



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 1 OF 2010

REPUBLICPROSECUTOR

VERSUS

DNL.....ACCUSED

J U D G M E N T

1. **DNL** herein stands charged with the offences of murder contrary to section 203 as read with section 204 Penal Code. The particulars being that on the 26th day of December 2009 in Embu East District within Eastern Province, the accused murdered **KK**.

Count 2.

He is charged with a 2nd count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that on the 26th day of December 2009 in Embu East District within Eastern Province, the accused murdered **GM**.

2. The case of the prosecution is premised on the evidence of fifteen (15) witnesses. PW1 - EKG the mother of the two deceased children testified that the accused with whom she was living as husband and wife and the deceased children arranged to go and celebrate Christmas at his home in Runyenjes. They were not legally married and he was not the father of these two children.

3. They were well received at the home of the accused. They left the children with the accused's mother. They went to Runyenjes to enjoy themselves with the accused's sisters PW4 - MW and PW5 - JML. While at Runyenjes they drank alcohol and moved from club to club just enjoying themselves. There arose a disagreement between them and the accused wanted PW1 to go home but she refused. PW5 stayed briefly and went home. PW4 eventually left them at 4am and went home.

4. The accused is said to have arrived home at about 4am excessively drunk. He asked for the kitchen keys and PW5 told him where they were. He also asked where his children had slept and PW5 told him. He then left.

5. PW3 AK a juvenile aged 12 years then, testified that on 26th December 2009 at about 6am he was in the house with his brother plus the two deceased. The accused came and took the deceased and told him to go back to the house. PW3 went back to their house. When he later woke up he saw the accused cutting grass for the sheep. He was not with the deceased children. The children were later found dead.

6. PW2 - ENL is the father of PW3 and a brother to the accused. He left home early in the morning of 26th December 2009 for Gicheche. Before reaching there he received a call from his sister and another

from PW1. They were asking him to go back home immediately which he did. He learnt that the accused had taken away the deceased children and no one knew where they were. They went to the coffee plantation to look for them. PW1 had come back home at 6am and found the children missing and she had wanted to take them away as they had quarreled with the accused.

7. After a bit of searching PW3 called PW2 saying he had seen the children. On rushing to where PW3 was he saw the children who were dead. They had cut wounds on the throats. He rushed to the Police Station and reported the matter and Police Officers came. After a while he saw the accused being carried by a group of people while bleeding from the back. He was taken to hospital.

8. PW10 - Kibaru Kaungutho and PW11 – Kibaru Kaungutho who are from the accused's village heard screams from the accused's home and went there. They saw the murdered children and they pursued the accused. They heard something groaning in the bushes and on checking they found it was the accused. His throat was also cut and a knife was recovered near him.

9. PW12 - Dr. Godfrey Njuki Njeru produced the post mortems of the two children. He found the cause of death to be severe bleeding as a result of the severed tracheas as blood vessels (EXB 2&3). PW9 - Dr. Joseph Thuo examined the accused for mental fitness and found him to be mentally fit to stand trial (Report EXB1).

10. PW13 - Henry Kiptoo Sang the Government analyst received several items belonging to the deceased children and the accused plus a kitchen knife and the blood samples of the accused and the deceased. He was unable to generate any DNA profiles from the blood on GM's green T-shirt and his blood sample. The DNA profile generated from the blood stains on the knife matched that of the deceased. He blamed delay for failure to generate more DNA profiles from the blood on the knife and GM's blood sample.

11. PW14 - No.78668 P.C. Cleopas Musinga from scenes of crime Meru but formerly of Embu visited the scene in company of C.I. Nyakera O.C.S. Runyenjes. They found two boys' bodies with deep cuts at the throat. They were lying in a shamba opposite their house. He took photographs of views of the bodies, compound and blood stained knife. (EXB5 (i-viii)). He also produced a certificate to confirm that he prepared the photographs.

12. PW15 – P.C.I. Henry Nyakira led a team of officers to the accused's home upon receiving a report of a murder of two children. They found the bodies in a shamba near their house. While there they found out that the accused was in a bush hiding. They rushed there and found him with a cut on his neck. He was unconscious. A knife (EXB7) was found at the scene where the accused was found. Accused was taken to hospital. The officers gathered all the evidence required and the accused was eventually charged.

13. The accused gave a sworn statement of Defence. He testified that on 25th December 2009 he went home with PW1 and their deceased children. On the way they met PW4 and PW5 and they all went home. They left the children with his mother and they all went to Runyenjes to enjoy themselves. They were taking beer. They were joined by PW2 and PW11. Around 11pm his wife (PW1) received a call by a stranger to him. PW1 then suggested they go to another bar. After consulting others they agreed to leave for another bar. Before they left, three men entered the bar and went to PW1 demanding for the two children or she goes back to her husband. A scene was created there but they left. PW2 and PW11 left but PW5 had left earlier.

