



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 33 OF 2013
(FORMERLY KISII HCCR NO. 19 OF 2011)

BETWEEN

REPUBLIC PROSECUTOR

AND

FOO ACCUSED

JUDGMENT

1. On 15th December 2011 in Mbita District within Homa Bay County, **SAA** (“the deceased”), a child, was in the company of another child walking along a footpath following the deceased’s mother to where she had gone to cut wood for charcoal with **FOO** (“the accused”). After a while the child was found dead under a bush while the accused had disappeared. The accused was arrested on the same day and on 16th December 2011, this court was informed that the accused had murdered the deceased contrary to **Section 203** as read with **Section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. He pleaded not guilty and the trial proceeded with the prosecution calling 10 witnesses while the accused elected to give sworn testimony without calling any witness.
2. The deceased’s mother, **MA** (PW 2), testified that the accused is her sister’s son. She recalled that on the morning of 15th December 2011, she went with the accused to the nearby hill to cut down trees for burning charcoal. While she continued to work, the accused left without saying anything to her. After a while she also decided to go back home. On the way she met **WAO** (PW 1), her sister’s three year old daughter standing alone. She asked her what she was doing and she responded that she was waiting for the deceased. PW 2 recalled that earlier that morning she had left the deceased with PW 1 at home. PW 1 told her that the accused had gone for a long call with the deceased in the bush.
3. Following what PW 1 told her, PW 2 went to look for the deceased near the bush and found the skirt the deceased was wearing that morning. She took the skirt home and found that the deceased was not at home. She told her mother, **GA** (PW 3), that the deceased was missing. She went back to the hills to look for the deceased but did not see her immediately nor did she see the accused. As she was looking for the deceased she heard PW 3 screaming. She quickly went to where her mother was and found the deceased in a bush lying face down with a black, red and green knitted cap next to the body. She recalled that she had seen the accused with the cap but could not recall seeing the accused with the cap on that particular day.
4. PW 3 confirmed that PW 2 was her daughter and that both the accused and the deceased were her

- grandchildren. She recalled that on 15th December 2011 at about 7.00am, PW 2 and the accused left to go and burn charcoal at the nearby hill. She remained at home preparing porridge for the deceased and PW 1. At about 8.00 am, the two children left saying that they were following PW 2. The deceased assured her that she knew where her mother was and that they would be back with their mother.
5. PW 3 testified that at around 10.00am, PW2 came back home carrying the deceased's skirt in her hand. PW 2 asked her where the deceased was and whether the accused had come back home. She responded that she had not seen them from the time they left in the morning. PW 2 told her that she had left PW 1 standing near a bush and that PW 1 had told her that the deceased had accompanied the accused for a long call. PW 2 further testified that she went back calling the accused and the deceased but there was no response. PW 3 followed PW2 back towards the hill but in a different direction looking for the accused and the deceased. When she reached a thicket, she saw the deceased's body lying face down. She was naked on the lower part of the body as she did not have a skirt. She called PW2 who came and started crying. PW 3 stated that she removed the deceased's body from the scene and noted that her neck was twisted. PW 3 testified that many people came to the scene and that the police later arrested the accused and brought him to the scene. The police took the deceased's body. PW 3 recalled that she found a red, black and green cap which the accused was wearing at the scene.
 6. DOO (PW 5) and MAO (PW 6) were at Osodo Centre on 15th December 2011 at about 10.00am. PW 6 had been called by his neighbour, Musa Omollo, who informed him that the accused had killed a child. PW 6 knew the accused as his nephew. Musa told him that the accused was headed towards Sindo Market and that he was wearing a vest and dark blue trousers while carrying a pink shirt. PW 6 told PW 5 what he had been told. PW 5 also knew the accused as the grandson of one YO. PW 5 and PW 6 decided to look for the accused. They went to see a motorbike rider, Dominic Makori Okeyo (PW 7). PW 7 recalled that PW 5 and PW 6 described the accused to him and they decided to ride off to Sindo. As they were riding, they saw the accused who, as had been described, was wearing a vest and dark blue trousers while carrying a pink shirt. When the accused saw them, he decided to run into a maize plantation. They gave chase, cornered him and tied him up. PW 5 then called the Assistant Chief of Kamreri West Sub-location, Moses Abich Ndago (PW 4).
 7. PW 4 recalled that on 15th December 2011 at about 10.30am, he was at home when he was called by PW 6 and informed that a murder suspect had been arrested at Osodo. He proceeded to where the suspect had been arrested and found that he had been tied down. As the suspect was being beaten, he intervened and tried to restrain the crowd. He also called the officer in charge of Lwanda Administration Police Post. PW 4 knew the suspect as the grandson of his uncle, YO.
 8. One of the officers who arrived from Lwanda was Corporal John Donde (PW 9) who testified that on the material day, he was on patrol within Kamreri Sub-location when he received a call from PW 4 informing him that a suspect was being beaten near Osodo Primary School. He boarded a motorbike with another officer and proceeded to a scene near the roadside where they found a suspect who had been tied up and was being beaten by a mob. They intervened and rescued the suspect from the mob.
 9. The AP Officers who arrived from Lwanda proceeded to the homestead of YO, in the company of PW 4, PW 5 and PW 6. They were directed to a bush where they found a girl lying on the ground. There was a black, red and green knitted cap nearby which PW 4 collected. PW 4 did not notice any injuries on the girl. He called the Commanding Officer from Mbita who sent officers to the scene.
 10. On 15th December 2011, Corporal Edwin Nyongesa (PW 10) was on duty at Mbita Police Station. At about 1.00pm, he was instructed by his Commanding Officer to proceed to Osodo Village following a report of murder. He immediately proceeded to the village and was directed to a bush where he found the body of a girl called SAA. He also found a black, red and green woolen cap

