



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 40 OF 2014

(Formerly Kisii High Court Criminal Case No. 43 of 2013)

REPUBLIC.....PROSECUTOR

-VERSUS-

JAMES CHACHA RUBIRIA..... ACCUSED

JUDGMENT

Introduction:

1. On the 23/03/2013, the body of **PS P**, a minor aged around nine years old (hereinafter referred to as "***the deceased***") was found in a water reservoir near [particulars withheld] Girls Secondary School in [particulars withheld] Village within Kuria West District of Migori County.
2. Following police investigations, **JAMES CHACHA RUBURIA** (hereinafter referred to as "***the Accused***") was arrested and a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code preferred against him. The accused pleaded to the information on 09/05/2013 before *Sitati, J.* in the High Court at Kisii. He denied the offence and a trial was ordered. The testimonies of three witnesses were taken by *Sitati, J.* before the case was transferred to this Court upon the establishment of a High Court station. They were **Isaac Bunyinge** (PW1), **Musa Bohembwe** (PW2) and **Peter Nyangoya Magaiwa** (PW3).
3. The case was then handled by *Majanja, J.* who on complying with **Section 200** of the Criminal Procedure Code, the accused opted for the case to start afresh and an appropriate order was made.
4. In a bid to prove the charge, the prosecution called seven witnesses and upon the close of its case the Court in a considered ruling placed the accused on his defence.
5. At that point in time, *Majanja, J.* left this station and the matter came before me for directions in compliance with Section 200 of the Criminal Procedure Code. The Accused opted to proceed on with the hearing of the case from where it had reached and the matter proceeded for the defence hearing. The accused elected to give sworn testimony and called one witness.
6. For purposes of understanding this case with a view of enabling a good discourse thereof, it is imperative to revisit the evidence as tendered during the trial.

The Trial:

(a) The Prosecution's case:

7. The father to the deceased testified as **PW1**. He was one **P N M**. PW1 knew the accused as his neighbour in their [particulars withheld] village. It was PW1's testimony that he left his home in the morning of 23/03/2013 and returned in the evening. On arrival at his homestead PW1 did not find the deceased and upon enquiry he learnt that the deceased had gone to buy sugar cane at the accused person's sugarcane plantation but was yet to return. That was about 06:30pm. Armed with a *panga* and a torch, PW1 proceeded to look for the deceased at the sugarcane plantation as well as at the home of the accused, but he did not find him. PW1 did not either find the Accused as well as his wife at their homestead. He then searched for the deceased at the nearby river but did not find him either. PW1 then returned to his homestead. That was around 07:00pm.

8. On return, PW1 met his wife one **S M P** (not a witness) who was not at home when he left to look for the deceased and in a joint effort PW1 and his said wife began the search for the deceased once again. This time round, PW1 and his wife proceeded to the water reservoir which supplied water to [particulars withheld] Girls Secondary School and which was next to the home of the accused. They saw a shirt, short and two pieces of sugarcane next to the water reservoir which they readily recognized as those belonging to the deceased, their son. On checking them they realized that the clothes were normal but wet. They did not however see any blood stains or any sort of abnormality on the clothes.

9. PW1 suspected that the deceased might have drowned in the water reservoir and decided to find out. He removed his clothes and entered into the reservoir. The water reservoir was measuring about 15 feet wide and 15 feet deep. As he started to swim, PW1 felt a human leg and pulled it up. With the assistance of his wife they managed to pull the body out of the water reservoir and found out that it was the body of their son, the deceased. The body was naked. On inspecting the body PW1 noted that the deceased's eyes were injured and that he had been choked. He also noted faeces oozing from the deceased's anal opening. PW1 further noted some other injuries on the face, but saw no active blood bleeding.

10. **PW1** and his wife raised alarm and almost the entire village responded and gathered at the scene. When the Area Chief also arrived, he called the police who arrived at around 11:30pm and took the body to the mortuary. PW1 identified the deceased's body for postmortem on 01/04/2013 and also recorded a statement with the police.

11. The whereabouts of the deceased on the 23/03/2013 were partly alluded to by the deceased's elder brother one **M B (PW2)**. He confirmed that at around noon as he had been sent to fetch some water at the river by his mother, he met the deceased with his friend one I B grazing three cows belonging to the accused as the accused was working on his sugar cane farm. The deceased and his said friend were in the farm of the accused which was next to the river. PW2 fetched some water and left the deceased with his friend behind. PW2 again met the deceased later in the early evening. It was around 06:30pm. PW2 saw the deceased passing near where he was playing football with his friends and on asking him where he was off to, the deceased informed PW2 that he had been sent by the accused to buy some airtime for him. Unknown to the deceased what was awaiting him shortly, the deceased asked PW2 to accompany him to the shop but PW2 told him that he was rushing back to their home. PW2 however asked the deceased to hurry up and find him at their home.

12. PW2 reached home at about 07:00pm and was sent by one **D M** (his brother's wife and not a witness) to go buy milk at Nyabohanse trading center. PW1 then learnt that his family members were looking for the deceased and since he had seen him not long ago, he informed them where he last saw him. PW2 then rushed to the shop and bought the milk and returned home about a half an hour later. That was around 07:30pm. On arrival at their home, PW2 heard her mother screaming near the river which was around 100 metres away and he rushed there. He was shocked to find his brother, the deceased, lying down; dead!

