



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 39 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

ALEX IKAARE.....ACCUSED

J U D G M E N T

The accused **ALEX IKAARE** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that **ALEX IKAARE** on the 29th November, 2017 in Nalondo village within Bungoma County Jointly with others not before court murdered **JOAN PHILIS KAPULE**.

The case for the prosecution is that on 5.11.2017 **PW5 Shem Kabule Kimilo** the sister of deceased Joan Philis Kapule was at their home with siblings Esther and Seth. While there one Samuel came and called the deceased, who was at home. Samuel told deceased that Alex was calling her. Alex is the accused and was a boyfriend of the deceased. The deceased then went to see Alex the accused. He knew accused to be the deceased's lover. He did not see deceased again. He later received information deceased had died.

PW6 Samwel Barasa Simiyu was on his way to the market on 5.11. 2017 when he met Alex the accused. Accused sent him to go and call the deceased who was their neighbor. He went and informed the deceased that accused was waiting for her at the Lupida school.

PW10 Esther Nasimiyu Kapule the sister of the deceased was at home with the deceased when Samwel came and informed deceased that the boyfriend Alex the accused was calling her and was waiting at the road. She went and met accused and came back and she noticed that deceased had left with clothes. She did not come back. She informed the parents. She knew accused as a boyfriend of the deceased.

PW1 Protus Kapule Oruko the father of the deceased received a telephone call on 2.12.2017 from the chief who informed him that he should go to Bungoma hospital. He did not go that day but sent his wife Jeska Auma (PW2). On 3.12.2017 he went and found the body at the mortuary. He was informed that the body had been taken there by nurses in ward 4. He went and spoke to the incharge in ward 4 who informed him the deceased had been brought to the ward by 2 ladies and a man who left the tel contact as 0704xxxxxx.

PW2 Jeska Auma the mother of the deceased testified that she knew accused as a boyfriend of the deceased who was 17 years old and that he had impregnated her.

On 5.11.2017 the deceased disappeared from home and on 2.12.2017 they received information that the deceased was admitted at Bungoma hospital. She went to the hospital on 3.12.2017 where they found the body of the deceased in the mortuary with injuries on the face and hands. **PW3 Joshua Okonyang Kabule** the brother of deceased only accompanied the father Protus to the mortuary where they found the body of the deceased.

PW7 Peter Oruko the village elder testified that he knew accused who was a boyfriend of the deceased as he had met them on 20.8.2017 at 3 a.m. and informed the father (PW1).

PW8 No. 241968 APC Douglas Mose was at Lupida AP post on 5.9.2017 when PW1 Protus the father of the deceased reported that he suspected the deceased who was in form 1 was at the home of accused. He went there and found accused and deceased. Accused was arrested and taken to Nambale police station.

PW5 No. 82896 Copl (W) Jackline Wandera attached to Nambale police station received the accused on 6.9.2017 and further the investigation caused him to be charged with offence of defilement in Busia S.O A 91/2017 where the deceased gave evidence. She confirmed she did not investigate the offence of murder.

The accused upon being placed on his defence elected to give sworn evidence. He testified that the deceased was a neighbor and girlfriend.

He testified that the father objected to the friendship and he was charged with offence of defilement in Busia CMCR 91/2017 and remanded in prison on 14.4.2017 and came out on 7.7.2018.

On being cross examined by M/s Omondi for state he stated it was true deceased was his girlfriend and wanted to marry her. He stated that he was not on bond in the defilement case. He stated his mobile NO. is 0792773212. He admitted he knew Emmanuel Bwakhu but denied that he stood surety for him.

Mr. Were for accused filed written submission. He submitted that it's not in dispute that the deceased died at ward 4 Bungoma district hospital. The prosecution did not call the persons who accompanied her to the hospital. It's on record that she was brought to the hospital by ladies who were not called as witnesses. The register of patients was not produced to show who brought her.

The circumstances under which she was brought to the ward 4 is shrouded in mystery. The court was left groping in the dark for answers. Even the persons who attended to her an intern called 'Daisy' was not called as a witness.

He finally submitted that the prosecution of accused was premised on mere suspicion on the basis that the deceased was the complainant in the defilement case.

The accused is charged with the offence of murder contrary to Section 203 of the Penal Code.

“Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder.”

From the provision of Section 203 the elements of the offence of murder are:

- a) The fact and cause of death***
- b) The unlawful act or omission that caused the death***
- c) That it is accused who occasion the unlawful act or omission or inflicted the injuries that caused the death***
- d) That the accused had the intention of causing death or malice aforethought.***

On the fact and cause of death **PW4 Dr. Harun Ombangi** who performed the post mortem on body of deceased testified that the deceased had bruises on hand and face. There was haemothorax with lung collapse and injury on right side of uterus. He formed opinion that cause of death was as a result of lung collapse due to blunt trauma. He produced treatment notes from namable Health Centre which showed she as 12 weeks pregnant. She had been admitted in ward 4 at Bungoma hospital where she died while undergoing treatment and had been seen by an intern called Daisy. From his evidence this witness confirmed the fact of death and ascertained the cause of death as due to blunt force trauma, which led to lung collapse.

