



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CRIMINAL CASE 12 OF 2010

REPUBLIC PROSECUTION

=VERSUS=

HAMISI JUMA NGUO ACCUSED

JUDGEMENT

The accused **HAMISI JUMA NGUO** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 9th day of May 2010 at M[...] in Msambweni District within Coast Province murdered G.S.W.”

The accused who was represented by **MR. MUSHELLE** Advocate entered a plea of **‘not guilty’** to the charge. The prosecution led by the learned State Counsel **MR. ONSERIO** called a total of eleven (11) witnesses in support of their case. The deceased was a young 9 year old girl named **“G.S.W.”**. **PW1 JOSEPHAT WAMBUA** and **PW2 ‘ESTHER MWENI’** the father and mother of the girl told the court that on 9th May 2010 a Sunday the family awoke and took tea. The deceased then left to go to attend church at 8.00 A.M. At 10.00 A.M. the father **PW1** also proceeded to church. Meanwhile **PW2** remained at home waiting for the deceased to return and take over the care of her infant twins so that she too could go to church. The deceased never returned. At about 1.30 P.M. **PW1** received information that his daughter’s body had been found near river Vanga. He rushed to the scene where a pitiful sight met his eyes. The deceased lay dead with a twisted neck. Her underpants had been removed and lay beside the body and her clothes had been bunched up around her waist leaving her private parts exposed. Police were called. They came and took photographs and later took the body to the Mortuary. The next day villagers arrested the accused who was a herdsman in the area on suspicion that he had killed the deceased. The mob beat up the accused and set him alight. However police arrived in the nick of time, rescued the accused and took him to hospital for treatment. He was later charged with this offence.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied any and all involvement in the murder of the deceased. This court now has the duty to determine whether the evidence on record proves a charge of Murder 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”.

This definition establishes three ingredients all of which must be proved in order to sustain a charge of murder. These are –

- 1) Proof of the death of the deceased and the cause of that death
- 2) Proof that the said death was caused by an unlawful act or omission on the part of the accused – this constitutes the ‘**actus reus**’ for the offence of murder, and lastly
- 3) Proof that said unlawful act or omission was committed with malice aforethought – this constitutes the ‘**mens rea**’ for murder.

The unfortunate and untimely death of this young girl is not in any doubt. **PW6 JOSHUA MUTISYA WAMBUA** told the court that on the material day he left church and went to his farm. Two young boys alerted him of the presence of a dead body by the river. **PW6** went to check. He saw the body of a young girl. A bag containing her books lay nearby. **PW6** checked the books and read the dead child’s name as ‘**G.W.**’. He returned to church to break the sad news to the father of the child. Then he led them to where the body lay. The parents of the deceased **PW1** and **PW2** told the court how they rushed to the scene near the Vanga river and found the half-naked body of their beloved child lying dead on the ground. **PW10 SERGEANT MICHAEL ODUOR** is the officer who produced and enlarged the photographs taken at the scene. The said photographs clearly show the body of the deceased. The identity of the deceased was confirmed by her parents.

PW9 DR. TUMU ZAUNGA carried out the autopsy on the body of the deceased. He observed that her hymen was perforated indicating that she had been defiled. He also noted a fracture of the cervical spine at the neck area. **PW9** gave his opinion that the cause of death was ‘**spinal cord injury secondary to cervical fracture**’. He filled and signed the post-mortem report which he produced in court as an exhibit **Pexb1**. This was expert medical evidence which was in no way challenged nor controverted by the defence. As such I find as a fact that the deceased child was defiled before she was brutally strangled to death.

Much as our hearts may bleed for the family and especially the parents of this young girl and much as society may wish to see the perpetrator of this heinous crime punished, this court is duty bound to ensure that the evidence adduced by the prosecution meets the threshold set down in law. That is to say the court must be satisfied that there is proof beyond a reasonable doubt that it was the accused who defiled and killed this child.

There was no eye-witness to the murder. Indeed no witness appears to have seen the deceased after she left the church service at 10.30 A.M. **PW8 MARY MWIKALI** who is a Sunday school teacher confirms that the deceased did attend Sunday school classes that morning from 8.00 A.M. to 10.30 A.M. At 10.30 A.M. **PW8** told court that she dismissed the class and saw the deceased depart for home. The deceased was never seen alive again.