13. On observing the deceased's body, PW2 noted that it was naked and had injuries on the chin and eyes and that some blood was oozing from the anal orifice. PW2 readily recognized the clothes which the deceased had worn by the daytime as those which were at the scene which were a red shirt and a pair of shorts. According to PW2, the body of the deceased was later on collected by the police and he recorded

his statement with the police thereafter.

14. Whereas PW2 was not aware when the accused was arrested, he recalled seeing him working on his farm on the day the deceased was buried.

15. **I B** testified as **PW7**. He was a minor aged 10 years old and the one who had spent a better part of the day (that is 23/03/2013) with the deceased. Although he had earlier testified as PW1 before *Sitati, J.*, his attendance before *Majanja, J.* was however preceded by some drama, so to say. PW7's father, one **W M** (not a witness) was bonded by the police to avail PW7 before Court. Although W M attended Court on 20/07/2015 in answer to the police summons, he did not avail PW7 and informed the Court that PW7 was in the custody of the mother in Nakuru. He sought for more time so as to avail PW7. The matter was then adjourned to 24/07/2015. PW7's father was however released on a personal bond of Kshs. 100,000/= so as to ensure that he attended Court as ordered.

16. Come 24/07/2015, W M did not attend Court and likewise PW7 was not availed. The Court then issued a warrant of arrest against the said W M who was arrested and arraigned in Court on 02/09/2015. W M informed the Court that PW7 was still in Nakuru with the mother and unfortunately he was yet to find him so as to avail him to Court. He was ordered to forfeit the sum of Kshs. 100,000/= for failure to produce PW7 and in default to serve 7 days in prison. Witness Summons were however issued to W M's wife one **M B M** (also not a witness). PW7's mother then appeared in Court on 03/09/2015 but without PW7 and she was also bonded to appear before this Court's Deputy Registrar with PW7 on 19/09/2015. However on 14/09/2015 PW7's father appeared before this Court's Deputy Registrar with PW7 and he was again bonded to avail PW7 on 16/10/2015 since the High Court was not sitting on that day. This time round PW7's father complied with the order of the Court.

17. As PW7 was a minor, the Court conducted a *voir dire* examination and just like *Sitati, J.* found PW7 intelligent enough but did not understand the nature of an oath. PW7 was then ordered to give unsworn testimony.

18. PW7 recounted that he had gone to buy sugarcane with the deceased at the farm of the accused on the day the deceased died but he could not remember the date. The farm was near a river. He recalled that before they bought the sugar cane, the deceased and himself were requested by the accused to untie some cows which belonged to the accused and graze them. They complied as the accused was seated in the farm. After some time the accused asked them to again tie the cows and they did so.

19. According to PW7, the accused then sent the deceased to buy some airtime for him from a nearby shop. PW7 waited for the deceased at the farm. On return the deceased handed over the airtime to the accused. The accused gave PW7 and the deceased two pieces of sugarcane each and he specifically told PW7 to go home and take care of the baby. PW7 left the accused with the deceased at the farm as he left.

20. As the night fell PW7 was approached by two men who sought to know the whereabouts of the deceased. PW7 informed them that he truly had spent a better part of the afternoon with the deceased, but he had left the deceased with the accused at the farm of the accused as the accused told him to leave for PW7's home and take care of the baby. PW7 however did not know who the men were as the night had already fallen. Come early the next morning, PW7 was approached by the accused who told him not to say anything about the deceased and promised to give him Kshs. 10/=. PW7 was however not given the money that morning. PW7 was later on taken to the police where he recorded his statement. PW7 did not however see the deceased alive again as the last time he recalled to have seen him was when the deceased was in a coffin at the funeral. PW7 identified the accused in Court as the one who had given them sugar cane at the farm and who had remained with the deceased as he left the farm.

21. The deceased's post mortem examination was conducted by **DR. VITALIS K'OGOTU (PW4)** on 28/03/2013 at the Pastor Machage Memorial Hospital Mortuary. The deceased's body was identified by PW1 and one **GABRIEL MWITA MARWA** (not a witness). PW4 made general observations on the deceased's body and noted that it was a body of a male African of about 9 years old in good nutritional status. It was 2 feet and 7 inches in length and it did not have any clothing. The body had been well

refrigerated.

22. On examining the external appearance of the body, PW4 saw bruises on the upper eyelids of both eyes with conjunctural hemorrhages on both eyes. There was also a cut on the right eye and some abrasions and bleeding on the upper lip. There were bruises on the neck interiorly. When PW4 opened the body, he observed that the lungs were normal with no fluid. He noted hematoma on the muscles of the neck. PW4 formed the opinion that the deceased's cause of death was asphyxia secondary to strangulation. He further explained that Asphyxia is a medical term which refers to the lack of oxygen in the brain and body tissues. PW4 signed the Post Mortem Form which he produced as an exhibit.

23. On cross-examination PW4 confirmed to have thoroughly checked the deceased's body both externally and internally and did not see any bruises or bleedings on the anal area.

