



Case Number:	Criminal Case 101 of 2003
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Case Class:	Criminal
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	Luka Kiprotich Kimaru
Citation:	John Macharia Gachanja v Republic [2004] eKLR
Advocates:	Mr. Mugambi for the Accused; Mr. Koech, State Counsel & Mr. Gumo, Assistant Deputy Public Prosecutor, for the Republic
Case Summary:	Criminal law - charge of murder - case dependent on circumstantial evidence - test that such evidence needs to meet in order to form the basis of a conviction - corroboration of the evidence of a child of tender years.
Court Division:	Criminal
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL CASE NO. 101 OF 2003

JOHN MACHARIA GACHANJA.....ACCUSED
VERSUS
REPUBLIC.....PROSECUTOR
JUDGMENT

The Accused, John Macharia Gachanja was charged with the offence of murder contrary to **Section 203 as read with Section 204** of the Penal Code. The particulars of the offence as stated in the information were that on the 13th of July 2003 Olkalou, Nyandarua District the accused unlawfully murdered E W

W. The prosecution called eleven witnesses in total. At the close of the prosecution's case, the accused was put on his defence. He gave an unsworn testimony. Other than himself, he did not call any witness to testify on his behalf. After the close of the Defence case, the counsel for the accused made submissions urging this Court to find that the prosecution had not established its case against the Accused to the required legal standard of proof beyond any reasonable doubt. Mr Koech, the Learned State Counsel made a reply to the said submissions made.

The summary of the evidence adduced by the prosecution is that on 13th of July 2003, PW 1 J K, a minor aged nine years and who is a standard three pupil was playing outside his home Nyandarua District. PW 1 was playing with other children who included the deceased, E W. The deceased was a child of about two years old. PW 1 testified that the accused came to where they were playing and took the deceased away. When PW 1 followed him, the accused chased him away. PW 1 went back home and informed his mother PW 2 E N M what the accused had done. PW 1 testified that the accused did not beat up the child but was annoyed that PW 1 had decided to follow him when he took the child.

PW 2 E N M testified that the mother of the deceased left the deceased with her when she went to a market called Kapten. She testified she fed the deceased and then left her to play with her other children outside the house. She testified that the accused went to her house on the material day at about 4.00 p.m. and inquired of the whereabouts of the mother of the deceased. When he was told that the mother of the deceased was away the accused went outside the house and picked the deceased and said that he was taking her to the kiosk to buy sweets for her. Later PW 1 informed PW 2 that the accused had taken away the deceased. PW 2 became concerned and went and informed both the village elder and the father of the mother of the deceased. PW 2 later learned that the deceased had been taken to hospital and had died. PW 2 confirmed that the accused appeared calm and collected when he took the child away.

PW 3 PW K the mother of the deceased testified that on the material day she had left the deceased in the custody of PW 2 who is her aunt. She testified that the accused was her husband. It was her testimony that she had lived with her husband, the accused for about nine months. She testified that the deceased,

E W had not been sired by the accused although the accused had accepted her as her child when he married her. She stated that her marriage to the accused was not a happy one due to the fact that the accused hated the deceased. It was her testimony that the accused used to molest and beat up the deceased even though the deceased was a child of less than two years old. PW 3 was not happy that her child was being beaten. She decided to leave her matrimonial home, when the accused had threatened to kill the child. All the efforts by the accused to be reconciled with PW 3 were in vain as PW 3 did not want her child to be subjected to further beatings by the accused. PW 3 stated that when she came back from where she had gone, she was informed that her child had been taken by the accused, seriously injured and later had died in hospital. PW 3 testified that the accused initially, when they started living together as husband and wife, loved the child but about three months later, he started abusing and beating up the child. The parents of the accused warned him, in vain, not to beat up the child. When PW 3 intervened when the child was being beaten up, the accused assaulted her too.

PW 4 J N W testified that on the material day at about 5.30 p.m. as he was walking on the road from Ndemi Shopping Centre towards his home at the Village, he saw a child, a girl, lying on the grass. Her clothes were bloody. PW 4 went to the owner of the farm and inquired if the owner knew the child. The owner of the farm where the child was found is called Mama Kabia. Mama Kabia did not know the child. PW 4 testified that the child appeared to be alive though it was unconscious. PW 4 testified that many people came to the scene including a girl called Zipporah (PW 5) who was able to identify the child. PW 4 testified that PW 5 had told them that she had seen the child together with her father, the accused. PW 5 assisted in taking the child to OI Kalou District Hospital. Later he learnt that the child had died.

