



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 29 OF 2009

REPUBLIC.....PROSECUTION

VERSUS

JAMES KITSAO CHANGAWA.....ACCUSED

JUDGMENT

The accused **JAMES CHANGAWA KITSAO** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence were that

“On the 21st of July, 2009 at Kaloleni Township, Kaloleni Location within Kaloleni District in Coast Province, murdered TATU DAVID.”

The accused entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced before me on 5th May, 2011. The prosecution led by the learned state counsel **MR. ONSERIO** called a total of eleven (11) witnesses in support of their case. **MS. MOMANYI** Advocate represented the accused.

Briefly the facts of the case were as follows. The deceased ‘*Tatu*’ was a child aged about three (3) years old. This child was a first cousin to the accused as their fathers were brothers. The extended family all lived together in the same compound in Kaloleni. On the material day of 21st July, 2009 both accused and the deceased were within the compound. Several witnesses saw the child playing within the compound with other children. Indeed **PW6 SALAMA CHANGAWA** also a cousin told the court that upto about 6.00 p.m. when she left to go and fetch water nearby she saw the deceased within the compound. Upon her return from drawing water she realized that the child had gone missing. **PW1 DAVID MASUMBUO KITSAO** was the father of the dead child. He told the court that on the material day he went out to his place of work leaving his child ‘*Tatu*’ alive and well at home with his wife. **PW1** returned home at 6.00 p.m. only to be told that his daughter was missing. The family then launched a search for the missing child. All family members including the accused participated in the search. The matter was reported to **PW7 WILLIAM KARISA THOYA** the local chief as well as to Kizurini police station. **PW1** even went so far as to seek prayers from their pastor and to make an announcement in the local mosque.

By midnight the child had not been traced. In the mean time **PW8 DICKSON RIZIKI CHANGAWA** who had been sleeping in the same room with the accused raised an alarm that he had been stabbed in the neck by the accused. This incident diverted the attention of the family from their search for the deceased. **PW8** told the court that whilst he was sleeping he suddenly heard the accused get off his bed climb onto

his stomach and hold his neck. The accused then stabbed him. **PW8** managed to overpower the accused and ran out of the house bleeding. His father and **PW1** rushed him to a nearby clinic for treatment.

By now it was about 2.00 a.m., however due to the anxiety about the whereabouts of the deceased family members were still unable to sleep. **PW2 ALICE NYEVU** who was the mother of the deceased told the court that at about 2.00 a.m. she was seated outside her house with other relatives. She heard stones being thrown towards the house and then she heard the voice of the accused say “*Yule mrembo wenu ako huko*” i.e. “*your beautiful one is here*”. **PW2** and others ran behind the house with her sister and found her daughter lying dead behind the house. They began to wail alerting others. The police came and took the body to Coast General Hospital. The accused who had run away was later traced and arrested in Mazeras two days later. He was taken to the police station and upon completion of police investigations was charged with the present offence.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. The accused opted to make an unsworn defence in which he totally denied having been in any way involved in the murder of the deceased. This court must now analyze the evidence on record to determine whether the charge of murder has been proved to the standard required in law.

The offence of murder is defined in section 203 of the Penal Code as follows:

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

From this definition, it is evident that there exist three (3) crucial ingredients all of which must be proved beyond a reasonable doubt in order to sustain a charge of murder. These are:

1. Proof of the fact as well as the cause of death of the deceased.
2. Proof that the deceased met her death as the result of an unlawful act or omission on the part of the accused; and finally
3. Proof that said unlawful act or omission was committed with malice aforethought.

On the first ingredient there can be no controversy. **PW2** the mother of the deceased narrated how she found the dead body of her daughter lying behind the house. Several other witnesses who included **PW1** the child’s father, **PW3 JOSEPH CHANGAWA**, her uncle as well as **PW7** the chief and other close relatives of the deceased all narrate how they saw the body of the deceased with blood running from the mouth and her right ear partially cut off. All these witnesses who knew the deceased well identify her as ‘*Tatu David*’. Similarly with respect to the cause of death of the deceased there can equally be no dispute. Apart from the cut to her right ear it appears that no other wounds were visible on the body of the deceased. **PW9 DR. MANDALYA** a consultant pathologist testified that he conducted an autopsy examination upon the body of the deceased. He noted the following:

- Fracture of right thigh
- Irregular bruises on neck
- Right ear partially cut of
- Fracture of cervical spine

Internally the doctor noted

- Bleeding in the throat area
- Congested lungs
- Features of asphyxiation

In the opinion of **PW9** the cause of death was “*hemorrhagic shock with spinal and leg fractures*”. **PW9** clarified that the cervical fracture and asphyxiation were the primary cause of death. In other words the child had been strangled to death. This was expert medical evidence which has neither been challenged nor controverted by the defence.

The next ingredient requiring proof is the question of the identity of the person who strangled the deceased thus leading to her death. There was no eyewitness to the incident. The child went missing at about 6.00 p.m. and about eight (8) hours later at 2.00 a.m. she was found lying dead behind her parents' house. There is evidence from all the witnesses that it was the accused who alerted the family to the presence of the dead body. Curiously the accused did not raise any alarm nor did he shout in shock, grief or horror. By all accounts the accused merely made a calm announcement saying “*mrembo wenu yuko hapa*” or words to that effect. **PW2** the child's mother, **PW5 SALOME JUMWAA**, the child's aunt and **PW6** the child's cousin all testified that they heard the accused utter these words. These were all close relatives of the deceased, who lived with him in the same compound. I have no doubt that these witnesses were in a position to recognize and identify the voice of the accused. More importantly the accused has not denied that it was he who alerted other family members to the presence of the body. In his defence he states that he found the body near the river. This version was not raised in cross-examination of any of the witnesses. I find this aspect of the accused's defence to have been a mere afterthought. There was no reason for the witnesses to state that the body was recovered behind the house if in fact it was recovered beside a river. Of what benefit would it have been to any witness to lie about this. The fact that the accused knew exactly where the body of the deceased lay certainly raises the spectre that he was in some way involved in her death.