24. **No. 86730 PC EDWIN CHEROTICH** testified as **PW3**. He was the arresting officer. He testified that on 24/03/2013 he was attached to Isebania Police Station and was manning the Report desk. PW3 confirmed to have received the accused who was in the company of another person at about 11:00am at the police station. The accused introduced himself and the other person as his brother and reported that he had been assaulted and injured by members of public at his village in [particulars withheld] . PW3 observed that the accused had visible injuries all over his body and had treatment notes from Isebania Sub-District Hospital.

25. As PW3 had information of the deceased's death from the [particulars withheld] area and that a suspect had been beaten up by members of public, he interrogated the accused and later on placed him in police cells. PW3 informed the OCS of the development and the OCS directed that PW3 and one Corporal Kimei do escort the accused to St. Joseph's Mission Hospital (also known as '**Ombo Hospital**') for treatment. PW3 complied and escorted the accused to Ombo Hospital where he was treated and later they escorted him back to the station and placed him in cells. PW3 produced the treatment notes which the accused brought to the station from Isebania Sub-District Hospital as an exhibit and identified the accused in Court.

26. The investigations into the deceased's death were undertaken by one **No. 65331 PC FESTUS MUSEMBI** who testified as **PW5**. By the time PW5 carried out the investigations he was attached at Isebania Police Station but was later transferred to Nyangusu Police Station. PW5 informed the Court that at around midnight on 23/03/2013 while on duty at the Isebania Police Station, he received a call from the Assistant Chief of [particulars withheld] Sub-Location who informed him that he had been informed by his villagers that a body of young boy had been found dead in a bore hole. PW5 mobilized his colleagues and proceeded to the scene. He found a naked lifeless body of a boy lying near a water reservoir. He also saw some clothes near the body together with two pieces of sugarcane. The police took the body to Pastor Machage Hospital Mortuary for preservation and autopsy.

27. It was the evidence of PW5 that he returned to the scene in the morning of 24/03/2013 at around 10:00am. where he managed to interrogate some members of the community on the death of the deceased. PW5 recorded statements from witnesses in the course of the investigation. He then narrated to the Court how the events leading to the death of the deceased unfolded which was a summary of the evidence by the other witnesses. PW5 confirmed that he was present during the autopsy and that with the consent of the accused, he took him for a mental assessment at Kisii Level 5 Hospital. He later on preferred the charge against the accused. PW5 reiterated the evidence of PW3 on how the accused was arrested. He also recalled seeing the accused at around 02:20pm on 24/03/2013 as he was being escorted to hospital for treatment and learnt that the accused was a murder suspect.

28. When PW5 escorted the accused to Kisii Level 5 Hospital for mental assessment on 17/04/2013, it was one **DR. JOSEPH EGALA JUMBA (PW6)**, a Consultant Psychiatrist who conducted the examination. PW6 concluded that the accused was fit to stand trial. He filled a P3 Form to that effect and produced it in Court as an exhibit.

29. The prosecution then rested its case with the foregone evidence and in a ruling rendered on

16/11/2015 the Court placed the accused on his defence.

(b) The Defence case:

30. The accused opted for and gave sworn testimony and called one witness. It was his evidence that he was a well known farmer who grew sugar cane for purposes of selling to the community. His farm was in [particulars withheld] village and it bordered a river. The accused testified that on 23/03/2013 he indeed met the deceased who was in the company of his friend, PW7. By that time the accused was in the company of the deceased's father, PW1, whom they had planned to take a walk together since they were good neighbours. The accused also confirmed having sent the deceased to buy for him some airtime worth Kshs. 20/= and on the deceased's return the accused had asked the deceased together with PW7 to untie his cows and graze them just near the river. As the deceased and PW7 acceded to the request by the accused, the accused went into his farm and cut four pieces of sugar cane which he gave the deceased and PW7 two pieces each.

31. As the accused gave the deceased and PW7 the sugar cane and before they left, the accused elder brother's son one **C N R (DW1)** arrived at the farm as he too wanted some sugar cane. The accused told the Court that while he was in the company of PW1 and DW1, they all saw the deceased and PW7 leave his farm with their sugar cane as he proceeded back to his homestead together with PW1 and DW1. The accused further stated that after a short while he left his home with PW1 and they went to take some local brew at a nearby joint. As the two joined other revelers for the drink, PW1's wife came and told PW1 that something bad had happened. It was at that point in time that PW1 and the accused left their drinks and followed PW1's wife who led them to the river. That was around 06:30pm.

32. The accused testified further that it was PW1's wife who told them that the deceased got into the river and had not resurfaced. Both the accused and PW1 were alarmed but since the river was deep none of them was ready to enter into and search for the deceased. By that time PW1's wife was screaming and villagers gathered at the scene. It was one young man one **CHRISTOPHER JOHN** (not a witness) who eventually got into the river and after a real hectic search managed to come across a body but he could not lift it up as the river was deep. PW1's wife rushed to her home and came back with two ropes which the said **CHRISTOPHER JOHN** tied around the body and the people pulled it outside the river. According to the accused, the body was tied below the armpit across to the neck. On retrieval of the body, the accused viewed it and noted that it had bruises on one side of the head and that was due to the act of pulling the body from the river. He also observed that the deceased's stomach was full of water and he witnessed PW1 standing on the deceased's body and forced the water out. That was before PW1 left the scene to make a report at the local police station. The accused later witnessed the deceased's body taken away by the police from the scene at around 07:30pm.