PW 5 Z G testified that she was aged seventeen years. She remembered on the material day at about 4.00 p.m. as she was going to visit her grandmother she met with the accused with the deceased. The accused was carrying the deceased. PW 5 knew the accused and also knew that the accused had married PW 3. PW 5 was not surprised that PW 5 was carrying the child as she knew the accused as the father of the child. When she came back from her grandmother's PW 5 saw many people having congregated near the road. She went to investigate. She saw the deceased lying on the ground with bloody clothes. She saw that the child had been seriously injured as she was bleeding from her chest and stomach area. PW 5 testified that when she had earlier in the day seen the child with the accused, the child was okay health wise. PW 5 testified that she saw PW 4 at the scene where the child was lying on the ground. PW 5 later learned that the child had been taken to hospital. PW 5 testified that when she saw the accused with the deceased, the deceased child was laughing with the accused. The deceased was happy. Two hours later, she saw the child abandoned in a farm seriously injured.

PW 6 D K the father PW 3 and the grandfather of the deceased testified that on the material day he was informed that his granddaughter who had been left in the house of PW 2 had been taken away by the accused. PW 6 sought help from a neighbour and they started looking for the child in the village. PW 6 started walking towards the direction of the home of the accused. After walking for about two kilometres they saw many people who were standing by the roadside. PW 6 went to the place the people were congregating. He saw a child lying on the ground. The child had

bee put on a gunny bag. PW 6 identified the child as his granddaughter. PW 6 testified that the child had been stabbed and her intestines were hanging outside her body. The child was unconscious. PW 6 sought assistance and took the child to OI Kalou District hospital. Later the child was taken to the Nakuru Provincial General Hospital where the child died. PW 6 confirmed that the accused and PW 3 did not have a happy marriage because the accused used to beat up the deceased. He further testified that the elders had advised PW 3 to return to her parents due to the suffering that PW 3 and the child had endured in the hands of the accused. PW 6 testified that when the accused married PW 3 he knew that the child was not his, but had agreed to adopt the child as his own.

PW 7 J G Maina testified that he was at a kiosk belonging to one Muchiri ati village when he was informed that there was a child who had been seriously injured and abandoned in the bush. PW 7 went to where the child was. He saw that the child's abdomen had been cut and the intestines had come out. PW 6 looked for a gunny bag, put the child on it and assisted in taking the child to OI Kalou District Hospital. PW 7 went to the Nakuru Provincial General Hospital on the 15th of July 2003 where he was informed that the child had died.

PW 8 D N a fifteen year old pupil at St. Joseph Primary School testified that on the 13th of July 2003 at about 4.00 p.m. while he was home in village, OI kalou the accused arrived and told him that he has strangled a child. The child was called W. The accused warned PW 8 not to tell anyone. He threatened to kill PW 8 if he told anyone. The accused then gave PW 8 his radio and iron box for safe keeping. The accused then left the homestead and went away. During the same day at about 8.00 p.m., people came to the homestead of PW 8 looking for the accused. PW 8 testified that the accused was not found on the material day. Neither was he found on the 14th and the 15th of July 2003. PW 8 testified that when he saw the accused, he did not have bloody clothes. PW 8 stated that it was normal for the accused to leave him with his radio and iron box when he was going to be away from home for a long time. PW 8 did not know why the people were looking for the accused.

PW 9 Police Constable Naftali Chege, then based at OI kalou police station testified that he received information that a murder suspect had gone into hiding at Ng'arua area. PW 9 testified that on the 19th of July 2003 he went with one of the brothers of the deceased to Ngarua where they were able to apprehend the accused. The accused was brought back to OI kalou Police station and charged with the offence of murder. On the 15th of August 2003 PW 9 accompanied the relatives of the deceased to the Nakuru Provincial General Hospital where a postmortem was conducted by the doctor on the body of the deceased, EW. PW 9 testified that the accused went into hiding after the incident where the deceased was seriously injured. He further testified that when the accused was arrested, he did not attempt to escape.

PW 10 Corporal Agnes Gitonga testified that she was the investigation officer of the case. She testified that she took statements from all the witnesses, had the accused arrested and later preferred the murder charge against the accused. PW 10 also visited the scene of the crime.

PW 11 Dr Vitalis Kogotu testified that on the 1st of August 2003 he carried out a postmortem on the body of W W. The body was of an African female child

aged about one year and six months. He testified that there was a cut wound on the chest curved downward running to the left for about five centimetres. The wound had been stitched. P W 11 testified that when he opened the abdomen he found that the stomach and the small intestines had been cut. PW 11 established the cause of death to be haemorrhage secondary to stab wounds. The postmortem report was produced as prosecution's exhibit No. 1.