and brownish skirt. The family members identified that cap as belonging to the accused while the skirt belonged to the deceased girl. He observed the deceased's body and did not notice any injuries. He took the cap and skirt as exhibits and arranged for the body to be taken to the mortuary for a post-mortem analysis. On the way back to Mbita, he passed through Lwanda AP Post where he re-arrested the accused and took him to Mbita Police Station.

11. On 19th December 2011, PW 10 witnessed the post mortem examination conducted by Dr. Ojwang' at Homa Bay District Hospital mortuary after the body was identified by PW 2 and PW 5. Dr Ojwang had died by the time the matter came up for trial hence in accordance with **section 77 of the Evidence Act (Chapter 80 of the Laws of Kenya)**, Dr Nicodemus Odungo, a senior Medical Officer at Homa Bay County Referral Hospital, presented the post-mortem report. He testified that he had worked with Dr Ojwang and was familiar with both his handwriting and his signature. According to the post-mortem report, the deceased had multiple bruises on the left jaw and on her head with a massive subcutaneous haemorrhage on the neck and back without fractures. An internal examination revealed that the lungs were pink in colour indicating deprivation of oxygen although the ribs had no fractures. The doctor concluded that the cause of death was suffocation due to asphyxia caused by strangulation. Dr Ojwang also examined the accused on 19th December 2011 to determine his mental status. He certified that the accused was mentally fit to stand trial.
12. The accused elected to give sworn testimony when put on his defence. He denied murdering the deceased. He testified that the deceased was his niece and that at the time of her death, she was also staying at the homestead of YO. He further testified that on the morning of the material day, he went to help PW2 to cut trees for charcoal and they proceeded to the hill together. They left PW 1 and the deceased behind. After cutting trees for a few hours, the accused testified that PW 2 requested him to go to Osodo to collect some money from someone she had sold charcoal. Before he reached Osodo, he met three people on a motorbike who started chasing him and threatening to kill him with the clubs and rungu they were carrying. He started running but they caught up with him and started beating him up while accusing him of killing the deceased.
13. The accused recalled that the area Assistant Chief came and asked the crowd to spare him. The accused further testified that when the AP officers came, they removed him from the Assistant Chief's custody and took him to YO's homestead. He was taken to where PW 2 was under a tree carrying her child on her hands. He testified that he heard the child breathing while she had her clothes on. Thereafter he was taken to Lwanda Chief's camp then to Mbita Police Station. He was then charged with murder at the High Court at Kisii. The accused stated that the cap produced in court belonged to him but denied that he had it with him on the material day. He accused the prosecution witnesses of colluding to frame him.
14. The accused further testified that PW2 had been quarrelling with their grandfather over her refusal to be married as he was not happy supporting her. He stated that by the time he was arrested, PW2's husband was to come and reconcile with her but she had refused. He further stated that the deceased was a source of friction between the two as the father wanted to take custody of the child but PW 2 had refused.
15. There are three key ingredients that *must* be present for the offence of murder to be established: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and, third, that the accused committed the act with *malice aforethought*.
16. I find and hold that the fact and cause of death was proved by the prosecution. The deceased was last seen alive in the morning of 15th December 2011 by PW 2 before she left for the hill. Her grandmother, PW 3, also confirmed that she made breakfast for her before she went with PW 1 to follow PW 2. There was no evidence that she was sick or unwell. When PW 2, PW 3, PW 9 and PW 10 viewed the deceased's body, there were no noticeable injuries. I also reject the accused's testimony that he saw the deceased alive and fully dressed after his arrest as this is inconsistent

