



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 51 OF 2002

REPUBLICPROSECUTOR

VERSUS

JULIUS NYONGESA MUDOGO 1ST ACCUSED

PATRICK WANYAMA MUDOGO 2ND ACCUSED

SAMWEL CHUNE SITOKI 3RD ACCUSED

REUBEN OCHANGO 4TH ACCUSED

KENNEDY KIGAME MWANZI 5TH ACCUSED

SILAS EDEBE PERU 6TH ACCUSED

ELPHAS MULUNDA OTUOMBA..... 7TH ACCUSED

JUDGMENT

The accused persons namely Julius Nyongesa Mudogo, Patrick Wanyama Mudogo, Samwel Chune Sitoki, Reuben Ochango Kafuna, Kennedy Kigame Mwanzi, Silas Edebe Peru and Elphas Mulumba Otwomba were jointly charged in four counts of murder contrary to Section 203 as read with Section 204 of the Penal Code.

It is alleged that on the night of 10th and 11th day of January, 2002 in Lugari District within Western Province jointly murdered J K, M W, A A A and J A A respectively.

THE EVIDENCE

The prosecution called a total of fourteen (14) witnesses. **PW1**, J A S initially testified on 6th October, 2004 before Hon. Justice Dulu. When Hon. Justice Gacheche took over the conduct of the trial, the accused persons took plea afresh before her on 9th March, 2006. PW1 was then called to testify afresh. It was the evidence of PW1 that his three children namely E I aged 14 years, J A aged 7 years and A A aged 11 used to watch television at the neighbours home of one Kepha who had bought land from him. The said Kepha had also erected a homestead on the farm. On 10th January, 2002 while the said children were on their way to their grandmother's house where they used to sleep, decided to go to Kepha's house to watch television as usual. On the following morning, it is only E, the elder child who showed up at their father's house. E was asked by PW1 about the whereabouts of her siblings and she said she left them watching the television at Kepha's house.

It is at this point that PW1 went to the house of Kepha to enquire about his children. There, he met Wanyama (1st accused) who informed him that his children had gone with Kamau (the deceased in Count I) to buy milk at Phoebe's house. He proceeded to Phoebe's home where he met Phoebe. On enquiring from Phoebe about his children, Phoebe told him she had neither seen them nor Kamau. PW1 had earlier passed by the house of his mother where the children ordinarily spent the night and had been informed that they had not spent the previous night there.

PW1 testified that he returned to Kepha's home and interrogated Wanyama about his children. Wanyama insisted that the children had gone with Kamau to buy milk. He then requested him (Wanyama) to accompany him to the Police Station to report the matter but he declined. He decided to report the matter to J M L, a Village Elder, also commonly known as Mrefu. The village elder referred him to Lumakanda Police Station. He returned to Wanyama and asked him once again to accompany him to Lumakanda Police Station but he declined. He made the report on 13th January, 2002. The search for the missing children began.

According to PW1, he was later informed by one Rose, his neighbour that some dead bodies of children had been found dumped in a river. Rose had received the said information from her son L. PW1 then ran towards the river. Word also spread about the found bodies and many more people proceeded towards the river. At the river, the bodies of PW1's two children namely A (deceased in Count III) and J (deceased in Count IV) as well as that of M (deceased in Count II) were found. They had been murdered, their bodies covered with blankets after being tied with a rope and subsequently dumped in the river. It was said that M had been taken to Kepha's home by Kepha's wife and was a friend of his children. Subsequent evidence however reveal that she was a daughter of Kepha.

PW1 testified that after the discovery of the bodies, he never saw Wanyama again.

According to PW1, J had a string on the throat. A had pieces of cloth stuck in her mouth. M had been slaughtered. They were covered with a blanket and a string around J's throat was used to tie the three bodies. He identified the manila rope and blanket in court. He also identified the bodies of the three deceased children.

PW1 further testified that he knew all the seven (7) accused persons as follows; 1st accused was Wanyama's (2nd accused) brother, 3rd accused as his brother, 4th, 5th and 6 accused persons as sons of his neighbours and 7th accused as 2nd accused's brother.

PW1 also said that the 3rd accused whom he had informed about the disappearance of his children accompanied him to the scene in search of the children.

