



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT CRIMINAL CASE NO. 32 OF 2015**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**SNM.....APPELLANT**

**J U D G E M E N T**

1. SNM, the accused herein, is charged with two counts of murder to wit;

*1) Count I- Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on Thursday, March 31<sup>st</sup> January 2015 at around 5:30pm in Kanyonyo Location, Lower Yatta within Kitui he murdered MM1.*

*2) Count II- Murder Contrary to Section 203 as read with Section 204.*

The particulars are that on 31st January 2015 at around 5:30 pm in Kanyonyo Location, Lower Yatta within Kitui County, he murdered MM2.

2. The accused person denied committing the offence when he was presented to this court to answer to the charges. The prosecution at the trial presented eight witnesses with the prosecution’s case mainly based on circumstantial evidence.

3. The first prosecution witness was ANM (PW1) who perhaps was the prosecution’s star witness in this Case testifying in Kikamba, she told this court on translation that, on the material date 31.1.2015 at 5: 00p.m she was coming from the shop and had left her three grandchildren a home. She reached home at 6:30 p.m where she encountered her eldest 8-year-old grandchild named L who told her that the Accused person had gone there and asked her to go and tether goats but she had refused. She reported to her that accused then entered the house and removed MM1’s (4-year old grandchild) pants and lay on her.

4. After she was informed of this by her grandchild she ran into the house and encountered SNM as he came out of the house and sat on a three-legged seat while MM1 and MM2 were lying on the bed inside the house. She checked MM1’s private parts and found that she was bleeding. She also checked MM2 who was not responsive and her abdomen was swollen. She went out and asked the accused person what he had done to the children but he denied doing anything. She then screamed and a neighbour, Catherine came. By then the Accused had ran off. They rang the village elder Nzau who came and rang the Assistant Chief who in turn rang the police who came and found that

the children were already dead.

5. She further stated that she later went to Kwa Vonza after being summoned by the police and that she later went to Kitui District Mortuary where a post-mortem was conducted. She identified the Accused on the dock and stated that he used to visit her daughter who is the mother of the three children. She added that the daughter is incapacitated and she said she is not of sound mind.

6. On cross-examination, **PW 1** stated that she has known SNM for seven years and that he is a far-off neighbour but they go to the same trading centre. She stated that the Accused is of sound mind but her daughter the mother of deceased children is of unsound mind. She also clarified that she did not say that the accused and her daughter were friends but that whenever her daughter would disappear, she would find her with the Accused person but she had never found the accused person at her home before.

7. She also informed the court that she found her eldest grandchild L at the gate crying telling her to go check on MM1. She stated that MM2 was already dead and her abdomen was swollen and denied suggestion that the child could have fallen.

8. She also stated that she saw the boda boda operator called Muasya who the accused had allegedly called to take the children to hospital before running away. She stated that she was present during the post-mortem and that MM1's ribs were broken and MM2 had internal bleeding.

9. She further testified that MM1 was 4 years old while MM2 was one-year-old and that L was the one babysitting the child (MM2). She also stated that when she screamed for help on noticing that the children were not responsible, the accused person ran away.

10. **Catherine Kennedy (PW2)** on her testified that on the material date she heard screams from her neighbour and PW1. She told this court that she responded by rushing in to find out what the problem was and on being told that the 2 children had been killed, she called the village elder and informed him. She added that she knew the victims well and corroborated PW1 that MM1 was 4 years old while MM2 was 1-year-old. She added that MM1 had a wound above her eye when she saw her body lying down. She added that she later attended post mortem examination and identified the bodies of the children. She denied any suggestion that the mother could have been responsible for the assault of her children (deceased children herein). She conceded that the mother had mental deficiencies but she loved and cared for her children despite the infirmity.

11. **Nzau Karwiti (PW3)**, the village elder Kiimani village within Kanyonyo Location testified and largely corroborated the evidence of PW2. He confirmed that he received a call from Catherine Kennedy (PW2) and informed that the accused had been suspected of killing 2 children whom he knew.