When the accused was put on his defence, he chose to give an unsworn statement. He testified that he became friends with PW 3 in 1999. Later he married PW 3 in November 2002. He testified that when they were friends with PW 3, PW 3 got pregnant while she was at home. In spite of this the accused testified that he still sought PW 3's hand in marriage. PW 3's parents consented to the accused marrying PW 3, P W. The accused was then allowed to live with Phyllis as husband and wife. It was his evidence, that four months into the marriage an aunt of P called G incited his wife against him. It was his evidence that due to the incitement, Phyllis ran away from the matrimonial home. When she came back she showed disrespect towards the accused by abusing him in front of his brothers and parents. They started quarrelling. P again ran away to her parents. The accused sought to be reconciled by the elder with P. An elders meeting was held. The elders were unable to reconcile the accused and Phyllis due to the fact that an uncle of P insisted that the accused pays dowry first before they could be reconciled. The accused testified that he did not have any problems with P and was sad that he was not given an opportunity to live with his wife.

He testified that on the 13th of July 2003 he gave his brother his radio and iron box as he was going to see his aunt who was living in Ngarua. The accused testified that the time he gave the said items to his brother was 3.25 p.m. He then bade farewell to his brother and parents and went to visit his aunt at Ngarua. After a week, the police came and arrested him. He was taken to Ol kalou police station where he was interrogated concerning the death of E W. The accused denied that he knew anything in connection with the death of the said E W. The Accused denied the evidence which was adduced by the Prosecution witnesses. It was his testimony that the people who were with the child ought to know who had killed the child. The accused testified that he was not aware what occurred at the home where the said E W disappeared and was later found seriously injured. The accused testified that he was surprised that P could have taken the child to her aunt's when normally she left her at her grandmother's. The Accused testified that he did not have any grudge against P and still considered her as his wife.

After the close of the Prosecution's and the defence case, submissions were made by Mr Mugambi, Learned Counsel for the Accused and Mr Gumo, the Assistant Deputy Public Prosecutor. I will revert back to the submissions later in this judgment. The evidence that was adduced by the prosecution was circumstantial. No witness saw the accused person injure E W W (hereinafter referred to as the deceased). The deceased was found having sustained serious injuries which later proved to be fatal. The deceased died from the injuries that had been inflicted upon her. To succeed in its case, the prosecution must establish beyond any reasonable doubt that it is only the accused person who could have inflicted the said injuries on the deceased to the exclusion of any other person. As was held in **James Mwangi –versus- Republic [1983] E. A. 327** at page 331 by the Court of Appeal;

“In a case depended on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of an accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on evidence 10th Edition p. 31) it is only necessary before drawing the inference of the Accused’s guilt from circumstantial evidence to be sure that there no other co-existing circumstances which would weaken or destroy the inference – Teper –versus- the Queen [1952] AC 480 at page 489.”

In the present case the prosecution called PW 1 J K, PW 2 E N M and PW 3 P W K who testified on the circumstances under which the deceased, who was a child of one year and eleven months left the home of PW 2 E N M. PW 3 P W Ki, the mother of the deceased testified that on the 13th of July 2003 she decided to go to the market. She took the deceased to her aunt, E N M (PW 2) who agreed to look after the deceased while PW 3 was gone to the market. PW 3 took the deceased to the house of PW 2 at about midday. PW 3 then left for the market which was situated at a place called Kaptan. PW 2 corroborated PW 3’s testimony. She testified that PW 3 left the deceased child with her when she went to the market at a place called Kaptan. PW 2 testified that on that material day she was inside her house resting while the deceased and her children were playing outside the house. PW 2 had already fed the children including the deceased.

At about 4.00 p.m., she testified that the accused knocked the door of her house. She welcomed him into the house. PW 2 was in the house with a visitor who was called Mumira. The accused greeted them and asked where PW 3 was. PW 2 informed the accused that PW 3 had gone away. The accused asked PW 2 if PW 3 was going to come back. PW 3 answered in the affirmative. After a while, PW 2 testified that the accused went outside and picked the deceased and said he was going with her to the kiosk. PW 2 remained in the house until when PW 1 informed her that the accused had taken the deceased away. PW 1 J K, a standard three pupil testified that on the material day, he was playing outside their house with the other children, including the deceased, when the accused came and told them that he was going to buy them sweets. He took the deceased with him. PW 1 followed him. However the accused told PW 1 not to follow him. When the accused realised that PW 1 was surreptitiously following him, he threw stones at PW 1 and succeeded in scaring him away.

