



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 84 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BERNARD GITHUA KIRAGU.....ACCUSED**

**JUDGEMENT**

**Background**

Bernard Githua Kiragu, the accused in this case, is charged with murder contrary to section 203 read with section 204 of the Penal Code. The particulars of the charge state that on 28<sup>th</sup> September 2011 at *[particulars withheld]* Village Kanunga sub-location within Kiambu County murdered S. N. The accused is represented by Mr. Solomon Wamwayi, advocate. The prosecution was handled by various prosecution counsels but Ms Ikol, Prosecution Counsel handled the prosecution case when I took over the proceedings in this case.

The previous judge Honourable Lady Justice Florence Muchemi who was handling the proceedings in this case was transferred to another station. She had received evidence of two prosecution witnesses G. K. N, PW1 and A. M. N PW2. Upon taking over the conduct of this case I received evidence from five prosecution witnesses and one defence witness.

**The charge**

Murder is an offence under section 203 of the Penal Code and the penalty for murder is death as provided under section 204 of the Penal Code. Section 203 of the Penal Code states as follows:

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

When unpackaged, the above words give us the ingredients for murder which must be proved by the prosecuting body beyond reasonable doubts. There must be proof of the identity of the person who causes the death of another person by unlawful act or omission; there must be proof of the act causing the death of another person and there must be proof of malice aforethought, the intention to cause the death or grievous harm to another person.

Proof of malice aforethought must meet the criteria set in section 206 of the Penal Code which states as follows:

**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.**

### **The evidence**

Out of the seven prosecution witnesses who testified in support of the case, the evidence tendered can be summarized in the following manner that on 28<sup>th</sup> September 2011 in the morning around 7.00am, little **S. N**, the deceased, aged five years was prepared for school by her foster mother PW2. **S. N** attended nursery school at *[particulars withheld]* School in Kiambu. She left for school around 7.45am and was expected back home around 5.00pm. The little girl did not reach school that morning nor did she return home in the evening as expected. She fell victim to one very sick person who defiled her and strangled her to death.

Her nursery school teacher N M W, PW3, received pupils that morning and conducted assembly where she called out the names of all her 27 pupils. The 27<sup>th</sup> pupil, **S. N**, was not present that morning. In an attempt to find out where the girl was PW3 called the girl's foster mother PW2 several times that morning without success. Later in the day PW3 succeeded and informed PW2 that little **S. N** had not arrived in school that day.

Both PW2 and PW3 were to learn of the death of the deceased from neighbours. Both visited the scene about 300 metres from the school. PW1 the foster father of **S. N** also learned of the death of his foster daughter through a neighbour and visited the scene. All the three testified that they found the deceased in the neighbour's banana plantation. The banana farm belonged to M W M, PW4. In the course of her chores in her farm, PW4 stumbled on the body of the deceased and screamed attracting neighbours to the scene.

The deceased was found lying on her back, her clothes pulled up to her stomach, her legs apart and her external genitalia exposed. She was frothing in the mouth and nose and her external genitalia were bruised and bleeding. She was dead.

The matter was reported to the area Assistant Chief who called police from Kiambu Police Station. The body of the deceased was collected and taken to Kiambu District Hospital Mortuary where the post mortem was conducted by Dr. Paul Mbalu PW5 on 29<sup>th</sup> September 2011. The doctor confirmed the deceased had died due to asphyxia as a result of strangulation. The doctor also found the deceased with injuries on her external genitalia indicative of sexual assault. He collected samples for examination.

Among the samples collected by No. 61240 Inspector of Police Maureen Kioko PW7 the investigating officer were deceased's clothes, the accused's clothes and cigarette butts collected both from the accused's house and at the scene. There were also urine samples and soil samples from the scene. I will come back to these samples in the course of this judgement.

The accused person was arrested in connection with the death of the deceased and charged with murder. In his defence he told the court that at the time of the incident leading to this case he used to do casual jobs including construction and weeding; that on a date he could not remember he had been working at the home of one Mrs. Ndungu a teacher and three days after this he was arrested from his home at midnight. He said he was taken to Kiambu Police Station where he stayed for one week and taken to his home where he showed police the clothes he wore on the day he is alleged to have attacked the deceased;

that the police collected these clothes and after one month he was charged in court. He denied committing this offence.

