



REPUBLIC OF KENYA



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**Republic v Omuholo (Criminal Case 50 of 2019)
[2025] KEHC 565 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 50 OF 2019
HI ONG'UDI, J
JANUARY 29, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID ANJERE AMUNYA OMUHOLO ACCUSED

JUDGMENT

1. David Anjere Amunya Omuholo the accused was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars are that the accused on 19th September, 2019 at unknown time at Kiwanja Ndege within Njoro township of Njoro subcounty in Nakuru county murdered Brenda Chepchirchir.
2. He denied the charge and the matter proceeded to full hearing with the prosecution calling a total of fifteen (15) witnesses. PW1 Ivy Cheptanui is the deceased's mother. She testified that they were three (3) families including that of the accused living on a plot in Molo. On 19th September, 2019 morning she took the deceased who was aged 4½ to Junior Friends Academy. On her return with her youngest child she tried to trace her phone in vain. The accused's wife had travelled home.
3. At around 3pm she went to pick the deceased from school but did not find her. She was told by the teacher that the deceased had left with her friends. PW1 left and on the way home met one of the pupils whom she asked about the deceased. The pupil told her she came with deceased who had gone home. She did not find her at home and, made some inquiries. A lady (Mama Naomi) informed her, the deceased had come home and sat on the veranda around 4pm and was called by another child.
4. At around 7-8 pm while she was with other neighbours she met with the accused. She asked him if he had seen the deceased. He requested to go and check at the alcohol drinking house. He returned shortly thereafter saying he had not seen the child. The search continued and on the way, they met two



- boys (David and another). David told her “Kama msichina ameenda kwa wanaume unasare” meaning “If a girl has gone to men you surrender”. The boy David testified as PW14.
5. They went to sleep at the neighbour’s house. In the morning she came to her house and met the accused nearby. He asked if she found the child. The matter was reported and the young David was arrested by the police over his remarks the previous day. He explained that he had seen an old man carrying a child to the field, with the child’s head covered and the child was crying. On 23rd September, 2019 the child’s body was recovered by some two people. She identified the body from her plaited hair. The police from Njoro were notified and they came for the body. She said it was PW14 who told them that it was the accused who killed the deceased.
 6. In cross examination and re examination she reiterated what she had stated in her evidence in chief only adding that she suspected the accused as the person who had stolen her mobile phone.
 7. PW2 Sarah Munyeché “Mama Naomi” testified that on 19th September, 2019 4pm she was weeding vegetables near PW1’s house when the deceased arrived from school and sat on the veranda near their house. The accused whom she knew came to his house while carrying a blue container and a bag. He put them in the house and left. About 30 minutes later the deceased was called by another child to go and play. When she later met PW1 who was looking for the deceased she explained to her what had happened earlier on.
 8. PW3 Caroline Chepkorir Murgor is the mother to PW1. She was informed of the missing child by PW1 who called her. She went to the place. The rest of her evidence is similar to that of PW1.
 9. PW4 Leonard Rono is the husband to PW1 and father to the deceased. On 19th September, 2019 while in Makueni on duty he received a call from PW1 informing him of the missing child. He came home on 21st September, 2019 and joined those conducting the search. On 23rd September, 2019 they received a report of a child’s body found in a field. They went and found the deceased’s naked body covered with grass. The head had a blunt injury. He denied any conflict between him and the accused but admitted there having been a resolved one between the accused and PW1. They had known the accused for one year prior to this incident.
 10. PW5 Joyce Wanjiku a teacher at the deceased’s school confirmed that the child was in school on 19th September, 2019 before being released to go home at 3pm. At 4.30pm she received a report that the child was being looked for. A search was mounted but she was not traced and PW1 made a report. She was later on 23rd September, 2019 called by the police and informed of the finding of the deceased’s body. The school is 250 meters from the deceased’s home. She did not know who committed the offence. In cross examination she said it was not the first time for the child to leave school without her parent.
 11. PW6 Joran Gichohi a village elder was at his home on 23rd September, 2019 8am when he received a report of a dead body being at the Egerton Farm. He went and upon confirming the report he called a village elder Omuge and Kimani, chief Kimeto, and the OCS who came. The body which had been covered with dry grass was then taken away, by the police.
 12. PW7 Joseph Chemjor is the father to PW4 and grandfather to the deceased. He received the report of the missing child and participated in the search and recovery of the body in a field while covered with grass. He attended the post-mortem exercise.
 13. PW8 No. 235577 Inspector Robert Kiprop is the Njoro O.C.S separate crime section. He testified that on 10th April, 2014 at 4pm he conducted an identification parade at the request of Cpl Mondo. The suspect was informed of the parade and he had no objection. He was identified by David Mbeche (a



