



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO.4 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

KITONGA MUSILI.....ACCUSED

JUDGEMENT

The Charge

Kitonga Musili, whom I will refer to as the accused in this judgement, was arraigned to court on 31st January 2012 to answer charges of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the charge are that on the 21st day of January 2012 (particulars withheld) of Mwingi District within Kitui County murdered A. K. M (referred to in this judgement as the deceased).

Facts

The deceased was aged two and half years at the time she met her death. The circumstances under which she met that death are as saddening as they are incredible. Like any other normal day in the lives of ordinary Kenyans in the rural setting, M. M, PW1, and the mother of the deceased left her children at home at (particulars withheld), Mwingi District within Kitui County and went to the farm to work. She left them in the company of their uncle, the accused in this case, and PW1's grandmother. The time was 7.00am. She returned home at 1.00pm and missed her daughter. She sought to know where the child was but failing to get an answer, PW1 went looking for the child. She followed some shoe prints to a bushy place about 100 metres from the homestead. She noted an area in the bush that had been disturbed. She found blood stained clothes her daughter had been wearing and fearing for the worst she ran home where she informed J. K, PW2, her brother. The matter was reported to the area Assistant Chief Joseph Musili Maithya, PW4, who led Administration Police Officers and members of the public in search for the deceased. The body of the deceased was found covered with tree branches. Following a report at the Mwingi Police Station the accused was arrested and charged.

From the outset, I wish to determine the issue of the accused's age at the time of the alleged commission of this offence. The offence is alleged to have been committed on 21st January 2012. According to PW1, the accused was aged sixteen years at that time. Chief Inspector Jonathan Wafula, PW6, who took the accused's statement under enquiry, told the court that the accused was aged seventeen years of age. In his defence in court, the accused said he was aged eighteen years.

The court ordered age assessment of the accused. The first age assessment report dated 31st January 2012

and which is attached to the medical report of the same date placed his age as “over 18 years”. The court found this too general and sought another opinion from a different doctor. By a report dated 12th March 2012, the accused was found to be approximately eighteen years. The first assessment was done in January 2012 just days after the alleged murder. The second assessment was done about two months from the date of the alleged offence. The evidence on his age, contained in the medical reports, does not agree with that of PW1. There is no other document tabled before the court on his age. For this reason and with no evidence to the contrary, this court will and does hereby adopt the medical reports as conclusive evidence that the accused was aged eighteen years at the time the alleged offence was committed. He is an adult in the eyes of the law.

The Prosecution Case

The prosecution led by the learned state counsel Mr. Allan Mulama, submitted that the prosecution has proved that the accused murdered the deceased beyond reasonable doubt and asked the court to convict him for murder as by law provided. He further submitted that the evidence of nine prosecution witnesses including the accused’s statement under enquiry has proved this case to the required standard.

Nine witnesses testified for the prosecution. According to PW2, PW1 confronted the accused over the issue of her missing daughter. PW2 said that PW1 claimed the shoe prints resembled those of the accused and this led to a conflict between her and the accused. PW2 intervened.

With the help of the area Assistant Chief, PW4, the body of the deceased was found hidden under the bushes. The matter was reported at Mwingi Police Station prompting PC Stephen Irungu, PW5, CIP Jonathan Wafula, PW6, in company of other officers visited the scene.

The evidence of PW5 is that the scene was about 100 metres from the homestead. He stated further that they found the body under tall grass making it difficult to spot. The dress was found about four metres from where the body was. The body had a deep cut on the throat. It was collected and taken to Mwingi District Hospital mortuary for examination.

The accused was arrested the following day, 22nd January 2012, with the help of PW4 and APC Francis Marita, PW7. He was handed over to the police and later charged.

The defence case

The accused is a youthful looking young man who often wears a disarming smile. He sat quietly in court and listened patiently to the evidence of the prosecution. In his evidence given without taking oath he simply told the court that he was aged eighteen years and that his sister had sued him on allegations of having murdered his niece. He said he did not know who had killed the child.

