



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 53 OF 2013

LESIT, J

REPUBLIC PROSECUTION

VERSUS

PETER KINYANJUI KAMAU ACCUSED

JUDGEMENT

1. The accused person is charged with **murder** contrary to **section 203** as read with **section 204** Of the **Penal Code**. The particulars of the offence are that:

“PETER KINYANJUI KAMAU: On the 17th day of April 2013 at Kyangombe village in Embakasi Division murdered JANE JUMA OMUKUBA”

2. The prosecution called a total of 7 witnesses

3. The summary of the prosecution case is as follows: PW2 John Ngoitiko Masake testified that on 17th April 2013 at around 7:00pm he was in company of Simon Ntari and Ole Maloi headed to Jomo Kenyatta Airport from Boma ya Kondo. On their way, Simon Ntari and Ole Maloi both not called as witnesses in this case, as the trio walked along a grassy area, Simon alerted PW2 and Ole Maloi that he had seen a man lying in the bushes. They decided to have a closer look.

4. PW2 testified that the three of them walked back to check and that is when the accused stood up holding a young girl, the deceased. PW2 stated the accused then held the deceased up, she was naked. PW2 testified that he went nearer to the accused and asked who he was. The accused did not answer but instead he said, **“this child is mine”, “this child is mine.”** PW2 stated that the accused started walking backwards and himself, Simon Ntari and Ole Maloi followed him. PW2 testified that the deceased looked faint and that a few minutes later the deceased gained consciousness and said, **“This is not daddy”**.

5. PW2 stated the accused then ran towards a nearby dam while holding the deceased by her neck. PW2 testified that they started chasing the accused. The accused went into the dam holding the deceased upside down by both legs. PW2 stated that he followed the accused into the dam and started hitting the accused with a club in pursuit to rescue the deceased. PW2 testified that the accused threatened to stab him causing him to withdraw.

6. PW2 stated that after the accused entered deep into the dam, he went under the water several times and

all that time the deceased was under the water. Unable to go nearer PW2 testified that they started throwing stones at the accused and shouting for the people in the nearby homes to come.

7. PW2 testified that people came at the scene and pleaded with the accused to get out of the dam with the deceased. PW2 stated that on examining the deceased after the accused brought her out of the dam, the deceased had injuries in her private part and on the neck. PW2 stated that he went to the police station the following day to record his statement and also requested to see the accused person.

8. PW3 testified that on 17th April 2013 at about 7pm he received a phone call from PW4 informing him of a man who had been found defiling a child. PW3 stated that he headed to the scene and on arrival he found the saw the accused in the dam. PW3 stated that the dam was deep and he could only see the accused from his chest upwards. PW3 testified that PW6 called the police who came to the scene and ordered the accused out of the dam. PW3 stated that the deceased was in the dam for about 2 hours.

9. PW4 testified that on 17th April 2013 he received a phone call from PW6 informing him that he wanted to be accompanied to a scene where a man had been found defiling a child. At the scene they found a crowd surrounding the dam. PW4 testified that the accused was the only one inside the dam holding the deceased. PW4 testified that when the accused pulled the deceased out of the dam the deceased was naked.

10. PW5 Dr. Dorothy Njeru a pathologist testified that on 26th April 2013 while on duty at City Mortuary, she received a request by P.C Mwanzia to carry out a post mortem on the body of the deceased. PW5 testified that externally the body of the deceased had injury on the front neck which extended to the left and was 18cm long. PW5 testified that on carrying out internal examination the body had a knife stab wound which had severed the external jugular vein at the neck level.

11. PW5 stated that there were no other injuries or signs of any disease on the body of the deceased. PW5 testified that she formed the opinion that the cause of death was excessive bleeding due to incised wound to the neck. PW5 produced the post mortem form as P. Exhibit 2

12. PW7 No. 232946 CIP Victor Nyogesa Oduor testified that on 17th April 2013 at 8:00pm he received a call from PW6 informing him of an incident where the accused had been found defiling the deceased. PW7 went to the scene and found that the body of the deceased had been retrieved. The accused had also been thoroughly beaten. PW7 testified that he had the scene photographed and the body of the deceased taken to the city mortuary.