- witness) by touching. The suspect signed the form showing he was satisfied. The form is dated 11th October, 2019 and was produced as EXB 1.
14. PW9 No. 90783 P.C Jane Jepchumba of Njoro police station, was the investigating officer. She testified that on 20th September, 2019 at 15.30hrs while at the station a young boy was brought to the station accompanied PW1 who told them the deceased had disappeared. She interrogated the young boy aged 16 years and who was the suspect. He informed them that he was a herder and had come across a man carrying a child on his back. The man wore a red marvin. He placed the child on a bicycle. The witness did not know where they went. The young man told her he was with his younger brother Ndungu herding cattle/goats. In cross examination she said she had another case against the accused who had stolen someone's chicken. So, she knew where he stayed on the same compound with the deceased.
 15. PW10 Dr. Titus Ngulungu from Nakuru Referral Hospital conducted the post mortem on the deceased's body on 1st October, 2019. His findings were as follows:Lack of oxygen as seen from the finger nails.Bruises on the upper and lower limbs with abrasionsTears on the penenum (private parts) showing tears on all sides. There was forced penetration which caused the tears.Collapsed lungs with bruises on the head (scalp)The brain was liquefied. Trauma to the brainCause of death was asphyxia – pressure to the mouth and nose.
 16. PW11 – Margaret Awinja said she is a sister to David Anjera the accused. She was interrogated in respect of the accused who police were looking for because of a child who had been defiled.
 17. PW12 Mary Awinja the accused's wife testified that she lived with the accused at Njoro. On 18th September, 2019 she went home in Western to visit her mother who was unwell. On 19th September, 2019 the accused called and informed him of a neighbor's missing child. She returned two (2) days later to find many people at the plot. The next day people came asking for the accused but he wasn't around. In the presence of the village elder she called the accused who said he was at Piston but he never came that day. The next day, the child's body was found and she went hiding at the police station since she had been threatened.
 18. PW13 Wilson Kipkurui Langat a security officer at Egerton University testified that on 23rd September, 2019 at 8am he and others reported to work. After 1½ hours they received a report of a body being found on the university farm. The naked body had been covered with grass. There were many people present and police took photos. The scene was a big field measuring about 200 acres.
 19. PW14 David Mirisia Mvirua a herder testified that on 19th September, 2019 at 6pm he was herding cows when someone passed with a child on his back. The person who was headed to Naisuit never talked to him. The man was 50 meters from where he was and was wearing a black marvin with an orange jacket. The child being carried was crying and the person told her that he was taking her to her mother. The witness then took cows home. At 7pm five (5) women passed by and greeted him and asked if he had seen the child. He told them he had seen the fellow with the child. He denied giving out the child. He was then taken to the police station by PW1 and members of the public. Later he was again taken to the station and to an identification parade. He identified the accused by embracing him. He also stated that the other school children did not identify him as the one who was seen with the deceased.
 20. In cross examination he said when he saw the accused he was carrying the child on his back. He then placed her on the bicycle that had been lying there. That the accused wore a jungle short and black marvin. He neither knew the deceased by name nor her mother. Further in re-examination he said he identified the accused by voice. That after placing the child on the bicycle he pushed it towards Naisuit.