PW2, Wilson Kirui, a Superintendent of police working with crime scene support services testified that he took photographs of the bodies of the three (3) deceased children before they were retrieved from the river. He said they were bodies of a boy and two girls. The bodies were masked with clothings and one of them had an injury on the neck. He produced all the photographs he took as exhibits.

PW3, E I A, then aged 17 years gave a sworn statement of evidence. It was her testimony that Kepha bought his land from her father. Kepha's house was occupied by a worker by the name Kamau. It is noteworthy that the Kamau being referred to is one and the same deceased J K. Kepha lived and worked in Nairobi but would occasionally visit the farm. A young girl by the name M also lived in the homestead with the said Kamau. Herself and her siblings J and A used to go to Kepha's house to watch television and thereafter would proceed to sleep in their grandmother's house.

It was PW3's further testimony that on the night of 10th January, 2002 she and her two siblings went to the house of Kephas to watch television as usual. They found Wanyama, Kamau and M in the house. Wanyama slaughtered a chicken and cooked it. He then asked her to make some ugali

but she declined. Wanyama chased her away for refusing to make the ugali. He then told her that he would escort the children after he had finished making the ugali. She thus left for her grandmother's house to sleep. On the following morning she went to their house to collect her siblings so that they could go to school but they were nowhere to be found. She later learnt that the siblings' bodies had been found in the river. When she went to the river, she saw the deceaseds' legs protruding above the water.

PW3 also testified that she knew the 1st, 2nd and 7th accused persons as brothers, the 3rd accused as her paternal uncle, 4th and 5th accused persons as neighbours and 6th accused as her cousin.

PW4, R K J said that A, J A and E were her children and they often went to watch television in the house of Kepha in the evening then proceed to sleep in their grandmother's house. She stated that Kepha had bought land from them and his wife resided on the farm. Kepha and his wife had employed a worker called Kamau who also lived on the farm. Kepha's wife had also employed Wanyama (2nd accused) but he would commute to work from his house on a daily basis.

It was PW4's testimony that her children would return to her house at about 6.00 a.m. But on 11th January, 2002 they had not returned by about 7.00 a.m. She requested her husband J A (PW1) to go at their grandmother's house and find out what had happened. PW1 obliged and later informed her that he had not found the children both at their grandmother's and Kepha's house. He had also looked for them at the shop to no avail. PW3 had also told her in the morning of 11th January, 2002 that she left the other siblings in Kepha's house after the 2nd accused chased her away. She then looked for the children amongst her neighbours to no avail. She later received information that some dead bodies had been seen at the Lumakanda River, which bodies turned out to be those of his children and M.

It was also PW4's testimony that she knew all the seven (7) accused persons. She said the 1st, 2nd and 7th accused persons are brothers, 3rd accused person her brother-in-law, 4th and 5th accused persons her neighbours and the 6th accused person her cousin's son.

PW5, S L S and a brother to PW1 testified that he was informed about the missing children by PW1. He stated that PW1 told him how he had looked for the children at their grandmother's house, Kepha's home and the shops without success. He also assisted PW1 to look for the children.

PW5 said he visited the scene at the river where the bodies were recovered. He said that the bodies had minor injuries. There was a manila paper tied around their necks which he identified in Court.

He also stated that he knew all the seven (7) accused persons.

PW6, J L W, testified that on 14th February, 2002 he went to graze cows near the Lumakanda River. He followed one animal which had strayed into the river. That is when he saw two human legs protruding above the water of the river. He had information that some children had gone missing. He informed his mother, who together with other ladies went to the river and confirmed the information. His mother in turn informed PW1. He stated that the 1st, 2nd and 7th accused persons were his paternal uncles while the 3rd, 4th, 5th, 6th and 7th accused persons were his neighbours.

PW7, R W N, testified that on 14th February, 2002, while she was at home, her son, PW6, who had been in the farm returned home and informed her that he had seen two human legs protruding above the waters of Lumakanda River. She was accompanied by other women to the river where they confirmed the information. She then informed PW1 about the incident as she knew his children had gone missing. He accompanied PW1 back to the river although she did not wait until the retrieval of the bodies but she later learnt that three (3) bodies had been retrieved from the river.

PW7 said that the 1st, 2nd and 7th accused persons were her brothers in law whilst the 3rd, 4th,

5th and 6th accused persons were her neighbours.

PW8, M I a sister to PW1 said that on 21st January, 2002 she went to Webuye District Hospital where she identified the bodies of the three children for purposes of conducting a post mortem.