13. PW7 stated that he later took the accused to Kenyatta National Hospital for treatment for injuries he had earlier sustained. PW7 produced the P3 form as P. Exhibit 2.

14. The accused person was placed on his defense after close of the prosecution case. He opted to give an unsworn statement. The accused stated that on 17th April 2013 he was on duty and left his work place at 6:00pm. The accused stated that he used his normal route home and at reaching Kyangombe he saw a child standing on the side of the road.

15. The accused stated that he drew closer to know what the deceased was doing since it was dark. The accused asked her what she was doing and the deceased replied that she had lost her way while following her mother to the shop. The accused stated while he was speaking with the deceased five men approached them, each armed with a weapon. One of them asked the accused what he was doing with the child (deceased) and also asked the deceased whether the accused was his father. The accused stated that the deceased denied that the accused was her father and that is when the five men started beating him.

16. The accused said that he ran to the dam which was 10 meters away from where they were. The five men followed him. The accused stated that he entered into the dam alone and did not carry the child with him. The accused stated that he was in the dam for about two hours before the police arrived at the scene. He also stated that the five men wanted to kill him that is why he opted to be in the dam until the police

arrived at the scene.

17. Mr. Wakaba for Mutitu for the accused gave submissions. The defence counsel in his submission argued that the prosecution had not adduced sufficient evidence to prove their case. He argued that the prosecution did not produce the murder weapon and that the prosecution witnesses PW2 and PW3 who were at the scene did not see the accused stab the deceased on the neck. Counsel also urged that the evidence of PW5 contradicted the evidence of PW3 and PW2.

18. Mr. Wakaba, urged that failure to produce the murder weapon was fatal to the prosecution case. Further that the evidence adduced by the prosecution was not sufficient to convict the accused of the offence.

19. I have carefully considered the entire evidence adduced by the prosecution and the defence together with the submissions by the defence counsel. The burden in this case like in all criminal cases lies with the prosecution to prove its case against the accused beyond any reasonable doubt.

20. The charge is that of murder contrary to **section 203** of the **Penal Code**. That section stipulates:

203. "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder"

21. The burden lies with the prosecution to adduce evidence to show that the accused by some act or omission caused or inflicted injury on the deceased out of which she died. The prosecution must adduce evidence to prove that at the time accused did the act or omission which led to the injuries causing the death of the deceased, he had formed the necessary malice aforethought or intention to either cause death or grievous harm to the deceased.

22. . 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 constitutes malice aforethought under **section 206** of the Penal Code. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought in the following terms:

"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 flight or escape from custody of any person who has committed or attempted to commit a felony."

23. There are facts which are undisputed. There is no dispute that the accused was at the scene where the incident occurred. It is not in dispute that the accused was in the dam for two hours before he was apprehended. There is no dispute that at the time of the incident the accused was in company with the deceased.

24. The issues in this case are

i) Whether there were any contradictions in the prosecution evidence and whether such

contradictions affected the prosecution's evidence.

ii) Whether the identification of the accused person is an issue in this case.

iii) Whether the prosecution has proved that the accused is the one responsible for the deceased death.

iv) Whether the prosecution has proved what caused the death of the deceased and whether the failure to recover the murder weapon is fatal to the prosecution case.

v) Whether the prosecution has proved malice aforethought against the accused.

vi) Whether the evidence adduced by the prosecution was credible.

25. The first issue in this case is whether there were any contradictions in the prosecution evidence and whether such contradictions affected the prosecution's evidence. The contradiction referred to by counsel for the accused is in the evidence of PW5, PW2 and PW3. PW5 testified that on examining the deceased body she did not see any signs of defilement whereas PW2 and PW3 testified that the deceased had injuries in her private parts and it looked totally damaged.

26. In addition while the evidence of PW2 and 3 suggest that the deceased died of drowning, the evidence of PW5 was to the effect that the deceased died of bleeding due to a severed jugular vein of the neck.

