identified by the witnesses as the ones worn by the two children on the day they went missing; the clothes and pair of safari boots worn by the accused on the day he visited PW3 and took the children away with him; the human skull said to belong to a small child and a human leg obviously by its size being that of a small child. The leg has flesh on the lower part below the knee. On the upper part from the knee, the leg has no flesh on it but the bone of the upper leg protrudes from the joint.

The evidence of PW9 on cross examination is that the clothes of the two children were found scattered and had blood stains on them. They were found at a place with bloodstains. The skull and the leg were found at a different place than where the clothes were found. PW8 also told the court on cross examination that the skull had no flesh on it but it was stinking. To him this was indication that it had not been at the scene for a long time.

Without forensic evidence to establish whose remains the leg and human skull were; without forensic evidence to show the cause of death; without forensic evidence to show what caused the death of the human being whose leg and skull were recovered, this court is left with speculation and suspicion only that those remains could be the remains of the M.K or his sister I.K the two children who are the victims in this trial. At the scene as seen from the photos, there are stones which appear to have blood stains. I have no evidence to show that the stones were used to assault the children or how the blood got on the stones. Evidence is required too to prove that the blood is human. What happened to the two children, I wonder? Could these children or any of them fallen victim of wild animals or even dogs? Were they murdered and were they murdered at the scene and by what means? Was the accused involved in murdering them if they died as a result of murder? Were they abandoned in the wild and had been mauled by animals?

I do not have answers to the questions I am posing here. The answers could have come from evidence tending to prove the issues I am raising. Such evidence is lacking. As stated above in this judgement, this case rests on circumstantial evidence. Other than the direct evidence that the accused left with his two children, the evidence that he murdered them is circumstantial. In **R. v. Kipkering Arap Koske & Another 16 EACA 135** the Court of Appeal for Eastern Africa held quoting from Wills on Circumstantial Evidence that:

> **“In order to justify 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. 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 on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”**

This principle was expanded by the same Court in **Simoni Musoke V. R. [1958] EA 715** which cited with approval the following passage from the Privy Council decision in **Teper V. R. [1952] AC 480 at P. 489**:

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

Further the Court of Appeal in **Abanga alias Onyango v. Republic Criminal Appeal No. 32 of 1990 (UR)** laid down the principle to be applied in order to test circumstantial evidence thus:

> **“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."

Can this case pass the test laid down in these authorities? My answer is simple: without evidence on what caused the death of the two children (was the death as a result of human activity or as a result of attack by wild animals?) and without evidence, perhaps by way of DNA profiles, that the human remains (leg and skull) recovered near the homestead of PW13 belong to the two children it is difficult for this court to make a finding that the accused is the one who killed his two children. Further, from the evidence it cannot be said that the circumstantial evidence in this case is so watertight as to exclude a possibility of another person having murdered or a wild animal having killed the children, if the remains alleged to belong to the children actually belong to them. I find that there is strong suspicion that the accused might have known how the two children died but suspicion alone, however, strong, is not enough to base a conviction on.

What this court is saying is that the remains were not examined to confirm that they belong to M.K and I.K or any of them. The remains were not examined to know what caused the death. All the remains of the two children or even of one child were never recovered. This court is assuming that the skull belongs to a child since there is no evidence to proof this. The human leg as can be seen from the photos is obviously of a small child but it was not subjected to forensic examination to confirm it belongs to any of the two children. With this kind of evidence lacking this court finds that the cause of death has not been established. It finds that the remains found outside the homestead of PW13 have not been proved as required by the law to belong to the two children. This may be very difficult for the family to understand. Law is technical and what seems obvious to a lay person is not so obvious when subjected to legal principles. On points of technicalities as explained in this judgement, this court finds that the evidence presented by the prosecution does not prove beyond reasonable doubt that the accused caused the death of the two children or that he possessed malice aforethought. Consequently, I find that the accused is not guilty of murder. Further, it is difficult to find the accused guilty of manslaughter or any other offence even if he is not charged with it because of the limitations in evidence as explained above.

This is a finding that will cause the family of the two children nightmares for a long time to come. They will not understand why the law has failed them and why they have not received justice. What I want to tell them is that this court, just like any other court, relies on evidence in order to deliver justice to those who come before it. This case is a sad one. It has limitations because of the manner it was investigated and the evidence presented to the prosecutor. The prosecution worked with the tools presented to her; inadequate evidence. Unfortunately, those tools were inadequate to enable her secure a conviction against the accused. It is my feeling too, that this case has suffered the misfortune of delay in determining it. It has also changed hands between judges thereby severing the links necessary for the judge to form opinions on the demeanour of witnesses. The investigating arm also failed the family in that the case was poorly investigated with crucial evidence being left out.

In conclusion therefore, after careful analysis of all the evidence from both sides; the opposing submissions and the law, it is my finding that the accused is not guilty of the two charges of murder. He has been in custody for a long time and it is time he is released from custody unless for any other lawful reason he is held in custody. I hereby acquit John Kioko Musembi of both counts of the murders of M. K and I. K respectively. Orders shall issue accordingly.

Dated, signed and delivered this 10th February 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Macharia, the prosecution counsel

Mr. Wachira, the defence counsel

Mr. John Kioko Musembi, the accused

Mr. Daniel Ngumbi, court clerk