21. PW15 No. 67602 Sgt Omollo Vonix Nyamondo of DCIO Njoro testified that on 23rd September, 2019 10am he was on duty when he was summoned by the DCIO. She told him of a missing child report made on 19th September, 2019 at Njoro police station. He accompanied Inspector Oruya to the scene at Kongongei near Egerton bus-park where the body of a 4½ year old had been found. He took over the scene, and took photos of it, interviewed witnesses whose statements he recorded. On 1st October, 2019 he attended the post-mortem, where the father and uncle to the deceased identified the body.
22. He stated that on 10th January, 2019 he and other two police officers proceeded to Khwisero where the accused had been arrested for the murder of an 11 year old child. He was brought to Njoro Police station where an identification parade was conducted the next day. The accused was identified by one witness. On 11th November, 2019 he took the samples indicated in the post-mortem report (EXB 1) to the government chemist Kisumu. He produced the photos (EXB 4a – f) and the Exhibit Memo (EXB 5 & EXB 6a).
23. The samples taken to the government chemist were examined and a report done by P.L.P. Lutta Kweyu produced as Exb 6b. The exhibits Nos 4a – f, 5, 6a and 6b were all produced by PW15 since counsel for the accused had no objection to their production.
24. The conclusion from the analyst’s report was as follows:
 - i. The DNA profiles generated from the premium swabs (Items A1 and A2) belong to a single unknown male person.
 - ii. DNA generated from David Anjere Amunya Omoholo (Accused) did not match with any of the DNA profiles from the above listed items.
25. He further testified that the deceased disappeared as she came from school. The accused disappeared to his rural home the same evening. He confirmed that there were other people living on the compound where PW1 and accused lived.
26. In cross-examination he said PW14 saw the accused carrying the deceased on his bicycle. He confirmed to not having recovered the accused’s bicycle. He agreed that the report from the government chemist exonerated the accused.
27. When placed on his defence the accused elected to give sworn evidence, without calling any witness. He gave his names as David Amunya Omuholo I.D No. 13577417. He therefore denied Anjere being his name. He testified that he lived in Njoro and worked at a flower farm as a casual labourer. He said he had rented a house on a compound with seven houses. He stayed in House No. 7 while the deceased’s family stayed in House No. 6, though three of the houses had no tenants. He knew PW1 as Mama Chirchir and she had two children.
28. It was his evidence that on 19th September, 2019 at 6.00am he left for his work place. He left for his residence at 4.30pm and arrived at 5.00pm, with a new plastic bag and food bag. As he rested, PW1 inquired from him if he had seen the deceased or anybody come to the compound. He answered in the negative since he had only seen the woman weeding vegetables (PW2). PW1 then left the compound. As he left to go and fetch water he was advised by PW1 that there was no water at their usual place. He thus went elsewhere and filled his jericans and returned at 5.30pm. PW1 reported to him of their unsuccessful search and requested him to accompany them in the search which he agreed to do. At 6.45pm he excused himself as he wanted to go and do his housework, which he did and slept.
29. The next day people came to the compound and to his house to inquire on whether the child had been found. Later PW1 informed him that after they parted the previous day they met two (2) boys (one



- who was PW14) who told her the deceased had already been married. She told him the two boys had been arrested. He had known PW14 before this incident. He never left until 4.30pm when he went to the market to buy a few items for his mother. He then left at 9am to get a bus which he later boarded and arrived home in Western the next day at 5pm.
30. Two days later he received a call from Njoro police station asking where he was. Upon explaining to them he was advised to pass by the station upon his return to Njoro. Further on 4th October, 2019 he again received three (3) calls from Njoro police station. As he took his sick mother to hospital he was arrested by officers from Khumusalaba in respect of a person found drowning in a river next to his shamba. He remained in custody at Khwisero for two (2) weeks. While there he was told of his visitors who were officers from Njoro police station. They tied him up and brought him to Njoro police station and placed him in cells. While there he was asked for the deceased's clothes which he knew nothing about. He was then beaten for denying the names David Anjere Omuholo.
 31. Three (3) days later the officers told him to wear clothes and enter a small white car and he was taken to hospital. Samples of his hair, blood and nails were taken. The doctor told him he would compare them with those of the deceased. He was returned to the cells. Later on another day he was asked to get his shoes from a box where he met PW14. He was then asked to go back to the cells. Later her saw several people lined up. PW14 was then sent to the O. B Office. He was called and asked to join the people who had lined up. PW 14 then came and pointed out at him saying "This is the mzee" It's his evidence that him and PW14 knew each other as PW14 was a herdsboy whom he used to bar from grazing cows in Pastor's shamba. Further PW14 had seen him take his shoes from the box. He denied having any bicycle in Njoro nor knowing anything about the deceased's death. He further denied not assisting in looking for the deceased. He accused the police of not conducting proper investigations.
 32. In cross examination he denied being known as "Anjere", and said he was forced by the police to accept the said names per as the charge sheet. He said he last saw the deceased on 18th September, 2019 as she played outside the house. He said he knew PW14 by appearance only and he had talked to him before. Further that it was PW1 who was given information by PW14. He confirmed that the deceased was a child and not a woman for marriage. He further confirmed that his wife (PW12) was not around when the incident occurred. He informed her and one Sila of his mother's illness. He did not report anywhere about the beatings by police officers, but he was treated at the Prison. He confirmed to having been identified at the identification parade by PW14 who knew him. He denied having been seen by PW14 on the day in issue.
 33. Both parties filed written submissions.