He further testified that while at a Trading Centre he saw the accused and when he ran away towards a motorcycle and when he caught up with him he reportedly told him he was looking for a motorcycle to take the children to hospital.

12. The village elder stated that he later followed them on reaching the scene of crime (Ndung'o Musangi's place) he was told that the accused had jumped off the motorbike and ran away. He testified that he found the children lying down dead and that he immediately called the Area Chief who in turn notified the police

at Kwa Vonza Police Station who came and collected the bodies. He further added that he knew the mother of the children as M and that the mother is of unsound mind.

13. **Margaret Mweni Nalombe (PW4)**, a sister to the accused, testified that on 2.2.2015 she received a call from

her suiter named Rael informing her that the accused had killed two children and disappeared. She testified that she went to Kwa Vonza the following day and found the accused who denied committing the offence. She testified that she advised him to go to the police and accompanied him to Kwa Vonza Police Station where he was placed in custody.

14. **Rael Mboye (PW5)** another sister to the accused testified that she was at home at Kwa Mutamba on 3.2.2015 at around 2 am when the accused person called her and that she opened the door for him and after giving him some food, he told her that he was afraid because he was suspected of having murdered 2 children. She testified that she could not escort him to the Police Station and she called her sister Margaret (PW4) and her brother who came the following day and escorted the accused to the Police Station. She further added that she knew the accused had married M who was mentally challenged.

15. **Dr. Cosmas Mutisya (PW6)** the Doctor who performed post mortem examination on the bodies of the 2 children testified as follows: -

i. In respect to the body of MM1, the doctor found bruise on the right side of the head measuring 10 x 4cm and a bruise on the left side of the forehead measuring 9 cm by 6 cm. He also made other following observations: -

*a) A vaginal tear on the hymen*

*b) Tears around the anus with rectum having collapsed.*

*c) Fractured ribs, 2nd, 3rd, 4th, 6th and 7th ribs on the right side*

*d) Fractured 2nd & 3rd ribs on the left side.*

*e) Liver ruptured with blood in the abdomen cavity.*

16. The doctor concluded that the case of death in respect to MM1 was Internal Hemorrhage caused by blunt force. He also noted that the vaginal and anal penetration were evident. He tendered the post mortem report and P. Ex 1 and that he signed and issued Death Certificate No. 752376.

17. In respect to MM2, the doctor found the child had been strangled as the body was cyanotic. The doctor had observed the following from the said body;

**a) Peri-anal lacerations or tears around the vagina.**

**b) Indented circumferential mark around the neck.**

**c) Left lung congested and hemorrhagic.**

**d) Digestive system gut was perforated with fecal matter within the abdomen.**

**e) The rectum was perforated.**

The doctor concluded that the child died from strangulation after sodomy with perforated rectum. The doctor tendered the post mortem report in respect to MM2 as **P Ex 2** and confirmed the death by issuing **Death Certificate Serial No. 753372**. He testified that Dr. Mutuku Patrick witnesses both post mortem examination.

18. **CPL Livingtone Katui (PW7)** a scenes of crime Officer form Kitui testified that he received a mortuary card

from P.C Kamande of Kitui DCI. He told this court that he processed six photographs and signed each as exhibits confirming that he had not retarded, altered or interfered with them in any way. He gave the following illustrations about the photographs;

a) **Photograph 1** shows the deceased persons lying at the mortuary. **Photographs (1) (II) (III)** shows the same deceased persons while undergoing post-mortem.

b) **Photograph 2(i)** shows semi-permanent house where the two deceased persons were staying with the grandmother.

c) **Photo 2(iii)** shoes a close view of the semi-permanent house and the position it is alleged that the two deceased were found lying dead. He then produced photographs as exhibit 3 and the certificate as to photographic prints as exhibit 4.