27. There is no dispute about the cause of death of the deceased. PW5 Dr. Dorothy Njeru who performed postmortem examination on the body of the deceased recorded her results in a report which she produced as P. Exhibit 1. In her evidence in court the doctor said that she found that the deceased died as a result of excessive bleeding due to incised wound to the neck. Meaning that the injury was caused by a sharp object with a sharp cutting edge. The doctor also indicated that there were no signs of defilement on the body of the deceased. It is therefore clear that the death of the deceased and the cause of death were established by the prosecution.

28. PW5 is an expert and testified as to the findings of internal and external examination of the body of the deceased. She found no signs of defilement. On the other hand there was evidence from the mother of the deceased that when she saw the body of the deceased at the City Mortuary her hip area was deformed. PW2 and PW3 who were the last to see the deceased before she died testified that the hip area was deformed and expanded. It was their evidence that they found the accused lying on top of the deceased. The deceased was a child of 7 years. What PW2 and 3 saw of deceased hip area is similar to what her mother PW1 saw.

29. Even though the doctor did not note the deformity on the deceased hip area, I am satisfied that the description of how the deceased body appeared to PW1, 2 and 3 is consistent with the manner in which the deceased was found on top of the deceased. The inconsistency in the evidence on that point is not material as it did not affect the substantive findings on the cause of death of the deceased by the pathologist. In any event the doctor was clear that at the time she examined the deceased body she had not been defiled.

30. **Regarding the issue of** identification of the accused person Mr. Wakaba for the accused person urged that there was no sufficient light to identify the accused person since it was dark and there was no source of light.

31. I will start by stating that the accused in his defence did not deny being at the scene of the incident. He gave graphic details of the events of the day and of his conversations with PW2 and 3, at the scene of this incident. He also did not deny seeing the deceased at the scene, and holding a conversation with PW2 and 3 about her.

32. What the accused made an issue in his defence is the person responsible for the deceased death. He

denied causing the deceased death. I therefore do not find that identification of the accused and his presence at the scene at the time of the incident, or the fact of having been at the scene at the time the deceased met her death is an issue.

33. In regard to the issue whether the prosecution has proved that the accused was the one responsible for the deceased death' and whether the failure to avail the knife as an exhibit in this case was fatal to the prosecution case.

34. The prosecution is therefore relying on circumstantial evidence. What constitutes circumstantial evidence has been the subject of judicial consideration. In SAWE –V- REP[2003] KLR 364 the Court of Appeal held.

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ...

5. ...

6. ...

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

35. In ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These principles are:

“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; and

(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.”

36. Going back to the evidence, it is the doctor's evidence and finding at post mortem that the deceased died of severed jugular vein in the neck area. None of the eye witnesses of this incident saw the accused severe the deceased veins with a knife.

37. It is the evidence of PW2 corroborated by that of PW3, PW4 and PW6 that the accused walked into the dam holding the deceased upside down by her legs. The deceased was still alive when the accused walked into the dam with her. They testified that they could see the accused from the chest upwards since

the dam was deep.

38. It is the evidence of PW2 corroborated by that of PW3 and PW4, that the accused was the only one in the dam with the deceased and that the accused remained in the dam for two hours until the police arrived at the scene.

39. The eye witnesses testified that they saw the accused go under the water at some point before the police arrived at the scene. That evidence shows that at the time the accused was in the water with the deceased, he had an opportunity to sever the deceased blood vessels at the time he bent under the water with the deceased.

40. I am satisfied that the prosecution has established that the accused had the time and the sole opportunity to sever the deceased veins. Furthermore, it was the evidence of PW2 that before the accused entered the water with the deceased, he threatened him with a knife warning him that if he drew any closer to him, he would cut him with the knife.

41. I find that the prosecution has established that the accused was armed with a knife at the time he took the deceased under the water. It is also confirmed by the pathologist that the injury the deceased suffered was caused by a sharp object which is consistent with a knife. I find that the prosecution has proved that it is the accused and no one else who committed the murder of the deceased.