Issues for determination

In a murder trial, just like in any other criminal trial, the prosecution bears the onus of proving that the accused person before the court committed the murder. The standard of proof is beyond reasonable doubt. This onus never shifts to an accused person.

The prosecution must prove:

- i. That there was an act or omission causing death of the deceased.
- ii. That the act or omission was unlawful.
- iii. That the accused person before the court possessed a guilty mind in causing the death.

In most murder cases, there is the motive for causing the death. The motive behind the death of the a deceased person in murder trials range from provocation, self defence, dispute with deceased over something, hatred for some reason, death resulted in the cause of the committing of an offence etc. What baffles me in this case is the question of the motive behind this death. But first, there are other issues to be

determined, namely, whether death occurred, who caused that death and whether that person possessed the guilty mind.

Death of the deceased

The prosecution evidence especially that of PW4, PW5, PW6 and PW7, is that the deceased had a deep cut on the throat. These injuries are confirmed by PW9, Dr. Hassan Abdullahi Abdulrahman. PW9 testified on behalf of Dr. Indumwa who had performed the post mortem on the body of the deceased. According to the medical evidence the deceased died due to cardiopulmonary arrest secondary to exsanguination (blood loss) due to deep cut on the neck. The fact that the deceased died and the cause of that death have been proved beyond reasonable doubt.

The evidence by the doctor was rather chilling! He stated thus:

“.....The body had a deep cut wound around 8cm long across the anterior surface of the neck. It extended from the left to the right of the neck. There was severing of trachea.....”

Who cut the deceased in this manner? What would cause a human being attack a two-and-half year old child and cut her from one end of the throat to another, completely severing her trachea, undress her and cover her body with grass and tree branches? This leads me to the next issue.

Who killed the deceased?

PW1 did not testify as to who might have killed her daughter. She told the court that **“I did not know how she met her death”**. PW2 testified that PW1 attacked the accused claiming that she suspected the shoe prints she had seen leading to the scene belonged to the accused. The prosecution did not lead evidence on the shoe prints and why PW1 suspected the accused.

PW2 further told the court the following in reference to the scene:

“Kitonga was also present. The Assistant Chief came with police officers. When we reached the scene, Kitonga escaped upon discovery of the body. He was later found and he showed us a knife. He did not run when we found him. He said he was scared because he feared being implicated. The knife was near the dress of the child. Dress and knife were together but body in a different place.”

In cross examination, PW2 stated:

“We went with police and accused led us to where the knife was. Accused pointed out where the knife was and police recovered it.”

On the same date of the murder, 21st January 2012, the accused visited the home of V. K, PW3. PW3 was a cousin to the accused. It was 9.00pm and PW3 wanted to know where the accused was coming from at that hour. In re-examination, PW3 said she had not seen the accused visiting her at such an hour before and that he looked normal.

PW3 said she lived 2 to 3 kilometres from the accused's home and that the accused told her that he wanted to sleep there and go home the following morning. He told PW3 that there was information that PW1's child had been killed.

On 22nd January 2012, the accused asked for three maize cobs to roast from PW3 and after roasting he left.

The evidence that the accused was not at home when the Assistant Chief, PW4 and the police were informed that he was suspected of the murder was confirmed by PW4. He told the court as follows:

“The family was suspecting someone. They mentioned Kitonga Musili. He was the child's uncle. He

is brother to the mother. We looked for him the following day. We went with the Chief and AP Officers. We found him. We found him at Mathiakani sub-location near B1 Market at a river called Kamunyu. He was walking around. He was doing nothing.”

The circumstances under which the accused was arrested are also confirmed by the evidence of APC Francis Marita, PW7. He was in the company of PW4 when they arrested the accused. The arrest followed a report from the members of public that the accused had been spotted at a place called B1. PW7 said they found the accused on the road and arrested him. PW7 further testified that the accused led them to a place about 300 metres from the seasonal river where he showed them a knife that had been hidden there.