The accused's submissions

34. These were filed by A. N. Geke & Co. advocates and are dated 27th October, 2024. Counsel submitted that though PW14 knew the accused the police made him see him before the identification parade which was contrary to the legal requirements and the police service standing orders on identification parades. He further submitted that PW14 said he saw the accused carrying the deceased. However, at the parade he said he identified the accused by voice. It was therefore not clear why the voices of the other people who participated in the parade were not captured. He thus submitted that PW14's evidence was choreographed to fix the accused. He questioned how PW14 who had been arrested as a suspect turned out to be a prosecution witness.



35. To close on this issue of the identification parade counsel referred to the Court of Appeal case of Samuel Kilonzo Musau V The Republic [2014] eKLR where the court stated:

“The purpose of an identification parade as explained in *Kinyajui & 2 others V Republic* (1989) eKLR 60, “is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for proper record to be made of that event to remove possible later confusion”

It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in conduct of identification parades is necessary to eliminate any unfairness or rise of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade”....

36. He contended that the conducting of this identification parade was a mere formality because PW14’s evidence on identification does not tally with that in the identification report (EXB 1). He finally submitted that the report from the government chemist (Exb 6b) exonerated the accused from the commission of the offence of murder. He thus urged the court to dismiss PW14’s evidence as an afterthought since from the first instance, he never told PW1 and the other women that he had seen the accused.

The prosecution’s submissions

37. These were filed by M/s Emma Okok principal prosecution counsel and are dated 14th November, 2024. Counsel reiterated their earlier submissions on case to answer dated 22nd February, 2024 by prosecution counsel Mr. James Kihara. Mr. Kihara submitted that the accused person was seen with the deceased alive, and he never escorted her to her mother’s house. He submitted while relying on the case of *Ahmad Abolfathi Mohammed & another v Republic* [2013] eKLR that the guilt of an accused person can be proved by either direct or circumstantial evidence.
38. He further submitted that the conditions to be satisfied for circumstantial evidence to be relied on to form the basis of a conviction were set out in the case of *Abanga alias Onyango V Republic* Criminal Appeal No. 32 of 1999. They are as follows:
- 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 the 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.
39. In support of the duty of the person last seen with the deceased to explain, counsel referred to the case of *Republic V E. K. K.* [2018] eKLR where the Court held:

“Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of *Moses Jua V The State* (2007) LPELP-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:



“Even though the onus of proof in criminal cases always rests squarely on the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased”.

40. On identification of the accused, counsel submitted that he was identified by PW1, PW14 and school children. He was further identified through the identification parade while referring to the accused’s defence, she pointed out that the accused never called his mother as a witness to support what he told the court about her health. Secondly, that at no point in the last five (5) years did the accused inform the court that Anjere was not his name. Further that any confusion in his names is not fatal to the prosecution case since the accused was well known to the deceased and her family and PW14 who was clear in his evidence that the accused was the last person to be seen with the deceased.
41. Counsel did not agree with the accused that the identification parade was not conducted according to the laid down procedures. On this, she relied on the evidence of PW14 and PW8. The latter conducted the identification parade. Further that the accused did not raise any issue with the manner in which the identification was conducted. Finally, she submitted that no evidence showed that the accused participated in the search for the deceased. That even his wife (PW12) did not know of his whereabouts during and after the incident.