42. Regarding malice aforethought, the evidence of PW2, PW3 and PW4 is clear that the accused went into the dam with the deceased, and that he remained in the dam for two hours. It was corroborative testimony of PW2, PW3 and PW4 that the accused was holding the deceased upside down with both legs and could go under the water and out leaving the deceased in water. It is the prosecution evidence that the scene had a crowd of people who tried to plead with the accused to bring the deceased out of water but the accused declined. It is after a long persuasion that the deceased got out of the dam with the deceased.

43. I find that the evidence on record points irresistibly and directly to the accused person as the one who caused the death of the deceased. The evidence adduced by the prosecution establishes without doubt that the accused was the only one in the dam holding the deceased before being apprehended by the police.

44. Under **SS.111 (1)** and **119** of the **Evidence Act** a statutory rebuttable presumption exists. In this case it exists against the accused person. The two sections stipulate as follows.

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

45. The accused had a rebuttable burden to explain either how the deceased died or met her death; or, how the accused parted with the deceased. The accused did not give any explanation of how deceased died. Neither has he claimed that he left her alive after he ran into the dam, according to his defence

rather what the accused did was to deny that he indeed inflicted the injuries on the deceased.

46. The prosecution has proved beyond a doubt that both accused and deceased were in the dam for two hours before the accused was apprehended by the police.

47. I am satisfied that the accused person lied in his defence and that he did not discharge the statutory burden created under **SS 111(1)** and **119 of Evidence Act**.

48. In the Court of Appeal case of **ERNEST ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)**, supra, the Court of Appeal observed:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

49. The accused in this case attempted to explain facts which he was reasonably expected to be able and interested to explain. However, the explanation he gave was obviously false. He gave obvious falsehood that he did not get into the dam with the deceased and that he therefore did not know how the deceased died. That was an obvious lie. I find that the same becomes of substantive inculpatory effect.

50. I find that all the circumstantial evidence adduced in this case points irresistibly to the accused guilt. I find that the circumstantial evidence adduced in this case points irresistibly to the accused guilt. I find that the circumstances of this case taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability the offence was committed by the accused and none else.

51. In regard to the issue whether the prosecution evidence is credible, the prosecution is relying on the evidence of PW2, PW4 and PW6. I considered the demeanor of these three witnesses as they testified in court. I found each of them honest, forthright and straight forward. I find that they had good demeanor, that they impressed me that they were telling the truth and were therefore worthy of belief. I found them credible witnesses and therefore believed their testimony.

52. The other issue is to whether malice aforethought has been proved. **Section 206** of the **Penal Code** stipulates what constitutes malice aforethought.

53. The prosecution has proved that the accused went into the dam with the deceased holding her by her neck. Later the accused held deceased upside down by both legs as he entered deep into the water. It is at the time the accused was seen pending under the water that he must have severed the deceased jugular. That action caused excessive bleeding from which the deceased died. I find that by holding the deceased upside down inside water the accused should have known that such action could drown the deceased. By severing her jugular veins, the accused must have known that such an action could lead to serious injury or that it was likely to lead to the deceased death.

54. I find that the prosecution has proved that at the time the accused held deceased upside down inside water, and by severing her jugular veins that he had formed the intention to cause death or grievous harm to the deceased. I am satisfied that the prosecution has proved malice aforethought to the required standard.

55. The deceased was a minor 7 years old. The accused ought to have handled the deceased with care considering that she was a child. The manner in which the accused handled the deceased, including cutting her veins are a clear indication the accused had intention to cause death or grievous harm to the

deceased

56. Having carefully considered the entire evidence adduced in this case, I find that the prosecution has proved its case against the accused beyond any reasonable doubt. Consequently I find the accused guilty of **murder** contrary to **section 203** of the **Penal Code**, and convict him accordingly pursuant to powers provided under **section 322** of the **Criminal Procedure Code**.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF DECEMBER, 2016.

LESIIT, J

JUDGE