PW9, Doctor Cleophas Kubasu conducted the post mortems on the bodies of the deceased persons. He conducted the exercise on 18th January, 2002 on the bodies of M W and J K.

As regards the body of M W, the tissues around the left eye were missing, tissues around the right eye were hanging out and the body was decomposing. The neck was also twisted.

Internally, she had a fracture of the cervical and the spinal cord was cut. He formed the opinion that she died of cardio-pulmonary arrest secondary to transected spinal cord as a result of possible assault.

As regards the body of J K, it was decomposing. There was a wire around his neck. He had hyper-inflated lungs. The left eye ball was hanging. It was concluded that he died of strangulation.

On 21st January, 2002, PW9 conducted the post mortem on the body of A A who was about 10 years old. The body was wrapped in a blanket. She was tied. The body was decomposing. The neck was swollen and lungs were hyper-inflated. The cause of death was due to strangulation.

On the same date 21st February, 2002 he also conducted post mortem on the body of J A whose body was also found floating in a river. The body was decomposing. The neck was markedly swollen, mucus membrane were turning blue due to lack of oxygen and the lungs were congested. The cause of death was due to strangulation.

PW9 produced the four post mortem forms as P. Exhibit 4 (a), (b), (c) and (d) respectively.

PW10, Seargent Onesmus Mutunga then attached to the CID office in Lumakanda partly investigated the matter.

He testified that on 13th January, 2002 a report was made of missing children. He was requested to assist the OCS, Lumakanda Police Station with investigations. They first arrested Wanyama, the 2nd accused and placed him in the cells. On 16th January, 2002 he arrested Samuel Chune, the 3rd accused. After interrogating the 2nd and 3rd accused persons, they led them to Lumakanda River where 3 bodies were retrieved. On further interrogating the 3rd accused, he led the police to where the body of J K was.

PW10, stated that the 3rd accused then led them to Vihiga where a 3rd suspect, Ochango (4th accused) was arrested. The 2nd, 3rd and 4th accused persons were charged.

PW10 stated that the bodies were pierced with a barbed wire which he identified in court. He said that he was accompanied to the river by Inspector Tawaya Senior Seargent Wangila, PC Katui and PC Kwambai. After his transfer from Lumakanda, he left the investigations with Inspector Tawaya and Senior Seargent Wangila.

PW11, A N K and wife of Kepha confirmed that they had bought a piece of land from Kepha where they had erected a homestead. She testified that on the material dates, she had gone to Nairobi and left behind J K alias K, her nephew and her daughter M W. On her return on 15th January, 2002 she received information that M and other children had been killed. When she entered her house, she found that everything had been strewn around especially maize. Many things had been stolen from the house. She reported the matter to Lumakanda Police Station and the CID office. It is in the latter office that she met a police officer by the name Mutunga (PW10) who told her that the 2nd accused had been arrested. She requested him (PW10) to also investigate the 3rd accused as both the 2nd and 3rd accused persons were good friends and inseparable. That is

how the 3rd accused person was arrested.

PW11 then went to Nairobi and informed her husband who travelled home. She later saw the bodies of all the deceased persons at Webuye District Hospital. She knew all the seven (7) accused persons.

PW12, Police Constable Jackson Gathara Theuri stated that at the material time of the incident he was attached to CID Lugari. On 18th January, 2002 he was instructed by the Deputy DCIO, Inspector Albert Musundi to take a suspect by the name Patrick Wanyama to record a statement. He handed over the said suspect (2nd accused) to Inspector Musundi and thereafter proceeded with the father of the deceased M W to Webuye District Hospital Mortuary for body identification. The bodies of the child M and J K were identified and a post mortem conducted.

PW13, Chief Inspector Albert Tawaya said that in the year 2002, he was serving as the Deputy DCIO Lugari Division. His testimony was that on 13th January, 2002, PW1 reported that his two children, A A aged nine (9) years and J A aged seven (7) years had gone missing between 10th and 11th January, 2002. On 14th January, 2002, PW1 reported to the police that three bodies had been seen floating on River Lumakanda. In company of OCS and other officers, he visited the scene and confirmed the information. They then retrieved the bodies from the river. The scene of crime officer (PW2) went to the scene and took necessary photographs. They later visited the home of PW11 where they found items inside the house scattered all over; these included beddings and remnants of cooked ugali and chicken. A television set, serving machine and a bicycle were missing from the house.