19. **CPL Sylvester Mutua Mwenza (PW 8)** the Investigating Officer on his testified that he was formerly at Kwa Vonza Police Station and that on 31.1.2015 a case of murder was reported at the Station by the Area Chief. He testified that he together with other officers went to the scene and collected the bodies of the children and took them to Kitui Hospital Mortuary. He later revisited the scene and drew a sketch map and took some photographs of the scene. He testified that he later recovered clothes from the house of accused which were blood stained trouser and a green shirt. He further testified that he took blood samples from the accused and mouth swabs for forensic analysis but the report from the government chemist came back negative.

20. When placed on his defence, the accused person gave sworn statement and denied the charges facing him. He could not recall what transpired on 31.1.2015 or the material day but recalled that on 1.2.2015 when he was busy tending his vegetables at a garden in his home, a youth leader went to him at around 10 am and reportedly told him that M had beaten her children.

21. He took issue with (PW1) stating that she wanted to take his parcel of land. He testified that the youth leader notified him that the 2 children were dead and that this customers also informed him about the issue forcing him to go and report. He added that M was mentally retarded and used to be tied and had heard that someone went and untied her. He denied having any relationship with the mentally retarded woman.

22. According to him M was untied and could have beaten her children. He declined suggestion of availing the witness to testify stating that the witness was away in Mombasa. He told this court that he decided to go and report to the police because there were rumours that he was involved with the death of the children. He added that when he went to report he was placed in custody.

23. In his written submissions done through Counsel, The Defence submitted that the police did very little to nothing to unearth the killer of the minors and that PW 1 is the only one who saw the accused at the house that was the scene of crime and that she did not see the accused wearing blood stained clothes and neither did the public.

24. Secondly, he submits that L, the 8-year-old elder sister to the deceased was a crucial witness to corroborate the evidence of PW 1 but was not called to testify. He also submits that the mother to the deceased, suffered from mental derailment and that PW 2 testified that when she heard screams, she thought that M was assaulting people and that from an inference can be drawn as to what she used to do when sick.

25. The Defence pointed out that the multiple injuries on the body of MM1 indicate that they were not caused by a normal person. He submits that the police should have conducted forensic examination on him and the bedsheets to show that defilement had taken place also that PW 4 did not produce a report on the forensic analysis on the Accused clothes that were presented for forensic analysis and later tendered in court as exhibits.

26. The Defence in sum submits that the accused was not connected with the defilement of the minors and that the younger one might have fallen down from the bed. He also avers that it is possible that the deceased persons' mother inflicted the injuries on them. The Defence also points out that there were no weapons recovered from the accused that could have inflicted the injuries on the children.

27. The Defence submits that the Accused might have lied and gave a different story but avers that the lie does not make him guilty. He cites the case of *Simon Musoke v. Republic (1958) EA* where the court held that it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there were no other co-existing circumstance's which would weaken them.

28. He also relies on the case of *Kevin Kiswika Kyongi versus Republic [2018] eKLR* where the court held that the accused person's presumption of innocence stands until proven beyond reasonable doubt he is guilty.

29. Lastly, the Defence cites the decision in *Republic versus Kipkering Arap Koskei & Ano. (949)16 EACA, 135* where the court noted that the burden of proving facts always remains with the prosecution and never shifts to the accused.

30. He also relies on the case of *Kevin Kiswika Kyongi versus Republic [2018] eKLR* where the court held that the accused person's presumption of innocence stands until proven beyond reasonable doubt that he is guilty.

31. Lastly, the Defence cites the decision in *Republic versus Kipkering Arap Koskei & Ano. (949)16 EACA, 135* where the court noted that the burden of proving facts always remains with the prosecution and never shifts to the accused.

32. The defence submits that failure to avail forensic evidence casts doubt in the prosecution's case against the accused. He faults the investigators of not taking samples from the accused or subjecting him to examination to establish if he was connected with the heinous act of defiling and killing the minors.