This Court is aware that the evidence of PW 1 who is a child of young and tender years has to be corroborated. Before the said witness testified, this Court conducted an inquiry and established that PW 1 was competent to testify under oath. PW 1’s evidence was corroborated to some extent by the evidence of PW 2 E N M, who testified that she had seen the accused take the deceased child away. She later was told by PW 1 that the accused had taken the deceased child away. Further corroboration to PW 1’s evidence was given by the evidence of PW 5 Z G. She testified that she was aged seventeen years. It was her testimony that on the material day as she was walking towards her grandmother’s place, she saw the

accused carrying the deceased. PW 5 knew the deceased prior to the said material date. She testified that she knew that the accused was married to PW 3. She testified that when she saw the accused with the deceased, the deceased was laughing. After seeing her grandmother, PW 5 on her way back, saw many people who had stopped at a farm belonging to lady whom she called Mama Kimani. PW 5 testified that she went to investigate. She saw a child lying on the ground with bloody clothes. PW 5 testified that she was able to identify the child as the one she had seen earlier being carried by the accused.

When PW 5 had earlier seen the child with the accused, the child was okay healthwise. PW 5 testified that when she saw the child the second time the child was lying on the ground with blood emanating from her chest and stomach area. PW 5 testified that between the time she had seen the accused with the child and the time the deceased was found abandoned, was about two hours. PW 6 D K the father of PW 3 testified that he was informed about the disappearance of the deceased by PW 2. Later he was informed that a child had been found abandoned. He went to the scene and identified the child to be his granddaughter. It was his evidence that the child had been stabbed in the stomach and her intestines were hanging outside her body. PW 6 with the assistance of others, took the child to OI Kalou District Hospital. The child was later transferred to the Nakuru Provincial General Hospital where the child died in the course of the night.

PW 4 J N W testified that he was going home from a local shopping centre called Ndemi. It was on the 13th of July 2003 at about 5.30 p.m. PW 4 testified while walking, he saw a child lying on the grass. The child's clothes were bloody. PW 4 testified that when he saw the child, the child was alive but was unconscious. He testified that many people came and later PW 5 came and identified the child. PW 4 testified that the child was later taken to hospital where she later died. PW 4's evidence was corroborated by the evidence of PW 7 J M who testified that he was informed that a child whose stomach had been disembowelled had been abandoned in the bush. PW 7 went to the scene. He saw the child's intestines hanging out. PW 7 assisted others to take the child to OI Kalou District Hospital. The child was transferred to Nakuru Provincial General Hospital where the child died on the same night.

PW 11 Dr Vitalis K'ogutu testified that he carried a post mortem examination on the body of the deceased. He assessed the age of the deceased to be about one year and six months. He observed that there was a cut wound on the chest running to the left side of the body. The cut wound was curved downward and was about five centimetres long. There was a stab wound to the chest wall which had penetrated between the T11 and T12 which was about 1.5 centimetres long. PW 11 testified that the internal appearance were that the deceased's stomach and small intestines had been cut. The deceased's spleen was punctured and there was internal haemorrhage. Dr K'ogutu was of the opinion that the cause of death of the deceased was internal haemorrhage secondary to stab wounds. The postmortem report was produced as Prosecution's Exhibit No. 1.

This Court has evaluated the said evidence which was adduced by the prosecution. This Court finds that the Prosecution has established by circumstantial evidence that the accused was the last person seen by the witnesses when the deceased