- with the testimony of all witnesses who viewed the body. The postmortem conducted by Dr Ojwang' revealed that the child had been strangled. I therefore find and hold that the deceased died and that she died as a result of strangulation.
17. As regards the element of who strangled the deceased, no one saw the accused kill the child hence the case against him is grounded on circumstantial evidence. It is therefore important to recall the principle that has been restated by our courts on many occasions, that is, that in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused. 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 (see **Rex v Kipkering Arap Koske & Another [1949] 16 EACA 135** and **Mwangi & Another v Republic [2004] 2 KLR 32**).
 18. The prosecution posited that the accused is the only person who could have murdered the deceased based on the fact that his black, red and green woolen cap was found near the deceased's body so soon after her death and that the accused's conduct after the act was inconsistent with his innocence. Counsel for the accused submitted that the prosecution failed to prove beyond reasonable doubt that the accused murdered the deceased. Counsel contended that the prosecution's testimony was contradictory and inconsistent and that the accused was framed.
 19. The testimony of PW 2 and PW 3 is that on that morning, the accused left with PW 2 to cut trees in the hills. PW 3 was left alone at home with PW 1 and the deceased. The two children went unaccompanied to the hills where the accused and PW 2 were cutting trees. After a while, the accused left PW 2 alone without saying anything to her. It is upon returning that PW 2 discovered that her daughter was missing and the accused could not be found. According to the accused, PW 2 requested him to go to Osodo to collect a debt on her behalf but this issue was not put to her on cross-examination. I therefore reject this aspect of his testimony as an afterthought.
 20. I reject the testimony of PW 1 in light of the fact that she admitted in cross-examination that she had been coached. Further, I note that she stated that she was 5 years old when she was testifying. This means she may have been 1 or 2 years old when the incident took place and she may not have been in a position to independently recall the incident. She was therefore susceptible to suggestion from adults during the time awaiting trial.
 21. I find that the totality of the evidence points irresistibly to the accused. Only four people were on the hill near YO's homestead on the fateful morning. The two children followed the accused and PW 2 who had gone ahead to cut trees for charcoal. The accused is the only person who could have strangled the deceased as he is the only person who had the means and opportunity to commit the felonious act. At the point of strangling the deceased, the accused left his red, black and green woolen cap which was found next to the deceased's body. The accused admitted that the woolen cap was his while PW 3 also testified that she had seen the accused with the cap that morning. The accused, in his defence, did not explain how his cap was found near the deceased's body in the thicket so soon after the deceased's death.
 22. By the time the deceased's body was discovered and alarm was raised, the accused had started fleeing towards Sindo. For the reasons I have stated, I reject the accused's contention that he had been sent by PW 2 to collect a debt. He was in fact running away after strangling the deceased. His conduct was inconsistent with his innocence.
 23. The accused suggested that he was framed. He suggested that PW 2 had a dispute with the father of the deceased who wanted custody of the child. However, this does not explain why any of his relatives would frame him just to deny the deceased of her father's custody. There is no evidence that the accused was framed.
 24. Counsel for the accused submitted that there were several inconsistencies in the prosecution's evidence. One of the examples cited is that there was inconsistent testimony as to whether the

accused was brought back to the homestead after he had been arrested. PW 2 testified that she saw the accused being brought back to the homestead of YO while the accused testified that he saw the child was still alive when he was brought back to the homestead. I am more inclined to believe the testimony of PW 10 who recalled that he collected the accused from Lwanda AP Post and took him to Mbita Police Station. The accused's counsel also cited the evidence that PW 2 removed the deceased's body from the scene and washed it before the police came. Although this may have happened, it did not undermine the prosecution's case as to the cause of death was clearly established and by the time PW 2 found the deceased, she was already dead. In my view, all these contradictions and inconsistencies are immaterial and do not detract from the substance of the prosecution's case as I have outlined.

25. I am satisfied that the prosecution proved the case against the accused beyond reasonable doubt. I find the accused **FOO** guilty of the murder of the deceased **SAA** and I therefore convict him.

DATED and DELIVERED at HOMA BAY this 6th day of April 2016.

D.S. MAJANJA

JUDGE

Mr Ongoso instructed by Ongoso Ayoma and Company Advocates for the accused.

Ms Ongeti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.