The evidence on the circumstances surrounding the death of the deceased is circumstantial. Circumstantial evidence is said to be the best evidence. It was defined in **Republic V. Taylor Weaver and Donovan [1982] 21 Cr. Appeal R 20** as the evidence of the surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics.

The same principle was applied in **R v. Kipkering Arap Koske and Another, (1949) 16 EACA 135**, where it was stated that:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

See also **Abanga alias Onyango V. Republic CR. App. No.32 of 1990(UR)** at page 5 where the court stated as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

This is the test this court will subject the evidence to. The deceased was left in company of her siblings and the accused. She was found missing when her mother returned from the farm at 1.00 O'clock. A search was conducted and the body was found hidden under the bushes. Immediately the body was discovered, the accused left home. He went to the home of PW3 on the evening of 21st January 2012 where he gave the story that he wanted to sleep there until the following morning when he could go home. On 22nd January 2012 he did not go home as he had promised PW3. He was arrested from the road walking about. He led police and members of public who included his brother PW2 to the place where the knife was recovered. His behaviour in my view is suspect.

My careful examination and analysis of the evidence by the prosecution leads me to the following conclusions:

- i. That the circumstances surrounding the death of the deceased have been cogently and firmly established;**
- ii. That these circumstances definitely tend to unerringly point towards the guilt of the accused;**
- iii. That these circumstances 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.**

It is my considered view that the evidence tendered in this case satisfies the principles enunciated in the

Abanga Case, above and confirm that the accused committed this crime.

The guilty mind

Did the accused have a guilty mind? What was the motive of this death? The demeanour of the accused is one of an amiable young man. He sat silently in the dock throughout the trial for the entire period his case took to conclude without a complaint. He always wore a disarming little smile that was not easy to detect but was there. Looking at him and the gravity of this matter, one is not able to reconcile that such a young man is capable of carrying out such an act.

The family suspected him. PW5 in cross examination told the court that he interrogated the accused who told him that there existed differences between the accused and PW1 his sister because PW1 used to deny him food. PW6 who took a statement of the accused under caution told the court that the accused told him that his sister, PW1, used to deny him food.

Other than the evidence of PW5 and PW6 that the accused said he had been denied food by PW1, there is no other evidence on the issue. PW2 said he was not aware that accused had problems with PW1 or her children.

As stated in this judgement, this court is satisfied that the circumstances of this case, as explained in this judgement, prove beyond reasonable doubt that the accused person committed this offence.

The deceased died of loss of blood due to a deep cut on her throat. The cut was done in such a way that the person who inflicted it must have known it would lead to either death or grievous bodily harm. It was a clean cut from one corner of the throat to the other. Having found it is the accused who cut the deceased's throat it is my view, and I so hold, that the accused had the intention of causing death or grievous bodily harm. I therefore find that the guilty mind of the accused has been established beyond reasonable doubt.

I have considered the statement under enquiry allegedly made by the accused before PW6. This witness was among the police officers who visited the scene after the matter was reported to the police. He saw the body of the deceased and was present when the body was removed from the scene. The following day, immediately the accused was arrested, PW6 took his charge and caution statement. PW6 told the court that he communicated to the accused in Kiswahili but recorded the statement in English. Having observed the accused in court, he did not strike me as someone who was capable of understanding what was going on around him immediately after his arrest. He seems slow in grasping and understanding the surrounding environment and it must have been confusing to him to be arrested and immediately to be asked to record a statement. In those circumstances he was not able to understand the gravity of that statement. In my view, it would not be fair to admit such a statement in evidence. This court will therefore disregard the statement.

I have however found that there is evidence proving beyond reasonable doubt that the accused caused the death of the deceased by an unlawful act and with malice aforethought. I therefore find him guilty as charged and convict him accordingly. I make orders accordingly.

Dated, signed and delivered this 11th March 2014.

S.N.MUTUKU

JUDGE

It came to the courts attention during mitigation and upon production of the birth certificate that the accused person was aged 16 years at the time of the offence. The matter was referred to probation for a report. Basing its findings on the report this court placed the accused at Kimumu Probation Hostel for three years.

S.N.MUTUKU

JUDGE