On 15th January, 2002 police visited the scene again for further investigations. They arrested the 2nd accused. On being interrogated he told the police he and Samwel Chune (3rd accused), Ochango (4th accused), Julius (1st accused), Kennedy (5th accused), Elphas (7th accused) and Silas (6th accused) were all linked to the incident.

PW13, said that the 2nd accused told him that they had strangled the deceased persons and dumped their bodies into the river. They then stole a TV set, sewing machine and a bicycle and kept them in the house of Reuben Ochango (4th accused).

PW3 stated that the 2nd accused told him that they had planned to raid and steal from the home of Kariuki which they knew very well. He surveyed the house by staying with Kariuki, the deceased. But in the evening two small children visited the house to watch the television while in company of their elder sister who left after sometime. After the elder girl left, the 2nd accused went and brought in the other accused persons. The gang first attacked Kariuki by strangling him with a manila rope that they picked outside the house. They then realized that the children would reveal what they had done and they decided to kill by strangling all of them. They then wrapped the bodies in a blanket. The 2nd accused carried away the body of Kariuki in a bicycle whereas the rest carried away those of other children. This was about midnight. They dumped the bodies in the river and believed they would sink into the water. The body of Kariuki was however dumped at a different spot from those of the children. They tied it with a barbed wire and threw it into the waters.

PW13 further testified that the 2nd accused told him that all the seven (7) accused persons then returned to Kariuki's house from where they stole a TV set, bicycle, sewing machine and other items which they took to the house of the 4th accused.

According to PW13, the 2nd accused offered to take them (police) to the place they dumped the body of J K. The said body was recovered on 17th January, 2002 by the police who were led to the scene by the 2nd and 3rd accused persons. The body was taken to Webuye District Hospital and both accused persons were escorted back to the cells. The 4th accused who had gone underground was arrested in Vihiga. The 1st accused was arrested at Webuye District Hospital while the rest of the accused persons were arrested from their homes.

PW13 produced the manila rope as P. Exhibit 1, the blanket used to wrap the bodies as P. Exhibit 2, barbed wire as P. Exhibit 7 and sisal rope as P. Exhibit 8.

The 2nd, 3rd and 4th accused persons were charged together. Later, all the others were charged and the files consolidated.

PW14, K N K testified that M W, the deceased in Count II was her daughter and that J K, the deceased in Count I was a son to his wife's brother. The other two deceaseds were children of his neighbour. PW11 was his wife while the 2nd accused had been employed by his wife. His family lived in *[particulars withheld]* Village where the incident occurred.

His testimony was that on 29th December, 2001 he left the village and travelled back to Nairobi after the Christmas holiday. He left behind his wife (PW11) plus K and M (both deceased) and two other younger children of his. After four (4) days PW11 travelled to Nairobi because she wanted to transfer one of her children from a school in Murang'a to Lugari. After leaving Nairobi, she went to Lugari. Thereafter, she returned to the village only to find her child M, nephew K and two of her neighbour's children had been killed. She then returned to Nairobi and informed him. He travelled to the village and reported the matter to the CID. The 2nd and 3rd accused persons had been arrested. He then accompanied six police officers together with the 2nd and 3rd accused persons to where the bodies of the children had been found. The two accused persons commanded by the 2nd accused person then led the police to where the body of J K was. The body was then pulled out of the water and he recognized it to be the one of Kariuki, his wife's nephew. It was taken to the mortuary. He also identified the bodies of the other deceaseds at the mortuary.

PW14 further testified that he had bought the land where his family lived in the year 2000. He said he did not know who had killed his children.

All the seven accused person gave sworn statements of defence. They all raised the defence of alibi stating that they were not at the scene of crime at the time the incident occurred.

DW1, the 1st accused stated that on 11th January, 2002 he was in Webuye where he has a farm whereas the incident occurred in Lugari District far away from Webuye. He said he was arrested in 2003, one year after the incident. He also stated that PW11 was a free mason worshipper and on the fateful night there were people wearing black suits who were seen coming from her house. He denied he was involved in the murders of the deceased persons.