was healthy and alive. The sequence of events as narrated by PW 1, PW 2, PW 3, PW 4 and PW 5 proves beyond reasonable doubt that the accused took the deceased from the homestead of PW 2 and was seen by PW 5 carrying the deceased who was in good health before the said PW 5 saw the deceased about two hours later lying on the ground having been stabbed in the stomach with the intestines having been disgorged from her abdomen. The critical time was between the time that the Accused was seen by PW 5 and the time that PW 4 found the deceased abandoned by the road side. It is between the said two times, which is about one hour that the accused must have stabbed the deceased. The Accused like a mad scientist in a horror movie dissected the deceased's abdomen as if her body was some scientific specimen. No evidence has been adduced by either the prosecution or the defence that would displace the inference that it is the accused person who stabbed the deceased thereby causing her fatal injuries. Other circumstance evidence adduced by the prosecution further supports the inference that it is the accused who stabbed and fatally injured the deceased. PW 3 testified that she was a friend of the accused before she conceived by another man and gave birth to the deceased. PW 3's evidence as to the existence of the friendship was corroborated by the accused when he gave his unsworn testimony in his defence. PW 3 testified that when she was married to the accused, and was living with her, the Accused used to beat the deceased. PW 3 testified that the accused hated the deceased. He told PW 3 that he was going to kill the deceased. It was because of the constant beating that the Accused administered on the deceased that caused PW 3 to leave her matrimonial home. The evidence of PW 3 was corroborated by the evidence of PW 6 D K (the father of PW 3) who testified that the elders had advised PW 3 to return back to her parents due to the fact that the accused used to beat up the deceased. This evidence is crucial as it proved that the accused had the motive to kill the deceased. From the Courts evaluation of the evidence which was adduced by the Prosecution it appears that the Accused was not happy that PW 3, his girlfriend had conceived a child with another man. The accused still loved PW 3. He went to her parents and sought her hand in marriage. He indicated that he did not have any problem in marrying PW 3 even though she had another man's child. It is only when PW 3 came to live with him that the Accused manifested his hatred of the deceased. He used to beat her up. Probably the Accused in a convoluted way blamed the deceased for having been born by his beloved. The Accused was jealous of an innocent child. It is the constant beating of the deceased that made PW 3 decide to leave the Accused's home. All the efforts by the Accused to have PW 3 return to the matrimonial home did not bear fruit. The elders met and decided that PW 3 was to remain at her parents. The Accused blamed the deceased for the breakup of his marriage. He hatched a plan. He went to the home of PW 2 when he knew that PW 3 would be away. The Accused's plan was to get the deceased out of the picture so that the Accused and PW 3 would live together as husband and wife. It is the finding of this Court that the Accused had the motive, the opportunity and the will to put into effect the murder of the deceased. The Accuse had malice aforethought. He had indicated his wish to kill the deceased to PW 3, got the opportunity and put his evil plan into effect.

In the case of **Rex –vs- Kipkering Arap Koskei (1949) 16 EACA 135** it was held that in order to justify, on circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of any other explanation upon any other reasonable hypothesis than that, of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution

and never shifts to the defence.

I do find that the Prosecution as established by circumstantial evidence that it is only the Accused who could have fatally injured the deceased. I have considered the submissions made on behalf of the Accused by his Counsel. No other person had the intention to do harm to the deceased. The Accused was the last person seen with the deceased while she was alive and in good spirit. The Accused's conduct was incompatible with his innocence. There can be no other inference other than the fact that the Accused killed the deceased by fatally stabbing her. After stabbing the deceased and leaving her for the dead, the Accused went home and informed his brother D N (PW 8) that he has strangled the deceased. He told him not to tell anyone. The Accused threatened to kill PW 8 if he told any other person what the Accused had told him. The Accused then left his radio and iron box with PW 8. He then went away from his home. He was traced a week later by Police Officers in the company of PW 9 Police Constable Naftali Chege and arrested. PW 10 Corporal Agnes Gitonga investigated the case and came to the conclusion that from the evidence recorded a charge of murder would be sustained by the Prosecution. The fact that the Accused disappeared after the incident which the deceased was fatally injured is incompatible with the conduct of an innocent man.

I have considered the evidence adduced by the Accused in his Defence. The Accused blames the aunt and the uncle of PW 3 for the breakup of his marriage to PW 3. The Accused denies that he fatally injured the deceased. It was his testimony that someone else must have injured the deceased and not himself. The Accused narrates the events leading up to his arrest at his aunt's place at Ng'arua. I have considered the evidence adduced by the Accused in his defence. The said evidence does not in anyway dent the strong case established by the prosecution against him. It is often said that circumstantial evidence is the best evidence in criminal cases. In the instant case it is the finding of this Court that the circumstantial evidence adduced by the Prosecution has established that no other person could have committed the heinous crime against the deceased other than the Accused. This Court finds that the Prosecution has established its case against the Accused person to the required standard of proof beyond any reasonable. The Assessors who assisted this Court during the hearing of this case Mr John Opondo Radero, Shadrack Nyambane Oyando and Samuel Momanyi Seremani all entered a verdict of guilty of murder against the accused. The finding of the Assessors in this case is in accord with the finding of this Court. In the premises therefore, this Court finds the Accused, John Macharia Gachanja, guilty as charged for the offence of murder under **Section 203 as read with Section 204 of the Penal Code** for unlawfully killing E W W.

DATED at NAKURU this 17th day of December 2004.

L. KIMARU

JUDGE



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