33. The prosecution on the other hand submits that it has proved its case against the accused pointing the evidence of Pw1 on how she arrived home to find her granddaughter named L in tears and how she found out that her 2 grandchildren lying down with blood oozing from their private's parts.

34. According to the State, the accused was well known to both the deceased minors and that he took advantage of them when their grandmother had just left for the shops to buy food and assaulted the minors in the most heinous way.

35. The State further submits that the evidence tendered placed the accused at the scene of crime and relies on the decision of *Republic Versus Antony Ndegwa [2014] eKLR*.

36. On malice aforethought, the prosecution contends that PW1 and PW5 both confirmed that the accused was known to be having intimate relationship with the mother of the deceased children who was of unsound mind. The State contends that the accused could have harboured ill motive to eliminate MM2 aged 1 year and touted to be the biological child to the accused. It relies on the decision of *Republic versus Roba Galma Wario [2015] eKLR*.

37. **Analysis and determination**

This court has set out above, the evidence tendered by the prosecution and the defence put forward by the defence.

From the onset, this court wishes to clarify that it took over this trial from Hon. Justice L. Mutende (upon transfer) when the prosecution had closed its case and the accused put on his defence. This court proceeded from where the

court left and heard the defence and considered the submissions filed by both the prosecution and the defence.

Having said that, the accused as observed above, was with 2 counts of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**.

38. Going by the above provision it is clear that for a charge of murder to be sustained under **Section 203 of the Penal Code** the prosecution must prove the following elements beyond reasonable doubt namely;

a) *The death of the deceased persons.*

b) *The cause of death and that the same was caused through unlawful acts or omissions of the accused.*

c) *That the accused had ill motive or harbored malice aforethought.*

39. The standard of proof in murder cases just like in all criminal cases is high. The prosecution has the burden to prove its case beyond any reasonable doubt. In the famous case of **Miller versus Ministry of Pensions [1947] 2 All ER** Lord Denning noted the following in regard to the burden of proof beyond reasonable doubt;

*“That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that shall suffice.”*

40. **The fact of death in this matter**

The fact of death of two minors namely MM1 aged approximately 4 years and MM2 aged approximately 1 year is uncontested.

The evidence of the grandmother (PW1) of the 2 victims is well corroborated by the evidence of Dr. Cosmas Mutisya (PW6) who tendered post mortem reports of the 2 minors as **P Ex 1** and **P Ex 2** respectively. The doctor also confirmed issuing Death Certificate in respect of the said minors and captured the details as Death Certificate Serial Number 752376 for MM1 and Serial No. 752377 for MM2. The prosecution’s case has therefore established and proved the fact of death of deceased children beyond reasonable doubt.

41. (ii) **The cause of death.**

The cause of death of MM1 going by the post mortem examination was internal hemorrhage caused by blunt force in addition with vaginal and anal penetration which was demonstrated by anal laceration and prolapse of the rectum.

42. The 2nd victim MM2 died as a result of strangulation after sodomy with perforated rectum.

There is no doubt that the children died a painful death caused deliberately by heinous acts of a person. The big question which is a subject of determination in this matter is who caused the death of the 2 minors.

43. (iii) **Actus Reus**

The prosecution has submitted that the cause of death of the 2 children is connected to the accused person, a contention denied in equal measure by the accused.

44. There is no dispute that the prosecution's case is dependent on circumstantial evidence because there is no eye witness who came forward to testify that he saw the accused person commit the heinous act.

The evidence of **PW1** clearly places the accused person at the scene of crime. The witness (**PW1**) clearly testified that she had gone to a shop and upon return she found her granddaughter named L at the gate who told her about what had transpired and reportedly told her that the accused had defiled the minors. The grandmother rushed to the house and encountered the accused getting outside the house and on getting inside, she found her two granddaughters namely MM1 and MM2 lying on the bed motionless. She stated that blood was oozing from MM1's genitals while MM2's abdomen was swollen.