33. The accused described the scene where the deceased's body was found as near a water reservoir and which place was clear and open and anyone could see it from a distance. Further the reservoir was a busy public place with a lot of activities including washing of clothes as well as vehicles. According to the accused the reservoir can be easily and clearly seen from PW1's homestead.

34. The accused testified that after the deceased's body was taken away by the police, he accompanied the other villagers and gathered at PW1's home to console the family for the loss of their child where he spent the night there. In the morning a Burial Committee was set-up where he was appointed its Chairperson. The committee had a total of 12 members and it put down plans towards raising funds from the community to assist in the funeral arrangements. They agreed to send the members around the village to collect some money from the homesteads. The committee members returned later at around 11:00am with a total collection of Kshs. 60,000/=.

35. The accused together with the other committee members continued with the funeral arrangements up to around 04:00pm when an incident occurred within PW1's homestead out of which the accused was injured. PW1's two sons, **R** and **G** started a fight. The accused asked PW1 to intervene and restore peace but PW1 feared as the fight was fierce and PW1 was threatened with dire consequences on intervention. It was the accused who then intervened and got hold of **G** and pulled him away and rescued **R**. As **G** was so

incensed as to why the accused had intervened in the fight, Gesambi knocked the accused with a stone on his mouth and several of his lower teeth instantly came out. That it was PW1 who rushed the accused to Nyanaraka Hospital and abandoned him there. The Accused person's brother then went to assist him at the hospital who later on escorted the accused to the Isebania Police Station and lodged a complaint. The police asked the accused to seek medical attention and he proceeded to the Ombo Hospital where he was treated and discharged and returned to his home.

36. The accused nursed the injuries at his home for about four days and then decided to go back to Isebania Police Station to get a P3 Form. On reaching there he was instead arrested and booked into the cells without any explanation given to him. He was later on taken to Kisii Level 5 Hospital for mental assessment and then arraigned in Court where he was charged with the murder of the deceased.

37. The accused denied killing the deceased and to him the charge was tramped up on him so as to make him not sustain the assault case against the deceased's family.

38. On cross-examination, the accused denied that his home was near the reservoir and estimated it to be around 450 metres away. He reiterated that he was at the scene of the incident when the police arrived and collected the deceased's body and that the police did not interrogate anyone at that point in time. On being referred to the treatment notes from Isebania Sub-District Hospital, the accused stated that the same were filled in with the help of his brother who was not even at the scene since he was so badly injured and was not able to speak until one week later. He also stated that the reason why he was referred to Ombo Hospital was that there was no doctor at the Isebania Hospital.

39. In response to a question as to who first lodged a complaint with the police between the accused and PW1's family, the accused emphatically stated that he was the one who did so first as he lodged his complaint on 24/03/2013 at around 04:00pm whereas the PW1's family only lodged their complaint later at 05:00pm. but on the same day.

40. On being re-examined by the defence Counsel, the accused admitted having gone to the Isebania Sub-District Hospital on 24/03/2013 and that he was only observed and referred to Ombo Hospital and that he was taken to the Ombo Hospital by PW5. The accused reconfirmed that the reservoir where the deceased died was at an open place and it could be seen from a distance. He asked the Court to acquit him of the charge and set him at liberty.

41. As the defence Counsel had marked PW3's and PW7's statements to the police, both of them were produced as defence exhibits.

42. In support of defence case was one **C N R** who testified as **DW1**. The accused was DW1's uncle as he was a younger brother to DW1's father. DW1 recalled that on 23/03/2013 at around 04:00pm he visited the accused at his farm as he wanted some sugarcane to chew. He truly met the accused grazing his cows with three children who were familiar to DW1 but he did not know their names. DW1 witnessed the accused giving some pieces of sugarcane to the three children and the children left the accused and himself at the farm. As the three children went away towards the direction of the water reservoir, the accused and DW1 walked back to the homestead of the accused.

43. At around 06:00pm DW1 heard screams from the direction of the water reservoir and rushed there only to see that it was one of the boys he had seen earlier at his uncle's farm that had drowned. He confirmed seeing the accused at the scene after the boy drowned.

44. On cross-examination, DW1 admitted that he hailed away from the accused person's homestead and that is why he did not know the names of the children he met at the farm with the accused. DW1 however confirmed that the accused was not in the company of PW1 when he met him at the farm with the children and even when he walked with him to his homestead. DW1 further clarified that the reservoir, which he knew too well, was not at an open place as it was covered and hidden by some sugarcane and banana plants.

45. On re-examination DW1 reconfirmed that the place around the reservoir was well known to him and the reservoir did not stand on an open place.