DW2, (the 2nd accused) stated that he and the deceased J K were employees of Kepha Nyamoro. He confirmed that PW1's three (3) children watched television in Kepha's house on a daily basis. He stated that on 11th January, 2002 he told PW1 that it was possible that Kariuki (deceased) had locked up the children in the house. He denied that he told PW1 that Kariuki had gone with the children to buy milk. He said that he left his employer's house on 10th January, 2002 at 5.00 p.m. At the time, E L was in the house. He denied that he is the one who chased E L away from the house. He also denied that he heard Esther (PW3) testifying that after she was chased away, she left behind J, A and M.

DW3, (3rd accused) testified that on the night of 10th January, 2002 he was in his house. He said that on the following morning, he was told by his brother (PW1) that his children had not returned home. He in turn told him that all he knew was that they used to go to watch television in the house of Kepha. After he learnt from PW7 that the bodies of the deceased persons had been seen in the river, he and the 4th accused person joined the neighbours at the river to assist in retrieving them.

He said he was arrested on 16th January, 2002 as they were preparing to bury the bodies. He denied having participated in the murders.

DW4 (4th accused) stated that on the material night, he was at his home and learnt of the incident only after his neighbour (I believe PW1) indicated that his children were missing. He said he

thereafter was with PW1 until the bodies were retrieved from the waters. He stated that he did not know how the children died.

DW5 (5th accused) testified that he learnt of the death of the deceased persons on 14th January, 2002 between 5.00 p.m. and 6.00 p.m. He heard people screaming across the valley overlooking his home. He joined neighbours and proceeded towards the river. He had earlier learnt that PW1's children had gone missing. He remained at the river until 8.00 p.m., then left for home. On the following day, he was informed that the bodies of the missing children had been retrieved from the river. He said he was arrested on 18th January, 2002.

DW6 (6th accused) testified that on the fateful night, he was at his home located about 1.2 Km from that of PW1. He stated that on 13th January, 2002, he received information that PW1's children had gone missing. He was accompanied by his father one Luka Mithamo to PW1's house to condole him. At PW1's home, they found PW1's father and mother and a village elder one Mudogo. The latter confirmed the information. He then joined other neighbours in looking for the missing children. On the same date at about 6.00 p.m., they heard screams coming from the river and the villagers told them that the bodies of the children had been seen in the river. He proceeded to the river where he remained until the bodies were recovered.

DW7 (7th accused) stated that he learnt about the disappearance of PW1's children after PW1 went to report the incident to DCIO, Lumakanda. At the time, he was doing some construction at the Lumakanda Police Station. On 14th January, 2002, he learnt from a villager that the bodies had been seen in the river by a child who had been herding cows. He then proceeded to the river and the bodies were retrieved at about midnight.

He stated that he did not know what killed the deceased persons.

It was also his testimony that PW11's house did not have windows.

At this point, it is important to note an anomaly in dates given in the evidence of both PW6 and 7. According to PW6, he stated that he took the cows to the river on 14th February, 2002 when he saw the human legs protruding above the waters of River Lumakanda.

PW7, the mother of PW6 said she received the information about what PW6 had seen on 14th February, 2002.

It is vivid from all other collective evidence that the bodies of the three (3) deceased children were seen in the river on 14th January, 2002, three days after their disappearance. Although the proceedings indicate the respective dates as given by PW6 and 7 as 14th February, 2002, that mistake, I believe, was an inadvertent typographical error on the part of the court. The dates should be read and referred to as 14th January, 2002 and not 14th February, 2002.

EVALUATION OF EVIDENCE

I have considered the evidence on record together with the submissions by the respective defence counsel and the State.

None of the fourteen (14) prosecution witnesses saw any of the seven accused persons inflict the fatal injuries on the deceased persons. The evidence on record is purely circumstantial. The principles governing circumstantial evidence were laid down in the case of **R -VS- KIPKERING ARAP KOSGEI AND ANOTHER (1949) 16 EACA 135**. In citing this case Hon. Onyango Otieno, Wanjiru Karanja and D. K. Maranga, JJA., in **JACOB MUTHEE & 8 OTHERS -VS- REPUBLIC (2013) e KLR** stated as follows:-

“The law as regards the principles that guide the court when considering circumstantial evidence is now well settled. It is found in the decision of the predecessor of this court in the

well known case of R -VS- KIPKERING ARAP KOSGEI & ANOTHER (1949) 6 EACA, 135 where the court held;

'that 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 hypothesis than that of his guilt, and 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 always on the prosecutions and never shifts to the accused'."