There was no one else in the house and the grandmother rushed out and inquired from the accused what he had done to the children and he reportedly denied doing anything. The accused person was the only person found at the scene of crime. It is unfortunate that the prosecution's attempt to secure attendance and testimony of L, the minor aged 9 years and who was with the minors at the material time was in vain because when the prosecution was in the process of lining her up to testify on 9th February, 2017, it realized that the minor "could not comprehend anything" and could not express herself sensibly. The prosecution abandoned her as a witness. The defence has submitted that whatever the said L informed **PW1** is hearsay and should not be given any probative value which I find to be well founded.

45. The evidence of **PW1** in respect to the information she received at her gate is technically hearsay because the witness who gave her the information did not testify to corroborate or authenticate the report which could have ultimately positively and directly connected to the cause of death of the 2 minors with the accused herein.

46. The prosecution's case in the absence of evidence of the said L was left hanging on circumstantial evidence which as I have pointed out is mainly based on the evidence of **PW1** who says she found the accused coming out of the house where the 2 minors laid dead. The circumstances based on the above really puts the accused person in a position that really is difficult to say that he was not involved in the heinous act. This is a situation where he was the only person found at the house where the crimes were committed. In the case of *Jebichiy Sawe versus Republic [2003]* the Court of Appeal inter alia observed that;

*"In order to justify conviction based on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt; circumstantial evidence can be a basis of a conviction only if there are no other co-existing circumstances weakening the chain of circumstances relied.... The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden is always with the prosecution and never shifts to the accused."*

That position is similar to the position taken in another similar case of *Republic versus Kipkering Arap Koske & Another 91949) 16 EACA135* where the Court of Appeal expressed similar views.

In this instance the accused person as per the testimony of **PW1** was found coming out of the house which was the scene of crime. He went and sat outside and when **PW1** came out after discovering what had befallen her two grandchildren, she inquired from him and the witnesses stated that the accused denied any involvement. This court finds that that is the same stand taken by the accused when he was placed on his defence. What he could not explain in his defence is what transpired on 31.1.2015 or the material day. He quickly brushed off any query regarding that day by simply stating that he could not recall what transpired. That in my view was an evasive tactic that suggests he was either trying to run away from taking responsibility or he felt a bit embarrassed, guilty or uncomfortable about the events of the material day. He surely cannot claim not to recall events of 31.1.2015 but readily recalls what transpired the next day on 21.01.2015.

47. The only downside in the prosecution's case that in my view weakens the inference or conclusion of guilt on the part of the accused is the level of investigation conducted by the police and lack of forensic evidence to connect the accused with the defilement and the murder of the 2 minors **CPL Sylvester Mutua Mwenza (PW8)** told this court that whereas the police recovered blood stained clothes from the accused and to be exact he stated he recovered a pair of green trousers, a green shirt and shorts all of which were blood stained. The same were tendered as **P Ex 1 & 2**. He further stated that he escorted the clothes to the Government Chemists for analysis with an exhibit memo prepared by P.C. Kamanda the further stated that he saw a report from Government chemist.

*“According to him the report, did not give me a positive result relating to the accused.....”*

The investigating Officer further confirmed blood samples from the accused and mouth swabs including some hair were taken for forensic analysis but in his own words;

*“there was nothing positive concerning the body of the deceased and that of the accused as per the samples obtained.....”*

48. The evidence of the investigating officer above reveals some gaps which a seasoned investigator, a prosecutor ought to have seen and addressed on time.

In the first place the prosecution for unknown reason failed to avail P.C. Kamanda who was closely involved in the investigations. **P.C. Katui (PW7)** stated that he received mortuary card from P.C. Kamanda with a request to process films. P.C. Kamanda also took photographs at the scene of crime before taking the bodies to mortuary.

49. **PC Sylvester Mwenza (PW8)** also revealed that the said officer visited the scene of crime and drew sketches on the scene and recorded statements from witnesses. The same officer also prepared exhibit memo in respect to blood samples and blood stained clothes recovered and forwarded to Government chemist for Forensic Analysis.