46. And with that evidence, the defence case was closed.

The Parties Submissions:

47. The defence filed written submissions which it later on highlighted whereas the State made oral submissions. The defence revisited the entire evidence on record and made reference to case law in submitting that the offence of murder was not proved and urged this Court to acquit the accused. The cases of *Sawe -vs- Republic (2003) 1 EA 277*, *R -vs- Kipkering arap Koske & Another 16 EACA 135*, *Dhalay -vs- R (1995-1998) 1 EA 29 (CAK)* and *Prosecutor -vs- John Ndungu Njoki & Another (2012) eKLR* were referred to in support of the call to acquit the accused.

48. In its oral highlights, the defence emphasized that the evidence of PW7 could not be relied upon as it contained newer and invented evidence which was not contained in his statement to the police and that PW7 was only coerced to attend Court under a warrant of arrest. It was also submitted that there was no evidence that the deceased was sodomized contrary to what the prosecution had alleged.

49. The State on its part readily admitted that the evidence was circumstantial but submitted that it was so water-tight and placed the accused as the only person who could have committed the murder of the deceased in the circumstances of this case and hence prayed for a conviction.

Analysis and Determinations:

50. I have carefully considered the evidence on record as well as the exhibits and the Counsels' submissions. As the accused is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will therefore consider each of the issues independently.

(a) Proof of the fact and cause of death of the deceased:

51. It is not in dispute that the deceased died. That fact was proved by PW1, PW2, PW4, PW5, PW7, the accused and DW1. On the cause of the deceased's death, PW4 confirmed to have carried out a post mortem examination on the deceased on 28/03/13 at the Pastor Machage Hospital Mortuary and formed the opinion that the deceased's death was as a result of strangulation.

52. Since there is no any other evidence contradicting that of PW4, this Court hence concurs with the medical finding that the deceased died as a result of strangulation.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused:

53. This issue is aimed at establishing whether it was the accused who actually caused the death of the deceased and if so, whether it was by an unlawful act or omission.

54. As rightly pointed out by PW5, the defence and the prosecution, the evidence which tend to connect

the accused with the deceased's death is purely circumstantial. I must therefore closely examine the evidence on record, not only as my normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;

(ii) The 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.

55. The foregone principles were set out in the *locus classicus* case of ***R -vs- Kipkering arap Koske & Another (supra)*** and have repeatedly been used in subsequent cases including the Court of Appeal cases of ***GMI -vs- Republic (2013) eKLR, Musii Tulo Vs. Republic (2014) eKLR*** among many others.

56. The Court of Appeal in the case of ***Musii Tulo (supra)*** in expounding the above principles expressed itself as follows:-

“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus:-

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

57. The chain of events leading to the arrest and arraignment of the accused before this Court came from the seven witnesses whose testimonies I have immortalized in great detail above. There are several facts which are not in dispute in this case. For instance it is not in dispute that the farm belonging to the accused abutted into a river and that along that river there was a specifically prepared water reservoir which supplied water to the Nyabohanse Girls Secondary School measuring about 15 feet width and 15 feet deep in size. Further, the farm belonging to the accused had sugar cane which the accused used to sell to people just for purposes of chewing. Equally it is not in dispute that on 23/03/2013, the deceased and PW7 had an encounter with the accused in the farm belonging to the accused when the two had gone to buy sugarcane as usual and that they grazed some cows belonging to the accused. There is also consensus in that the accused sent the deceased to buy some airtime for him and that the deceased complied. There is equally no dispute that the accused gave both the deceased and PW7 two pieces of sugarcane each while still in his farm and that all those events occurred as from 04:00pm onwards.

58. What appears to be in dispute is what exactly happened after the accused gave the deceased and PW7 the pieces of sugarcane. According to the accused in his testimony, this is what happened: -

“..... I then asked the deceased and Isaac to go and untether the cows as I was going to get them the sugarcane.....I then returned with four pieces of sugarcane and gave each two of them. As the two were about to leave another boy called R who is my elder brother's son came to where we were. He is C R . He also wanted sugarcane. I cut one piece of sugarcane for him and I saw the boys heading to their homes. The two boys left P N (PW1), C R and myself behind and then we went back to my home.....”

59. When DW1 testified on what transpired at the farm after the boys were given the sugarcane, he stated that: -

“On 23/03/2013 at around 04:00pm I visited the accused in his farm.....I met him grazing his cattle with three children.....The accused person then went in and cut cane for all of us and gave us all. The three children left us behind and then I walked back to the accused person's home with him. The children went to a certain place where there was a water reservoir.....”

60. The two foregone versions although in essence were contradictory were indeed at total variance with that of PW7 who had the following to say after they were given the pieces of sugar cane :-

“.....He gave us two pieces of sugarcane each. He told me to go home. He remained with P talking. He told me to run home to take care of the baby...”

61. As stated earlier on, the evidence of the accused and his witness, DW1 does not add up on the turn of events. I say so because of some material contradictions which cannot be logically reconciled. For instance first, the accused dealt with two children that is the deceased and PW7 whereas DW1 saw three children with the accused. DW1 even witnessed the three children leave the farm after they were all given some sugar cane. Second, the accused stated that he was in the company of PW1 and DW1 at the farm as he gave the sugar cane to the deceased and PW7 and witnessed them leave as the three of them also left for his home whereas DW1 stated that PW1 was not at the farm but it was only himself and the accused as the three children left.