The same principles were echoed in the case of **PETER MOTE OBERO & ANOTHER -VS- REPUBLIC (2011) E KLR – COURT OF APPEAL AT KISUMU, CR. APP. NO. 177 OF 2008** learned Omolo, Waki & Nyamu, JJA., stated as follows:

“It is the essence of the circumstantial evidence that, in order to justify an 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 guilt. 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 – TEPER -V- R [1952] AC 480. With those safeguards in place, circumstantial evidence is as good as any direct evidence which is tendered and accepted to prove a fact. In R. V. TAYLOR, WEAVER AND DONOVAN [1928] 21 Cr. App. 20 CA, the court stated:-

'Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial'."

In the instant case, it is the 2nd accused Patrick Wanyama Mudogo who was the first to be arrested. His arrest was necessitated by the fact that he was the last person to be in the company of all the deceased persons. This fact was confirmed by PW3, a sibling of two of the deceased persons. The 2nd accused person did also confirm that he was with the deceased persons on 10th January, 2002 albeit he said he left them behind at 5.00 p.m.

On 15th January, 2002, PW10, Seargent Onesmus Mutunga met PW11 A N K, the mother of M W who told him that the 3rd accused person should also be arrested as he was a close friend of the 2nd accused. That is how PW10 arrested the 3rd accused.

It is after both the 2nd and 3rd accused persons were arrested that they informed police about the greasly murders of all the deceased persons. According to PW10, it is the 3rd accused who told them (police) where they had dumped the body of J K. PW13, Inspector Albert Tawaya then in detail testified how the 2nd accused narrated to him how they planned to execute a robbery in the home of PW14. For the mission to succeed, J K (deceased) who was a resident worker in the home had to be done away with. Apparently, the other three deceased persons were in the house watching the television. They had seen J K being strangled to death. For fear that these children would disclose what had happened, they too, had to be done away. And that is how they met their deaths, which, coincidentally, was also through strangulation.

Back to the evidence of PW1, although he said that the 2nd accused told him that it is the deceased J K who had left with the children to buy milk, it is the same 2nd accused person who later revealed where the deceased persons' bodies had been dumped after they killed them.

Suffice it to say, after the arrest of the 3rd accused person, he was joined with the 2nd accused and both became the guide to the police officers in search of the deceased, J K. Although the bodies of the children A, J and M had already been retrieved from the river by the time the 3rd accused was arrested, it is worthwhile noting that the 2nd and 3rd accused persons did also show this site (river) to the police officers. Nevertheless, the body of J K was recovered after the 3rd accused led the

police to scene. And as I have noted, the 3rd accused was in the company of the 2nd accused as well as PW14.

The question that begs from these circumstances is; how did the 2nd and 3rd accused persons know where the bodies of the deceased persons were if they did not have a hand in their deaths? The answer is simple – they knew what had transpired on the night the deceaseds disappeared and that is why they did not hesitate to lead the police to where the bodies were. In my view, I am convinced they were culprits and they fully participated in the murders.

I am further persuaded as testified by PW13 that the motive of killing all the four (4) deceased persons was so that they could steal from PW14's house in the absence of anyone. They knew that J K being a resident worker in PW14's house would be the first eye witness to the theft. And so he was the first target of elimination. After eliminating him, they realized that the other occupants would definitely tell the fate of Kariuki – that he had been murdered. They too had to be eliminated.

To buttress this point, PW11 as well PW13 did confirm that theft did occur in the former's house. A television set, sewing machine, bicycle and other items were found missing in the house. Unfortunately they were never to be recovered.

For the above reasons, it follows that events leading to the deaths of the deceaseds tightly link both the 2nd and the 3rd accused persons to the deaths of the deceased persons. They died in murders more foul. One by one they were strangled to death and their bodies dumped into the Lumakanda River. And as the saying goes "*the days of a thief are counted*", it was only after 3 days that PW6 noticed human legs protruding above the waters of Lumakanda River. He raised an alarm and the bodies of the three children were retrieved. Thereafter, the 2nd and 3rd accused persons owned up and the body of J K was also retrieved from the same river.