Analysis and determination

42. I have carefully considered the evidence on record, the submissions by both parties, and the law. The main issue is whether the accused is the person who killed the deceased who was aged 4½ years then.

43. Murder is defined under 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”.

For a charge of murder to succeed the following must be established:

- i. Proof of the fact of death and its cause.
- ii. Whether it is the accused who committed the unlawful act that caused the death. (actus reus)
- iii. Whether the unlawful act was intentional which is malice aforethought (mens rea)

44. Before I get into the analysis of the case I wish to deal with an issue raised by the accused in respect to the name “Anjere”, which is his second name as per the charge sheet. I have perused the record and I have not seen anywhere in the proceedings where the accused denied “Anjere” being his name. I am sure if he had raised such concerns with his advocate, the same would have been addressed by the court at the earliest opportunity. Secondly PW2 a neighbor and his own blood sister (PW11) knew the accused as David Anjere. No issue was raised in the cross examination of these two witnesses about the said name. I therefore find no substance in the said issue being raised for the first time during the defence hearing.

Proof of the fact of death and its cause

45. PW1 and PW4 (deceased’s parents), PW3 and PW7 (deceased’s grandparents) among other witnesses confirmed the death of the deceased, whose body was found lying in an open field. The body was



identified by PW4 and PW7 to the doctor for post-mortem. I therefore find that the fact of death was proved, by the prosecution.

46. The post-mortem report (EXB 3) prepared by PW10 gave the deceased's cause of death to be asphyxia – pressure to the mouth and nose. The doctor also found that the body had extensive tears on the perineum, vaginal opening and anal onifice. The recto-vaginal septum was pushed inwards with extensive tear on either side. It is clear that the deceased was defiled before she was killed. The defence did not raise any issue in respect of this report. I am satisfied that the deceased died out of an unlawful act.

Whether it is the accused who committed the unlawful act (actus reus)

47. There is no prosecution witness who saw the accused kill the deceased. What has been presented before this court by the prosecution is pure circumstantial evidence.
48. The Court of Appeal had this to say on circumstantial evidence in the case of Ahmed Abdafathi Mohammed & another V Republic [2018] eKLR.

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in Republic V Taylor, Weaver and Donovan [1928] Cr. App. R 21: - “It has been said that the evidence against the applicant is circumstantial. So, it is but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial”.

49. It is trite law that before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances which could weaken or destroy the inference of guilt (see Sawe V Republic [2003] KLR 364). It is further settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests viz: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency, unerringly pointing towards the guilt of the accused: 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 [see Teper V Republic 1952 ALL E.R 480 and Musoke V Republic [1958] E.A 715].
50. In this case the evidence of PW14 who was aged 16 years old at the time of incident is key. He said he was herding cows on 19th September, 2019 at 6pm along the road (area not stated). He then saw a man pass with a child on his back. The man wore a black marvin with an orange jacket. The child was crying and the man was telling her he was taking her to her mother. PW14 was suspected to have given out the child and was even taken to his primary school for identification by the school children. The children said he was not the one, though he looked like the culprit.
51. It was his evidence that he had never seen the man with the child nor the child before the 19th September, 2019. That the names of the man were given to the women by the pupils from the school. He said the person whose names were given by the pupils is the accused. That at the identification parade the people were told to speak and he embraced the accused. In cross-examination he said the school children described the person they had seen.



