



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL CASE NO. 8 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DENNIS OGOLLA OTSIENO.....ACCUSED**

**JUDGMENT**

1. Dennis Ogolla Otsieno is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that between 4<sup>th</sup> and 7<sup>th</sup> day of May 2019, at Bujumba village, Butula sub-county within Busia County, murdered Gentah Heldah Adhiambo.
3. The prosecution case is that the accused sent his younger brother to call the deceased. After the deceased had gone to the house of the accused, the latter sent him to fetch water from the river. When he was returning, he heard the girl scream. He later met the accused on the way. He asked him to accompany him where their mother was attending a funeral. He never saw the girl alive again. It was the same boy who discovered the decomposing body of the girl which was behind their mother's house.
4. The accused denied any involvement in the murder of the deceased herein.
5. The issues for determination are:
  - a) Whether the accused was involved in the death of the deceased; and
  - b) Whether the offence of murder was proved against him.
6. BO (PW1) is a ten years old brother of the accused. His testimony was that when the deceased passed near their home while carrying containers to fetch water, the accused sent him to call her. He complied. The deceased went into the house of the accused. The accused asked him to go and fetch water and he complied. When he was returning from the river, he heard the girl scream. He later he met with the accused who was carrying a bag. The accused asked him to accompany him to a home where their mother was attending a funeral. He was the one who later discovered the decomposing body of the deceased behind their mother's house.
7. Section 124 of the Evidence Act provides:

**Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

In the instant case, I will endeavour to find if the evidence of BO (PW1) has been corroborated by other material evidence.

8. RA (PW2) is another minor witness aged nine years. She testified that the deceased who was her cousin went to fetch water at about midday but never returned. She described the clothes she was wearing at the time. These were the clothes that were recovered with her body.

9. Can the evidence of a child that require corroboration corroborate that of another child" My opinion is that if that **“other material evidence in support thereof implicating him”** as envisaged under section 124 of the Evidence Act is independent, it can.

10. In the instant case, RA (PW2) was at a different location with BO (PW1) when she perceived the evidence she gave. Her evidence was not at all influenced by the circumstance under which BO (PW1) was. None of these two children influenced each other's evidence. I therefore find that the evidence of RA (PW2) corroborated that of BO (PW1) who testified that the accused sent him to call the deceased who was going to fetch water from the river.

11. The recovery of the pair of knickers of the deceased in the house of the accused, further corroborated the evidence of BO (PW1). He, BO (PW1), testified that the accused was staying in his house alone.

12. Johnstone Othieno Othieno (PW4), BJO (PW3), Chrispinus Stephen Barasa (PW5) and Francis Omondi Ochola (PW6) testified that they were present when police officers recovered the underpants of the deceased from the house of the accused. They also testified that they were present when the sandals and a green **lesso** of the deceased were recovered.

13. PC Danston Wangila (PW7) testified that when they searched the house of the accused, they recovered a pair of underpants that was at the ceiling. It was identified as that of the deceased by her grandmother, BJO (PW3).

14. The evidence of these two children is further corroborated by the evidence of the clothes the body of the deceased was in when the recovery was made. This was in agreement with their evidence as to the clothes she was wearing when she went to fetch water.

15. The evidence against the accused is circumstantial. In the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** Osiemo Judge explained what circumstantial evidence is, as follows:

**Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.**

16. In order for any court to make inference of guilt from circumstantial evidence, such evidence must satisfy the conditions prescribed by the Court of Appeal in the case of **Republic vs. Kipkering Arap Koskei & another 16 EACA 135**, which held:

**In order to justify 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.**

17. In the instant case, the evidence on record is overwhelming against the accused and displaces his defence as mere denial.

18. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

**The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and**

malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

19. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It 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 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;**

**(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.**

20. The prosecution did not adduce evidence to prove the existence of malice aforethought. I therefore find that the offence of murder was not proved against the accused. I accordingly acquit him of the said offence. However, the prosecution has proved the offence of manslaughter beyond any reasonable doubt. I find him guilty and convict him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED and SIGNED at BUSIA this 2<sup>nd</sup> day of December, 2020.**

**KIARIE WAWERU KIARIE**

**JUDGE**



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