All the other accused persons were mentioned by the 2nd accused. Apparently, after the disappearance of the deceaseds, the 4th accused person Reuben Ochango Kafuna went underground. Prior to the incident he was always at his home. He was named by PW1, 3, 4, 5, 6, 7, 8 and PW11 as a neighbour of PW 1, 11 and PW14. According to PW1, he left Lumakanda for Vihiga after the incident. He had seen him in Lumakanda, the area where the murders took place on or about 8th or 9th January, 2002. PW5 stated that he saw him on 14th January, 2002 at the river bank when the bodies of the children were being retrieved. Further, it was his evidence that he accompanied other villagers to the river on 14th January, 2002 to help retrieve the bodies of the children. The 3rd, 5th, 6th and 7th accused persons also said they were at the river with the 4th accused on 14th January, 2002. So then, why did he then go underground soon thereafter?

It is not very clear on what date he was arrested, but it must be not too long after the bodies were retrieved as he was charged alongside the 2nd and 3rd accused persons. But one thing is evident – he fled his home after bodies were retrieved to Vihiga. He did not give an explanation in his defence as to where he was or what he had gone to do in Vihiga. This fact of fleeing from his usual resident raises eyebrows and must have been actuated by a guilty conscience.

Again I hold that that fact of his disappearance from his home is sufficient corroboration to the adverse inference of his guilt as was disclosed by the 2nd accused to PW10 and 13. He knew he would be arrested and to evade this, he fled from his home.

As was held in the case **MALOWA -VS- REPUBLIC (1980) KLR 110**, where the Appellant had disappeared from his home for six months after committing the offence, that his conduct of disappearance from home was a piece of circumstantial evidence which sufficiently corroborated the deceased's dying declaration. In the same spirit, in the instant case, the 4th accused person's disappearance from his home sufficiently corroborates what his co-accused (2nd accused) told PW10 and 13.

As for the 1st, 5th, 6th and 7th accused persons, the only incriminating available evidence is that of their co-accused, the 2nd accused. This evidence is not corroborated by any other. Whereas they may have participated in the murders, that assertion remains a suspicion. It is trite law that suspicion, however strong, can never found a ground for conviction. And for the lack of corroboration to the 2nd accused's contention, these four accused persons will get off the hook. See the case of **ABDALLA BIN WENDO & SHEH BIN MWAMBERE -VS- REPUBLIC (1952) EACA, 166 AT 170 – CRIMINAL APPEALS NOS. 44 AND 45 OF 1952** where the then East African Court of Appeal said;

“Suspicion, however strong, cannot supply a basis for inferring guilty when proof of guilty cannot be safely inferred beyond reasonable doubts.”

From the foregoing, I am disinclined to hold that the 2nd, 3rd and 4th accused persons gave any credible defences. I treat them as mere denials which cannot bail them out.

The fact of the death of the deceaseds was confirmed by PW9, Doctor Cleophas Kubasu who did all the post mortems. The cause of the deaths pointed to human factors being assault and strangulation. Indeed the assault weapon was also produced in court – that is a manila rope.

Let me also note that this trial has taken unnecessarily too long to conclude. A perusal of the record shows that the file has gone through the hands of eight (8) Judges. Substantively the prosecution's case was heard by Hon. Justice Gacheche and Ibrahim J, (as he then was). Thereafter Hon. Justice Mshila took over upto the start of defence hearing (evidence of DW1). I then completed the defence hearing.

It appears that the frequent transfer of the various Judges occasioned the delay in the trial as it took rather too long to type proceedings taken by the previous Judges.

This delay must have unnecessarily caused anxiety to the accused persons and although our systems may have been slow to push the trial forward as would be expected, the court owes all the accused persons an apology – not because the delay was deliberate, but so that in future such an occurrence should be avoided. And even if some of them will be convicted, no amount of words may adequately compensate the anger and anxiety caused to them as they waited for justice to be done.

In the end, I find that the prosecution has proved its case against the 2nd, 3rd and 4th accused persons. I find them guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and I convict each one of them in the four counts accordingly.

However, the prosecution did not prove its case against the 1st, 5th, 6th and 7th accused persons to the required standards – beyond all reasonable doubts. I accordingly acquit them in all the four counts of murder as charged under Section 203 as read with Section 204 of the Penal Code.

DATED and DELIVERED at ELDORET this 3rd day of July, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Omboto for the 1st, 2nd and 3rd Accused

Mr. Chepkwony for the 4th and 7th Accused

Mr. Onkangi holding brief for Nyambegera for the 5th and 6th Accused

M/s. Oduor for the State