62. In view of those contradictions, the only logical conclusion one can make is that either DW1 was not at the farm or if he was truly present at the farm then either him or the accused was not truthful to the Court since it is not reasonably possible for two people at the same place to have seen completely different things in the circumstance of this case. The evidence of the accused and DW1 on that aspect is hence unreliable and is hereby rejected.

63. That leaves the Court with the evidence of PW7. However that evidence was challenged by the defence on two fronts. First that it contained other and further evidence which was not in the PW7's statement to the police and second that PW7 was compelled to attend Court to testify by way of a warrant of arrest. On those two grounds I was urged to reject the evidence of PW7.

64. I will now deal with the two objections. On the contention that PW7's testimony in court contained other and further evidence that what was contained in his statement to the police, I will as a starting point refer to the record and remind myself that indeed PW7 testified before Court on two occasions; that is before *Sitati, J.* and *Majanja, J.* Both Judges conducted *voir dire* examinations on PW7 and concurred that PW7 was intelligent but since he did not understand the meaning and nature of an oath, they both ordered that PW7 gives unsworn testimonies. Those findings on PW7's intelligence were however not challenged. As to whether PW7 was truthful in view of the evidence he rendered in Court compared to what was recorded in his statement with the police, this Court will readily adopt the reasoning by the Court of Appeal in the case of ***Dickson Mwangi Munene & another v. Republic (2014) eKLR*** on the issue when it stated thus;-

“ 50. Although a witness first statement made soon after the incident he witnesses is supposed to contain all the details, a lot also depend on the question put to him by the officer who records his statement and the circumstances under which such statement is made. In this case therefore, depending on the question put to them, PW3 and PW4 could have omitted some details from their first statements. It should also be noted that the witnesses must have been still under shock from the events which had just taken place.”

65. I have also looked at the testimonies of PW7 as he testified before the two Judges given that they both form part of the record and I find a lot of consistency in the flow of the evidence in general.

66. In respect to the contention that the PW7 was compelled to testify, this Court would wish to set the record straight. It is not correct that PW7 was brought to Court to testify under a warrant of arrest. As PW7 was a child, he remained in the care and custody of his parents. PW7 was not bonded at any one time to attend Court and failed. The police summons were issued to PW7's parents. The failure to comply

with the summons and Court orders is what brought about the issuance of the warrant of arrest against PW7's father. That was a legal process taking its course. If by any chance therefore it may be taken that PW7 avoided attending Court to testify then any such inference can only be made against his parents and not PW7. Further, I have not seen anything on the record which may make this Court imply that PW7, by his own voluntary action refused to attend court until when he was compelled under a warrant of arrest neither is there any iota of evidence to the effect PW7 did not tell the Court the truth. PW7 withstood cross-examination into his statement to the police and boldly and confidently stated that:-

“.....What I have said in court is what I have remembered. What I have said is what I know.....I did not see Sogoro (Accused) beating P (deceased).....”

67. This Court therefore believes the testimony of PW7 as truthful on account of the events that unfolded at the accused person's farm after the accused gave PW7 and the deceased two pieces of sugar cane each.

68. However the fact that the accused was left with the deceased moments before the deceased was found dead cannot be said to confirm that it was the accused who strangled the deceased. Going by the legal precedents referred to above, all 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. Had the encounter between PW7 and the accused ended at the farm when PW7 left the accused with the deceased, this Court would not have been in any difficulty in resting the matter at this point with the verdict that the connection between the accused and the deceased's death was not firmly established.

69. There is however something more to that in this case. PW7 told this Court that the accused approached him at his home in the morning of the following day and told him not to tell anyone about the deceased and he offered to give him Kshs. 10/=. I have carefully considered the cross-examination on the issue and found that the same did not go deeper to unravel that assertion by PW7 in creating any reasonable doubt as to its truthfulness. I equally find that PW7 was truthful in stating that the accused approached him the following morning and asked him not to say anything of and concerning the deceased.

70. The question which now begs an answer is why the accused told PW7 not to tell anyone about the deceased. If the accused was truthful in what he stated in his sworn testimony of and concerning him and the deceased then he would be ready to stand tall anywhere and restate that position. The act of the accused approaching PW7 and telling him not to tell anyone about the deceased and to further offer him Kshs. 10/= sent different signals altogether. A reasonable person would fairly conclude that the accused was out to conceal something about the deceased and himself. But what could that have been?

71. From the evidence the logical inference to draw is that the accused was the last person, and not one of the last persons, to be with the deceased before the deceased met his death. I say so because PW2 met the deceased on his way to buy the airtime for the accused and that was around 07:00pm and PW7 parted ways with the deceased after the deceased had taken the airtime to the accused and PW2 learnt about the death of the deceased at around 07:30 pm. Further PW1 confirmed that he retrieved the deceased's body from the water reservoir at 07:00pm or thereabout. In so finding I have addressed my mind to the fact that the deceased did not drown in the water reservoir but was strangled elsewhere and then thrown into the reservoir with the obvious intent of concealing the real cause of death and that act must have equally taken some time. That would explain why the deceased died within such a short span of time after he was left with the accused since had the deceased actually drowned then that act would have taken some considerable time and may be the deceased would have been found by his parents still struggling in the water well before drowning. It has also to be remembered that according to the accused the reservoir stood on a very open place with many people and activities and with that scenario the deceased would have definitely been rescued before 'drowning'.