50. The said officer in my view was central to the investigations and should have been availed to testify and had he been availed perhaps he could have helped in shading more light in some grey areas for example if there were blood stains on the beddings where the bodies were recovered and if the same blood stains were taken for forensic analysis.

51. Secondly, the other obvious weakness in the prosecution's case is failure to adduce evidence from the Government Chemist. The evidence tendered failed to positively connect the accused with the blood samples taken from the clothes produced as exhibits. At least the court could have been kept in the know of what the investigating officer termed as *“nothing positive concerning the body of the deceased and that of the accused as per samples obtained.”* The failure by the prosecution to adduce forensic evidence after offer taking so much trouble in obtaining the same can only mean one thing. The results obtained did not connect the accused to the crime. In other words the forensic evidence failed to form a chain so complete that an inference can be made that the accused was responsible for the defilement and the murder. The case cited by the defence that is ***Abanga Alias Onyango versus Republic Criminal Appeal No. 32 of 1990 (V.R)*** is a famous case and relevant in the circumstances obtaining in this case. In that decision the court of Appeal pointed out guidelines regarding circumstantial evidence and when it can be considered sufficient to sustain a conviction. The court held;

*“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy the following tests;*

- i. The circumstances from which an inference of guilt is sought to be drawn must be cogent 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 by the accused is the one who is responsible and no one else.*”

52. In this case, this court finds that the prosecution’s case has passed the 1st and 2nd tests because as I have observed above, the evidence tendered places the accused squarely at the scene of crime. He was the only person at the scene or at least the only man. He tried in his defence to lay blame on the mother of the children a woman said to be of unsound mind but in my considered view the said women obviously had no means of defiling the children even if she was of unsound mind.

The defence adopted by the accused in that respect holds no water and was merely an escapism taking advantage of the situation as it were, of the fact that the mother of the victims was of unsound mind.

53. However, this court has taken some time pondering over the 3<sup>rd</sup> test in *Abanga Alias Onyango’s decisions* which is whether the circumstances obtaining taken cumulatively forms a chain that is so complete to lead to inescapable conclusion that the crime was committed by the accused. As I have observed in my considered view that chain is broken by lack of forensic evidence linking the accused with the defilement and the attendant murder that followed. The investigators in my view should have done a better job of collecting samples including vaginal & anal swabs for forensic or DNA analysis with a view to positively connecting the accused with the crime he is charged with. The fact that the blood samples collected from him and the samples of blood found in the clothes recovered from him did not match or provide any useful connection in my view fatally weakens the otherwise strong inference of guilt that could be drawn against the accused from the evidence adduced.

54. (iii) *Malice aforethought.*

The prosecution’s contention on this element is that the accused was known to have had an intimate relationship with the mother of the victims notwithstanding her mental infirmity. The prosecution submits that the accused was touted to be the biological father of MM2, aged 1 year and that the fact could have made him have ill intention to eliminate her. The contention however is too remote and is not supported by the evidence tendered by the prosecution. This court finds that there is no witness called during trial that even suggested that the accused harboured ill motive.

55. The ingredient of malice can of course be inferred under *Section 206 of the Penal Code* from the actions of an accused person. There is no doubt given the nature of injuries inflicted on the minors that an inference of malice aforethought can be inferred on the perpetrator but as I have found out above, inference on the guilt of accused in respect to the element of *actus reus* is not safe for the aforesaid reasons.

56. In the end, this court finds that despite the sad manner in which the heinous crime was committed against innocent minors, this court finds that the prosecution’s case against the accused herein has failed to reach the threshold. This court finds it unsafe to base the conviction on the evidence tendered. As I have said the prosecution and the police should have done better but they did not. They have left this court with no choice but to return a verdict of not guilty. The accused is found **not guilty** and is hereby **acquitted** under *Section 322 (1) of the Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 10TH DAY OF MARCH, 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**



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