Giving further credence to this conclusion is the statement made by the accused to **SUPERINTENDENT CATHERINE IRUNGU** at Kaloleni police station on 28th July, 2009. This statement amounted to a confession. The accused did attempt to repudiate the statement and the court proceeded to conduct a trial within a trial in order to determine its admissibility. At this trial within a trial evidence was recorded from the police but the accused elected through his advocate not to make any statement. I delivered my ruling on 8th May, 2013 in which I found that the statement (confession) was voluntarily made and did comply with the provisions of section 25A of the Evidence Act, and was therefore admissible as evidence. No to rehash the said ruling but the court was satisfied that there was no element of threat, coercion and/or promise involved in the recording of the statement. The accused made the statement in the presence of both his parents. In that statement the accused gave a detailed account of the events of the day. He revealed that due to feelings against his uncle and aunt (the parents of the child) he strangled the deceased in order to hit back at them. It is pertinent that the accused revealed that he had strangled the child – the fact that this confession corresponds exactly with the cause of death as found by the pathologist, cannot be a mere coincidence. The accused also signed the statement and his parents also signed it thereby confirming its authenticity. Therefore the accused himself admitted that he killed the deceased and his participation in the search for the child was merely an exercise to try and pull the wool over the eyes of the other family members. By his confession the accused explained how after killing the child, he initially covered the body with ‘lessos’ to hid it and then later at night he removed the body out of the house and then called the child's mother to come and find ‘*her beautiful one*’. Here again I find it very telling that after showing where the body was the accused ran away from the home. He was arrested two days later at Mazaras. If the accused was innocent of any wrongdoing why would he run away? The normal thing would have been to remain in the homestead and to join other family members in mourning and in preparing for the burial of their loved one. The action of the accused in running away is clear pointer to a guilty mind. Once again in his statement the accused reveals details of where he went and persons he spoke to which only he could have known. He spoke of having gone to a church in Mazaras and narrated how some men he told of the incident took him to the chief from where the police eventually picked him up. From the fact that it was accused who revealed where the body of the deceased was, the fact that he ran away after that revelation and on the basis of his confession to the police I am satisfied that there exists sufficient proof that it was the accused who strangled the deceased to death. The *actus reus* of the offence of murder has been proved as against the accused.

The final ingredient requiring proof is the existence of malice aforethought. Malice aforethought is defined by section 206 of the Penal Code 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 cause.**
 - c.
 - d.”

The act which led to the death of the deceased was strangulation. The deceased was a small child aged about 3 years old. She was no more than a toddler. The accused who in his statement gave his age as 17 ½ years was much older, bigger and stronger than her. To strangle a child so young by the neck certainly must be accompanied by an intention to kill or at the very least cause grievous harm to that child. Indeed the pathologist **PW9** did confirm in his evidence that

“Any pressure on the neck of such a young child can cause a spinal fracture.”

The actions of the accused certainly prove malice aforethought in terms of section 206(a) of the Penal Code. The accused could not have expected any outcome from his action other than what actually occurred i.e. death.

Aside from malice aforethought the actions of the accused on the material night reveal that he had motive to act as he did. In his statement accused stated that he was angry at the deceased parents because he had overheard them discussing him in a negative light. As a means of revenging and hurting his aunt and uncle, the accused decided to kill their child. There is also evidence that on that same night the accused pounced on his cousin (who was a brother to the deceased and a son to his uncle and aunt) while they were in their room sleeping and stabbed him. The said cousin **Dickson Riziki PW8** had testified to this. Several other witnesses had confirmed the incident which even led to the suspension of the search for the deceased, because family attention was diverted to seeking medical treatment for **PW8**. All in all it is clear that the accused’s actions were motivated by extreme anger against his uncle and aunt. It was this that led him to kill their child. I am satisfied that the *mens rea* for murder has been proved as required by law.

Based on the foregoing, I am satisfied that the charge of murder has been proved as against the accused beyond a reasonable doubt. I therefore enter a verdict of ‘*Guilty*’ and I convict the accused accordingly.

Dated and delivered in Mombasa this 24th day of March, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Ayodo for State

Mrs. Kariuki for State

Court Clerk Mutisya

Court:

Mention 1st April, 2014 for mitigation and sentence.

M. ODERO

JUDGE

15th July, 2014

Before Hon. Lady Justice M. Odero

Ms. Kagoiri for State

Ms. Momanyi for Accused

Court Clerk Mutisya

Court:

I have considered the probation report filed today in court. At the time of the offence the accused was a minor but now at the close of the trial he is 22 years old and an adult. Many of the sentences recommended for children are no longer available to the accused e.g. Borstal Institutions. He committed a heinous crime which left a young girl aged 3 years dead. In my view probation would not be an appropriate sentence since the family of the deceased who are relatives of the accused are yet to come to terms with the incident. Given the circumstances I do hereby sentence the accused to serve 15 years imprisonment. He has a right to appeal within 14 days.

Read in open court.

In the presence of:

Ms. Momanyi for Accused

Mr. Ondari h/b Ms. Kagoiri

Court Clerk Mutisya

M. ODERO

JUDGE

15TH JULY, 2014