72. Having found so, I will now endeavour to interrogate several other aspects of the defence tendered by the accused so as to satisfy myself if there is any weak point in the chain of the events leading to the death of the deceased. One of issues is whether the charge of murder was preferred against the accused so as to

silence him from pursuing a criminal complaint against one of PW1 son's who had allegedly assaulted him. The accused stated that he was injured by the one G when he was in the process of separating him from fighting with his brother R. The accused was very forthright that it was the said G who hit him with a stone and not a group of people or a mob and that PW1 took him Nyamaraka Hospital and abandoned him there. It was the testimony of the accused that he was later on taken by his brother to Isebania Police Station where he lodged a report and then proceeded to Ombo Hospital where he was treated and discharged after which he went to recuperate at his home since he could not even talk for a whole week. To the accused, he returned to the Isebania police station after four days to get a P3 Form but he was instead arrested and eventually charged.

73. Whereas the accused stated that he could not talk after he was injured and that the history in the treatment notes from Isebania Sub-District Hospital was given by his brother who was not even at the scene, PW3 testified that he was the one who received the accused at the report office and that the accused introduced himself and also introduced his brother and complained that he had been beaten by a mob at his [particulars withheld] home and that he had been treated at the Isebania Hospital before proceeding to the police station. That evidence of PW3 was in tandem with the history in the treatment notes which the accused handed over to the police.

74. Further PW3 noted that the accused had injuries all over his body unlike what the accused indicated that he was only injured on his mouth. I have again carefully perused the treatment notes and they tend to tally with the testimony of PW3. The notes reveal that the accused had multiple swellings and injuries all over his body and that he had been referred for an X-ray. Further, if it was true that the accused was abandoned at a certain hospital by PW1 and that he could not speak then one wonders how the accused communicated with his brother who came to his aid at the hospital.

75. The accused was also not forthright in explaining how he eventually reached Ombo Hospital. In his examination-in-chief he stated that he went to the Ombo hospital with his brother after lodging the complaint with the police who asked him to seek further treatment and that there were no doctors at the Isebania Sub-District Hospital. During cross-examination, the accused maintained that there were no doctors at the Isebania Sub-District Hospital and that is why PW5 escorted him to Ombo Hospital. On re-examination the accused stated that he was indeed examined at the Isebania Sub-District Hospital and referred to Ombo Hospital for treatment and that he was taken to Ombo Hospital by PW5 and not his brother as he had alleged during examination-in-chief. But PW5 denied having taken the accused to hospital and stated that he saw the accused being escorted to hospital by PW3 and one Corporal Kimei and learnt that the accused was a murder suspect. On the other hand PW3 confirmed to the Court that he indeed arrested the accused when he went to the Isebania Police station and on the instructions of the OCS escorted the accused to Ombo Hospital with Corporal Kimei where he was treated and they returned him to the station. One may also pose here and ask why the accused was escorted to Ombo Hospital by the police, as he alleged under cross-examination and re-examination, and yet he had not been arrested. It is clear that the accused avoided stating clearly what happened that led him to be escorted to the hospital by the police and that makes this Court believe the evidence of PW3 on why the accused was escorted to hospital by the police. The accused was under arrest by then.

76. On an equal footing, his contention that he was the first one to lodge a complaint with the police on 24/03/2013 and not the family of deceased cannot hold. The accused confirmed that he was injured on 24/03/2013 at around 04:00pm whereas there is ample evidence on record that the death of the deceased was reported to the police by the Area Chief as early as 08:00pm on 23/03/2013 upon which report was acted on and the police visited the scene of crime and collected the deceased's body.

77. As I noted herein above, the defence was also riddled with unresolved contradictions. Apart from the contradiction between the Accused and DW1 on whether or not PW1 was with the accused at the accused person's farm and the other contradiction as to whether there were two or three children at the farm when DW1 arrived there, there was again no consensus on whether the water reservoir was visible from a distance or not. Whereas the accused stated that the reservoir stood at an open ground and could be easily seen from a distance, DW1 was not of that view. Amid appearing as confused and not taking a definite stand on the issue, DW1 eventually stated that the reservoir was not at an open ground as it was

hidden by some banana and sugarcane plants. If DW1 knew the place for sure, it would not have been so hard for him to be forthright.