### **Analysis and determination**

That the deceased died as a result of asphyxiation due to strangulation is not in doubt. I have the evidence of Dr. Mbalu to confirm this. From the evidence of witnesses who saw the body of the deceased at the scene and also by the doctor, though not confirmed by medical evidence, it appears that the deceased was sexually assaulted. She was aged five years and the fact that her legs were parted and her external genitalia were bruised and bleeding is indicative that this was the case. Even in the absence of evidence to support this, it is apparent to this court that the person or persons who sexually assaulted the deceased may have killed her either in the process or immediately thereafter. I find the act of death of the deceased proved beyond reasonable doubt.

Who killed the deceased? Both PW1 and PW2 the foster parents of the deceased did not implicate the accused in the death of the deceased. PW1 said he did not know the accused and saw him first in court. PW2 said she did not know who killed her foster daughter. PW3 the teacher at the nursery school where deceased attended said she did not know the accused. PW4 who found the body of the deceased at her farm told the court that she did not see the accused at the scene. She said she only saw a footprint at the scene. She did not associate that footprint with the accused. She said she saw the accused in court and did not know him.

PW7 is the only witnesses who testified as to how the accused was arrested. The relevant part of her evidence reads as follows:

**“I visited the home of the accused after learning that the accused had been spotted. I acted on information and I arrested the accused. He showed me the clothes he had worn on 28<sup>th</sup> September 2011.”**

In short, police acting on information arrested the accused. It is not clear from PW7’s evidence whether she meant the accused was spotted committing the offence or spotted at his home. The informant gave PW7 information leading to the arrest of the accused was not disclosed or called to testify. The woman, identified by the accused as Mrs. Ndungu who was a teacher and who had employed the accused did not testify nor did the Assistant Chief. Evidence also shows that the police took photographs at the scene but these were not produced in court.

Police collected a number of samples in a bid to connect the accused with the offence. From the deceased were collected exhibits marked A-1 to A-5 her clothes; A-6 the vaginal swab; A-7 the blood sample and A-8 the dry swab. From the accused were B-1 light blue shirt; B-2 dark blue long trousers; B-3 grey underpants; B-4 saliva; B-5 urine; B-6 blood; B-7 cigarette butts from his house; B-8 pubic hair; ‘C’ cigarette butt from the scene and ‘D’ soil sample from the scene.

The samples were sent to the Government Chemist with a request from the police to the Government Analyst to ascertain:

- i. Whether there was presence of spermatozoa in the deceased’s clothes exhibits A-1, A-2, A-3, A-4 and A-5 and accused’s clothes exhibits B-1, B-2 and B-3.
- ii. Whether deceased’s clothes had any fibre material from accused’s clothes.
- iii. Whether deceased’s clothes contained any hair from the accused.
- iv. Whether there was any relationship between deceased’s and accused’s clothes.
- v. Whether exhibits A-6 deceased’s vaginal swab and A-8 deceased’s dry swab contained any spermatozoa.
- vi. Whether there was any relationship between deceased’s vaginal and dry swabs with exhibit B-4 accused’s saliva.
- vii. Whether exhibit A-7 deceased’s blood sample matched blood stains found on exhibit B-3 accused’s grey underpants.

- viii. Whether exhibit B-7 the cigarette butts collected from the house of the accused had any relationship with exhibit B-4 his saliva and exhibit 'C' the cigarette butts collected from the scene.
- ix. Whether exhibit B-2 accused's dark blue long trousers containing traces of soil match exhibit 'D' the soil sample from the scene.
- x. To conduct DNA profiling on exhibit A-6 deceased's vaginal swab, A-7 deceased's blood and A-8 deceased's dry swab and B-4 accused's saliva, B-5 accused's urine, B-6 accused's blood and B-8 accused's pubic hair.

The Government Analyst who examined the above exhibits, Mr. Paul Waweru Kang'ethe was not available to testify as he had retired from service. Instead the prosecution called Mr. Henry Kiptoo Sang PW6 to testify on his behalf. Mr. Sang told the court that he could not produce in evidence the report prepared by Mr. Kang'ethe because it had some anomalies. He asked the court to be allowed to withdraw the report and be allowed more time to conduct fresh analysis on the exhibits and table a fresh report. This request came after the witness was sworn in as he was giving evidence. The request was opposed by the defence counsel who submitted that the witness was in court to testify and therefore he ought to proceed with his testimony and produce the report as prepared. This court agreed with the defence and directed the prosecution to make submissions on the issue to allow the defence counsel to respond for the court to make a ruling on whether to allow for fresh analysis or not. I wish to state here that this was not done and therefore the report that is before this court is the one prepared by Mr. Kang'ethe.