14. He went with PW1 and PW4 to **4AM Bar** Runyenjes. They continued drinking alcohol. He then told PW1 and PW4 that they should leave and go home. PW1 refused in spite of his persuasion. Later PW1 made a call and the three men whom they had left in the other bar came. One held PW1's hand and told him he was lucky but he would finish his business/work. At 2.30am he took a boda boda and went home passing through the Police Station to report the taking away of his wife. The Police Officers told him to go home and wait for her there.

15. Reaching home he woke up his mother and PW5 and he was given the key. PW5 told him where his children were in PW2's house. He called PW3 who opened the door and he took the children. They went

to sleep. PW1 later came and he opened for her. He went back to sleep. He later went to feed the goats. On returning he found PW1 seated on a chair. This was around 4.30am and he heard people in the house asking for him. He went and found the three men who had been at the bar. They attacked him and beat him until he lost consciousness and found himself in Hospital with injuries on the neck and hand. He was informed that his children were dead. He was arrested on 26th December 2009 and charged. He denied the charge.

16. In cross-examination he admitted having been drunk. He connected the three men to the call PW1 had received. He admitted not being the father of the deceased children. He further said his house to his mother's house is 30M, same to his brother's. And to come to his house one had to pass through his mother's house.

17. Both the State and the defence Counsel filed written submissions which they highlighted. The gist of the submission by Mr. Njeru Ithiga Advocate for accused is that the prosecution did not prove any malice aforethought against the accused. Counsel cited the case of **REPUBLIC –V- ERICK KIPRONO SIGEI - KERICHO HCR CASE NO.36/11**. She further submitted that the prosecution relied on circumstantial evidence which did not prove that it is the accused who killed the children. She relied on the cases of;

- i. **REPUBLIC –V- JACOB LINAH AGA KISUMU HCR CASE NO.19/10**
- ii. **REPUBLIC –V- DANIEL MUSYOKA MUASYA & 2 OTHERS MOMBASA HCR CASE NO.42/09.**

18. On the other hand M/s Ing'ahizu learned State Counsel submitted that the prosecution had proved its case for the following reasons;

- i. The accused was the last person to be seen with the children alive.
- ii. Malice aforethought was proved.
- iii. Recovery of the murder weapon next to the accused.
- iv. The accused's defence was dislodged in cross-examination.

She relied on two cases where accused persons had been convicted on circumstantial evidence;

a. JOHN NDUNDA MWANIKI –V- REPUBLIC NAIROBI CRIMINAL APPEAL NO.365/07.

b. JAMES GACHEGWA MWAURA NAKURU HCRA NO.73/09.

19. This is now the case before this Court for determination. Section 203 Penal Code defines murder as follows;

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

The two ingredients to be established in a murder charge are;

- i. Malice aforethought which imputes *the mens rea* or intention to kill.
- ii. The *actus reus* or actual killing

Section 206 Penal Code defines malice aforethought as;

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”.

20. I have carefully considered the evidence on record and the submissions by both the State and the defence. There is no witness who saw the accused herein kill these children. The prosecution wholly relied on circumstantial evidence (indirect evidence) to state their case. The accused has denied any involvement.

21. The following are the undisputed facts;

- That PW1 and the accused were living together as husband and wife. When the two started living together PW1 already had the deceased children who were twins and were from a different relationship.
- On 25th December 2009 PW1, accused, and the children went to accused's home for Christmas.
- PW1 and the accused left the deceased children with the accused's mother as they went to Runyenjes to enjoy themselves. They were joined by the deceased's sisters (PW4 and PW5) in Runyenjes.
- Each of them returned home alone PW1 being the last to arrive home early 26th December 2009 morning.
- The deceased children were found lying dead with their throats slit in a shamba near their house. The accused was also found with an injury on his neck and groaning in a nearby push. A blood stained kitchen knife was found next to where he lay.

22. The issue for determination is who killed the children and what led to the commission of this heinous act. As I have stated above, the prosecution relied on circumstantial evidence. What then is circumstantial evidence? In ***REPUBLIC –V- TAYLOR WEAVER & DONOVAN [1928]21 CRIMINAL APPEAL R 20;***

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified exam is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”

And in ***MWANGI & ANOTHER –V- REPUBLIC [2004]2 KLR 32*** the Court of Appeal stated this on circumstantial evidence;

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypotheses except the hypothesis that the accused is guilty of the charge”

23. The evidence of PW1, PW4, PW5 and the accused shows that the four of them were taking alcohol during the time they were in Runyenjes. They did not settle in one bar but moved from bar/club to another. PW5 left for home earlier than the rest. PW4 also left later after seeing PW1 quarrelling with the accused. Both PW1 and accused have confirmed that there was a quarrel between them while in Runyenjes. The bottom line is that PW1 and the accused did not go back home together. The accused went home leaving PW1 behind. PW5 testified that the accused arrived home that night at 4am alone. This is confirmed by the accused in his defence.

24. The evidence of PW3 is that he was in the house with his brother Patrick Maina plus the deceased, when the accused came and took the deceased and asked him to go back to the house. The accused in his defence admits having gone to PW2's house and taken the deceased. It is PW3 who opened the door for him.