52. The above being PW14's narrative, the question that quickly comes to mind is what description of the accused did PW14 give to the women who confronted him and later took him to the police? From the evidence adduced by this witness the following are glaring: PW14 did not give any evidence of having described the culprit to anyone. According to PW8 (Inspector Robert Kiprop) when PW14 was called to the identification parade he touched the suspect. The identification parade form (EXB 1) confirms what PW8 told the court. However, in his evidence PW14 said, the people on the identification parade were told to speak and he went and embraced the accused. In other words, he identified him by voice. Who between PW8 & PW14 was telling the truth? PW14 testified that he had never seen nor interacted with the man he saw with the child at any time. He never explained how many times he heard the man tell the child that he was taking her to her mother. If he only heard this statement once, was that sufficient for him to identify him by voice? PW8 said PW14 gave him the description of the culprit. PW9 P. C Jane Jepchumba who was the investigating officer was never given any description of the culprit by PW14. So, how was she conducting the search? Such material information ought to have started from her docket, as the investigating officer. According to the teacher (PW5) PW14 was seen with the deceased by some pupils. PW14 told the court he was taken to his school for some form of identification but the pupils said he was not the one. This means the pupils knew who had been with the deceased before her disappearance. To my surprise none of these pupils was called as a witness. Secondly it's not clear who was carrying out the identification by the pupils. In his evidence PW14 stated as follows at page 30 of the typed proceedings:

“The women came to ask about the names. They got the names from school. The pupils gave them the name. The person is here in court (points at him). We are not related at all”.

From this narration by PW14 the accused's names were given by pupils from a school. Why were these pupils giving out the accused's names not called as witnesses? Had they seen him take away the deceased child? Were these pupils ever interrogated by the police or PW9? It's not lost to this court's mind that it is the same pupils who allegedly exonerated PW14 from being the one who handed over the child to the culprit. These pupils who allegedly gave out the culprit's name were never interrogated by PW9 nor testified.

53. Finally, on PW14's evidence he said the pupils described the person they had seen with the deceased as having worn a military jungle trouser. However, the man PW14 saw wore a jungle short and a black marvin. There was no evidence adduced to show that the accused was the wearer of jungle clothes, whether trouser or shorts.
54. The Government Analyst's report EXB 6 (b) was produced by PW15 by consent of both parties. Samples as recommended by the pathologist (PW10) were extracted from the deceased and the accused for analysis. The outcome was as follows:
- a. The DNA profiles generated from the perineum swabs (items "A1" & "A2") belong to a single unknown male person.
 - b. The DNA profile generated from the reference samples of David Anjere Amunya Omuholo (Accused) did NOT match with any of the DNA profiles generated from the above listed items.
55. In a nutshell the Analyst's report (EXB 6 (b)) exonerated the accused from the incident. The accused in his sworn defence denied having committed the offence, and explained in detail what transpired between 19th September, 2019 and his time of arrest while attending to his sick mother.
56. Lastly still on the evidence, PW15 Sgt Nyamwando told the court that the accused disappeared and went to his rural home on the evening of 19th September, 2019. However, the evidence by PW1



- (deceased's mother) is that she met with the accused on 20th September, 2019 morning when she returned to her house. In his defence the accused said he left for his rural home on 20th September, 2019 evening. The evidence of PW15 on this was therefore not correct.
57. Upon due consideration of the entire evidence and the outlined loopholes in the prosecution case, I find that the circumstantial evidence adduced does not meet the standards as stated by the Court of Appeal in the cases of:
- i. Sawe V Republic (supra)
 - ii. Nyakundi V Republic [2003] KLR 700
 - iii. Achira V Republic [2003] KLR 707
 - iv. Mwendwa V Republic [2006] KLR 133
58. Further in the case of Nzivo V Republic [2005] I KLR 600 the Court of Appeal held thus:
5. In a case dependent on circumstantial evidence in order to justify the inference of guilt the incrimination 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 hypotheses 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 co-existing circumstances which would weaken or destroy the inference.
59. From the above analysis it is clear that if the police diligently conducted their investigations they would have traced the people who were involved in the killing and defilement of the deceased. Secondly failure to call the pupils who allegedly saw and/or knew the boy who handed over the child did a blow to the case. Thirdly failure to call the pupils who allegedly gave out the accused's name was yet another blow to the prosecution case.
60. The identification of the accused by PW14 was not grounded on properly conducted investigations hence the reason for the variance between the evidence of PW8 and PW14 on the mode of identification. It is therefore my finding that there exist in this case circumstances (already pointed out) which have broken the chain of circumstances relied on by the prosecution.
61. For my part I find the accused not guilty and acquit him under section 322(1) Criminal Procedure Code. He shall be released forthwith unless otherwise lawfully held under a separate warrant.
62. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF JANUARY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