The report is contained in a copy dated 2<sup>nd</sup> April 2014. The prosecution counsel asked the court on 21<sup>st</sup> April 2015 to allow her mark the copy as an exhibit with promises of tabling the original. This was allowed. However as at the time of writing this judgment, the prosecution counsel had not made good her promise to bring the original. I have read the copy in the court file. Mr. Kang'ethe did not act as requested by the police or if he did so this is not captured in the report. Of all the things he was asked to do, he seems to have only conducted the DNA profiling on exhibit B-7 the cigarette butts found from the accused's house, 'C' cigarette butts found at the scene and 'D' soil samples from the scene. His opinion and conclusion on the matter is that all the three items gave a partial male DNA profile. He then tabulated the DNA profiles.

From a layman's point of view (this court's view) there was no linkage between the DNA profiles said to belong to a male with the accused before the court! In short the analysis does not help the prosecution case by connecting the accused with this offence.

In the absence of direct evidence linking the accused with this offence, this court must turn to circumstantial evidence. This issue was aptly captured by the defence counsel Mr. Wamwayi in his submissions. He submitted that the prosecution lacked direct evidence to link the accused to the offence and was relying on DNA profiling which was inconclusive as testified by Mr. Sang. Mr. Wamwayi submitted that the prosecution did not pursue fresh analysis of the exhibits and that circumstantial evidence must point irresistibly to the guilt of an accused person. To support this point counsel relied on two Court of Appeal decisions: **Criminal Appeal No. 223 of 2007 Khadija Mwaka Yawa v. Republic** and **Criminal Appeal No 333 of 2006 Jane Wangechi Ndirangu v. Republic**.

The point the two authorities are emphasizing is captured on the first paragraph in the **Khadija's case above** as follows:

**“It is now well established that in a case depending exclusively on 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”.**

The court further cited **Simon Musoke v R [1958] EA 715** where the case of **Teper v R [1952] AC 480, 489** quoted at 719 the following:

**“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”.**

I have critically examined the circumstances of this case. The deceased left home around 7.45am on 28<sup>th</sup> September 2011 to go to school which was about 300 metres from her home. She did not reach the school and was found later that day murdered in the farm of PW4. The accused was later arrested in connection with that death. Soil and cigarette butts found at the scene were collected together with blood and vaginal swab samples of the deceased. These were sent for analysis together with accused's clothes, his saliva, blood samples, pubic hair, clothes, urine and cigarette butts found in his house. The analysis did not yield anything positive or connecting the accused with any of the samples. I noted that it is indicated on the exhibit memo that the accused's underpants had blood stains. I find no evidence from any witness to that effect and it is surprising to see this on the memo accompanying the exhibits to the Government Chemist. The footprint found at the scene was not connected to the accused. The informant who gave PW7 information leading to the arrest of the accused did not testify. With great care I find that there is no evidence, not even circumstantial evidence, connecting the accused with the offence.

Having settled the issue that there is no evidence connecting the accused before this court with the murder subject of this trial, it will be an exercise in futility for this court to determine whether there is proof of malice aforethought. This will not serve any purpose given that the accused has not been identified as the person who committed this offence.

In conclusion it is my considered view that this case was poorly investigated. The police did a poor job in investigating this case. PW7 who took over investigations and any other officer who handled the case did not seek witnesses who would help the police bring the culprit to answer to this heinous crime. The deceased is an innocent five year old who could not even understand what was happening to her. Despite her young age and innocence some very sick member of society in her neighbourhood took her life away in such a cruel manner. Such a person does not deserve to live in society. For such a person to answer to his cruel act, he must be found guilty through proper investigations and successful prosecution. I share the pain the parents of the deceased went through and are still experiencing. They may not understand why the accused is not found guilty but after finding no evidence, whether direct or circumstantial connecting the accused with this offence this court has no option but to apply the law and find the accused not guilty of the murder of S. N. He is hereby acquitted of this offence. He shall be released from custody forthwith unless for any other lawful reason he is held in custody. It is so ordered.

**Dated, signed and delivered this 13<sup>th</sup> day of July 2015.**

**S. N MUTUKU**

**JUDGE**