There is no witness who at any time saw the accused in the company of the deceased on the material date. **PW3 KILULU MUTUKU** told the court that on the same day at about 11.00 A.M. he saw the accused passing near the area where the body of the deceased was found. This fact is not by itself any proof of guilt nor does it give rise to any suspicion. Indeed under cross-examination by defence counsel **PW3** says:

“I saw Hamisi [the accused] passby. That is the main road. Any person can pass there. It is not an offence to pass there ...”

By this **PW3** concedes that this was a public path which the villagers ordinarily used. There was absolutely nothing suspicious in the accused using that same path.

The prosecution also called as witnesses two (2) minors **M.M. PW4** aged 14 years and her sister **A.M. PW5** who was ten years old. The two told the court that on the material day they were out near the river herding cattle. They saw the accused emerge from the bushes and they ran and hid. This was because accused was to them an unfriendly person who had once chased them. The fact that the accused may have been less than sociable, or even the fact that he may not have particularly liked young children does not make him a murderer. Both **PW4** and **PW5** state that when they saw the accused he was alone. At no time did they see him with the deceased. I was able to observe the demeanour of the two girls as they testified. In my view their evidence was rehearsed and they had clearly been coached on what to say in court. In any event their testimony does not in any way implicate the accused in the murder of the deceased. It is clear that the area by that river was a place where people often passed and herded their livestock. There was nothing unusual in the accused being there that morning just as **PW3 PW4** and **PW5** were.

There is evidence that the accused was deemed a suspect because he had allegedly tried to rape another girl in the village called 'M'. This 'M' was never called to testify as to whether or not the accused had ever tried to rape her. Even if it were proved that accused did attempt a girl before [which has in no way been proven] this would not mean that it was he who defiled the deceased. In his evidence **PW3** told the court:

“The village chairman told us to search for one Hamisi who it was alleged had tried to rape another village girl called M. No action was taken over this alleged attempted rape”

PW3 goes on to state:

“The village chairman is ‘JULIUS MUSENYE’. He did not witness the attack on the deceased Grace. He named accused as a suspect. We went to search for the accused”

This village chairman who gave orders that accused be arrested was never called as a witness to explain why he felt that accused was a suspect in this case. **PW11 CORPORAL DANIEL KAIMUNGUR** also stated:

“They [the witnesses] told me they suspected the accused because they claim he had a history of attempted rape cases. No such report had been made to police. The cases were being handled by the village chairman”

This is the same village chairman who gave orders that accused be apprehended yet he did not witness the attack on the deceased and he was not called to testify in this case. Why would the police place reliance on this type of unsubstantiated hearsay evidence? There is absolutely no basis shown for such an allegation.

The prosecution goes on to present an even more bizarre reason for the arrest of the accused in connection with this case. **PW7 STEPHEN MUTISYA** a community policing officer told the court that he had once seen accused write on the ground ***“Nitakutomba na nita kuuwa”*** i.e. ***“I will rape you and I will kill you”***. If the accused indeed wrote such words then this amounted to a serious threat to society. Again no report was made to police and no action was taken apart from ***‘warning’*** the accused. Further it is not clear to whom these threats [if in fact they were ever uttered] were addressed. Certainly no allegation was made that the accused named the deceased Grace as his intended victim. Once again these are unsubstantiated claims which have no basis.

It is quite clear that the police relied on rumours and innuendo by villagers as a basis for charging the accused. No tangible evidence exists to link the accused to this crime. In my view police failed dismally in their duties because no investigations were conducted. **PW11** relied wholesale on stories told to him by the villagers. The police if they were serious ought to have ensured that blood samples and/or a vaginal swab were obtained from the deceased as there was clear evidence that she had been defiled. This would reveal if there was any presence of semen in her vaginal canal. Such samples could then have been compared with a saliva sample taken from accused. The police investigations into this matter can best be

described as half-hearted.

From the evidence on record it becomes manifestly clear that the accused was arrested and charged on the basis of pure suspicion. It is a well established tenet of our law that mere suspicion alone no matter how strong cannot form the basis of a conviction against an accused person. In this case the accused made no attempt to flee or abscond. He was arrested from his home and he voluntarily surrendered to the community policing agents. Indeed the accused was even beaten and burnt by the villagers before police stepped in and rescued him. All in all I find no evidence to prove that it was the accused who defiled and killed the deceased. The actus reus for the offence of Murder has not been proved against the accused. As such I enter a verdict of '*not guilty*' and I acquit the accused of this charge. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 11th day of July 2012.

M. ODERO

JUDGE

In the presence of:

Mr. Were holding brief for Mr. Mushelle for Accused

Mr. Tanui for State