25. The issue now is what happened to these children after he took them. According to him his wife had been called by a stranger while they were in a bar in Runyenjes. Minutes later three men unknown to him came and spoke to PW1. They were demanding to have the children or she goes back to her husband. The three men created a scene and started drinking. He said all this happened in the presence of PW2,

PW4, PW5 and PW11. Unfortunately none of these witnesses mentioned anything close to what the accused stated in his defence. Furthermore the defence did not cross-examine them on this. My conclusion is that this is not what happened.

26. He again said he left Runyenjes at 2.30am for home after the three men again appeared after PW1 called them. PW4 stated in her evidence that she left PW1 and the accused in Runyenjes at 4am after she saw them quarrelling. PW5 further confirmed that the accused had arrived home alone at 4am. It is therefore not true that he left Runyenjes at 2.30pm.

27. The accused has told the court that while in his house the three men who had taken PW1 arrived. He was in the house with PW1 and the children when the three men took him and beat him unconscious. From the evidence on record the accused's family members seemed to be at home during this festive season. PW2, PW4 and PW5 and their mother were at home. Their houses are close to each other. He also stated that to reach his house one must pass through his mother's house. Obviously if the accused was ever visited by the said three men the people in the homestead could have heard the commotion or even seen them. Even the children could have screamed. My finding is that the story of the three (3) men is an afterthought. Had it been true the defence counsel would on the accused's instructions have cross examined all these witnesses about the alleged three men.

28. These children were not taken away by a stranger. They were taken away by a person they knew and in whose hands they felt safe. That's why they did not scream or make any noise. PW5 told the court that when the accused came he asked her for the **kitchen keys** and she told him where the keys were. After being told where the kitchen keys were he asked where the children had slept and he was told. Why was he asking for kitchen keys? What was he going to do in the kitchen? The evidence of PW11 and PW15 was that they recovered a blood stained kitchen knife from where the accused was found lying unconscious. The knife was photographed as EXB5(ix) and produced as EXB7. My finding therefore is that this knife is what the accused went to get from the kitchen hence the request for the kitchen keys.

29. The bodies of the children were found near their house in the shamba. The accused was found near there in a thicket groaning with the blood stained knife next to him. The tee-shirt he wore (EXB10) was found to have been heavily stained with blood. The report by the Government analyst – PW13 was that the DNA profiles could be lifted from it.

30. From the chronology of events the accused used the knife to cut himself after he had slit the throats of the two children. It was therefore not possible to get traces of their blood on this knife which I find to have been the murder weapon.

31. The accused was the last person to have been seen with these children while alive. He failed to offer any plausible explanation of what happened to them as was required of him under section 111 of the Evidence Act. The explanation he offered in his defence is not tenable as the evidence by the prosecution witnesses dislodges it.

32. The Court of Appeal in the case of *NZIVO –V- REPUBLIC [2005]1 KLR 700* held thus;

“In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his 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 coexisting circumstances which would weaken or destroy the inference”.

I am satisfied that the circumstantial evidence herein is incompatible with the innocence of the accused and directly points to him as the person who killed the two deceased children.

33. The next issue to determine is whether *Mens rea* was proved. Did the accused have the intention to kill these children? Instances when malice aforethought is established is provided for in section 206 P.C. which provides;

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

a. An intention to cause 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.

34. While evaluating the evidence I will deal with two facts which have been established by the facts. These are;

- i. The accused had been in Runyenjes with PW1, PW4 and PW5 drinking alcohol. Infact the accused drunk alcohol for over eight (8) hours.
- ii. While in Runyenjes the accused quarreled with his wife (PW1). They went back separately though they had gone to Runyenjes together.

35. In the case of **KARISA KIMUNZU –V- REPUBLIC CRIMINAL APPEAL NO.266/06** the Court of Appeal held thus;

“But under subsection (4) the Court is required to take into account the issue of when the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial Court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the Appellant’s drinking spree of the previous night and even that morning in determining the issue of whether the Appellant was capable of forming and had formed the intention to kill his sons”.

36. The above case was followed by the Court of Appeal in **ANTHONY NDEGWA NGARI –V- REPUBLIC NYERI COURT OF APPEAL CRIMINAL APPEAL NO.352/12**. The facts have established that the Accused had taken a number of bottles of alcohol in Runyenjes before he returned home in the wee hours of the morning minus his wife. Section 13(4) Penal Code provides;

“Intoxication shall be take into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence”.

Considering the content of alcohol the accused had taken prior to the incident, I do find that the accused may not have been in a proper state of mind to make any rational decision/decisions. He had left with his wife to go and enjoy themselves leaving the children with their grandmother. In the name of enjoying, both of them took quite an amount of alcohol and even quarreled while there. The prosecution failed to establish any prior intentions by the accused to kill. I therefore find that the prosecution has proved the offence of manslaughter. I accordingly reduce the charge to manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict the accused accordingly.

**DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 9TH DAY OF
SEPTEMBER 2014.**

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for state

M/s Muthoni for Ithiga for accused

Accused – PIP

Mutero/Kirong – C/c