78. There was also the issue as to how PW1 came to know of the deceased's death and whether or not the accused was present when the deceased's body was retrieved from the reservoir. The accused stated that it was PW1's wife who came to where he was taking some local brew with PW1 and informed PW1 that something bad had happened and led PW1 and himself to the reservoir. PW1 on the other hand stated that it was as a result of a search with his wife that led to where the deceased was. PW1's version was corroborated by PW2. Given that there were unresolved inconsistencies between the evidence of the accused and DW1 as to whether or not PW1 was ever with the accused at any point in time, the allegation by the accused cannot be said to be holding. I also remain alive to the fact that the accused never raised that issue with PW1 when he testified. This Court therefore finds that PW1 came to know of the death of the deceased after the search with his wife and not that PW1 was informed by his wife. As to whether or not the accused was at the scene when the deceased's body was retrieved, there is again no consensus. The accused and DW1 stated that the accused was present during the exercise whereas PW1 and PW2 denied his presence. PW1 stated that he was the one who retrieved the body with the assistance of his wife well before they raised alarm and people gathered. The accused stated that the retrieval was made by one Christopher John. Again despite hearing PW1 alleging to have retrieved the deceased's body by himself, the accused never raised that issue during cross-examination. PW2 was among the very first people to respond to the screams by PW1 and his wife and when he reached at the reservoir he saw that the deceased's body had already been retrieved and was lying outside the reservoir. Again PW2 was not examined on how the body was retrieved from the reservoir.

79. If the accused knew that he would raise the above twin issues in his defence, then it was imperative for him to raise the issues earliest possible, at least during cross-examination, so as to give room to the prosecution witnesses to respond otherwise the logical inference would be to regard the issues as afterthoughts. There was also the explanation given by the accused as to how the deceased sustained the injuries on his body. According to the accused the injuries were caused by the ropes which were tied around the deceased as he was being pulled out of the water as well by PW1 when he stepped on the deceased's stomach and gushed water out of the body. That explanation would have perfectly fitted had the deceased truly drowned in the reservoir.

80. However according to PW4 the deceased did not drown but was strangled and then thrown into the water. The issue of PW1 having stepped on the deceased's stomach and water gushing out does not hence arise at all. It was therefore a false statement by the accused. Infact PW4 was quite categorical that the inside of the deceased's body, including the lungs and stomach, did not contain any foreign fluid. As that aspect of the defence also fails, it goes a long way to buttress the fact the accused was likely not to have been at the scene when the retrieval of the body took place.

81. The above analysis brings out the defence as not having been carefully designed and crafted. It is highly doubtful and this Court finds that the same has failed to shake and create any reasonable doubts on the prosecution's case. The same be and is hereby disregarded.

82. The upshot of the foregone discourse is that the events in this case taken cumulatively 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. I equally find that there are no other co-existing circumstances which would weaken or destroy the above inference.

83. As I come to the end of the issue on whether the death of the deceased was caused by the accused, I wish to put the record straight by stating that nowhere did the prosecution allege that the deceased was sodomized. The record has it that PW1 stated that on observing the deceased's body he noted faeces oozing from the deceased's anal orifice whereas PW2 instead saw that it was blood which was oozing out from the said orifice. The contention and submission on sodomy were hence misplaced and are hereby dismissed.

(c) Proof that the said unlawful act was committed with malice aforethought:

84. **Section 206** of the Penal Code defines 'malice aforethought' as follows: -

“206. 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 of 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) An intent to commit a felony.

(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.

85. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed”.

86. My Lordships in the above case went on to say that: -

“In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...”

87. And in the case of **Mary Wanjiku Gitonga -vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows:-

“We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed....Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.”

88. In this case malice can be gleaned from the events as they unfolded towards the death of the deceased. It is not in doubt that the accused must have planned to kill the deceased and that opportunity dawned when the deceased presented himself to the accused in the afternoon of 23/03/2013. The accused ensured that the deceased remained within his ease of reach. First the accused asked the deceased to graze his cows under his watch and even after finishing doing so he did not release him. He then sent the deceased to buy airtime for him leaving PW7 behind. The accused must have hoped that by the time the deceased returned, PW7 would have left on his own volition. When PW7 did not leave, the accused asked him to leave and run back to their home and take care of their baby. By doing so the accused created an opportunity of remaining with the deceased.

89. Having been left with the deceased, the accused must have then confronted the deceased and strangled him by the neck as evidenced by the hematoma on the neck muscles. To further his intended mission, the accused took the deceased which was already dead and threw it into a water reservoir. The only probably reason for doing so was to conceal the actual cause of death by making it to appear that the deceased drowned in reservoir. That evil intention was revealed further when the accused undressed the deceased and placed his clothes just next to the reservoir together with the two pieces of sugar cane the accused had given him. That likely theory was however disputed by medical science when PW4 explained that the deceased did not drown in water but had instead been strangled.

90. The act of ensuring that there was no flow of oxygen to the deceased's body tissues and the brain by blocking such flow is a clear realization that the accused intended either to kill or to cause grievous bodily harm to the deceased. Obviously by doing so the accused was fully aware that there was a serious risk that death or grievous bodily harm will ensue from his acts. Likewise the acts were very deliberate and without any lawful excuse and the accused remained well aware that he was exposing the deceased to the risk of death or grievous harm as a result of his acts. That was therefore a clear manifestation of malice.

91. It is therefore this Court's finding that the prosecution likewise proved malice aforethought in this matter.

Conclusion:

92. The prosecution having proved all the ingredients of the offence of murder against the accused person leaves this Court with the only option of finding the accused **JAMES CHACHA RUBIRIA** guilty of the murder of **P S P** and so does. The accused is hereby convicted under **Section 322 (2)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of MAY 2016

A. C. MRIMA

JUDGE