The other ingredient the prosecution must prove is that it is the accused who committed the unlawful act or omission that caused the death of deceased or inflicted the injuries in this case.

PW1 Protus Kabule Oruko the father of deceased was informed by the chief on 2.12.2017 that deceased was admitted at Bungoma hospital. He went there on 3.12.2017 and found the body already in the mortuary. He was informed that the body had been brought from ward 4. He was given information that deceased had been brought by 2 ladies and a man who left his mobile No. which he stated belonged to the accused. He did not witness the murder. **PW2 Jeska Auma** the mother on cross-examination testified she did not witness accused killing the deceased.

PW5 Shem Kabule Kimato the brother of deceased testified how one Samwel came and informed deceased that accused was waiting for her. This was on 5.12.2017. He also confirmed that accused and deceased were friends.

PW6 Samwel Barasa was sent by accused on 5.11.2017 to call deceased. He passed the information and deceased went to where accused was. He did not know how she died. Both **PW8 APC Mose** and **PW9 Copl Jackline Wandera** gave evidence in relation to the arrest of accused on defilement charges in Busia CM S.O.A 91/2015. They were not involved in the investigation of the murder.

PW10 Esther Nasianya the sister of deceased testified how **Sammy Barasa (PW6)** came and informed deceased that accused was waiting for her at the road. She later noticed deceased had left with her clothes.

Of all the prosecution witnesses none of them was an eye witness to the murder. Indeed there was no direct evidence to connect the accused to the offence. Where there is no direct evidence the prosecution can establish the charge against accused by circumstantial evidence. This is where the prosecution proves facts which when taken cumulatively point to the accused and no other as the person who committed the offence:

In ***Republic –vs- Ricahrd Itweka Wahiti (2020)eKLR*** para 23, 24:-

23. *In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal had this to say on this point:*

“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 which 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 R 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.”

See also Musili Tulo v Republic Cr. App. No. 30 of 2013.

24. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:-

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence.

In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- 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.*

(see also Sawe v Republic (2003) e KLR and GMI v R Cr. App. No. 38 of 2011).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt. (see Teper v R [1952] ALLER 480 and Musoke V R [1958] E.A 715). In Dhalay Singh v Republic, Cr. App. No. 10 of 1997,

this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

In this case the prosecution sought to establish that the accused was known to the deceased, called her and went with her and later took the deceased to Nambale health center hospital where she died while undergoing treatment.

PW1 Protus testified that he was given the telephone contact left in the hospital by incharge of ward 4 to be 0704xxxxxx. He stated that it belongs to accused. None of the staff who treated the deceased at Nambale Health centre or the ones who handled the deceased in ward 4 was called as a witness. Indeed neither was the incharge or the doctor whose name was given as Daisy was called to confirm who escorted the deceased to hospital, or whether accused was one of the two ladies and man who took her to hospital. These crucial witnesses is the link between the deceased injuries and the accused. In their absence I find the prosecution has a gap in their evidence.

The second doctrine the prosecution sought to rely on to connect accused with the offence is that he was the last person seen with the deceased alive. This is the doctrine of last seen with deceased alive.

PW3 Joshua, PW10 Esther all stated that they last saw deceased when she was informed by Samwel PW6 that accused as waiting for her. PW6 Samwel testified how he passed the information and thereafter deceased left the home. This was on 5.11.2017. On 3.12.2017 almost 28 days later is when information was received that deceased had died.

Where the prosecution seeks to rely on this doctrine of last seen with the deceased it must prove:

- 1) That the deceased was last seen alive with the accused.
- 2) That the date of last seen and date of death is proximate.
- 3) That there was no time the deceased was away from the accused.
- 4) That the accused's explanation or absence of explanation will lead to the court to be justified in drawing an inference that the accused killed the deceased.

In this case the accused is alleged to have called and left with the deceased on 5.11.2017. The deceased was taken to hospital on 3.12.2017 or thereabout. The people who took her to the hospital were not identified. The telephone contact left at the hospital was not investigated to determine the owner and whether there was any communication with deceased when alive. In the absence of these crucial items of evidence, the prosecution case has not attained the threshold to proof of circumstances from which this court can make an inference that it is accused and no other who committed the offence.

In the circumstances I find that the prosecution has not proved a charge of murder against the accused beyond reasonable doubt. I therefore find accused Alex Ikaare not guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and acquit him under Section 215 C.P.C. I direct that the accused Alex Ikaare be set at liberty unless otherwise lawfully detained.

DATED AT BUNGOMA THIS 31ST DAY OF MARCH, 2022

S.N RIECHI

JUDGE