



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 42 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

MOSES JUMA WEKESA.....1ST ACCUSED

MARY N. WAYELE ALIAS SIEFU.....2ND ACCUSED

J U D G M E N T

The accused **MOSES JUMA WEKESA** (accused 1) and **MARY N. WAYELE alias SIEFU** (accused 2) are charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that **MOSES JUMA WEKESA** (accused 1) and **MARY N. WAYELE alias SIEFU** (accused 2) on the 6th day of December, 2019 at Sango area in Bungoma South Sub-county within Bungoma county Jointly with others not before court murdered **BEATRICE NANGUNDA WEKESA**.

The case for the prosecution is that on 7.12.2019 at around 10 a.m. **PW3 Elizabeth Wamalwa** the village elder was at her home when she heard screams from the home of deceased; who is the wife of Ismael Wekesa. She went there and found the deceased who had injuries on the neck. She asked for accused Moses who stays with deceased on the same compound. She was told accused 1 was drinking alcohol in a neighbour's home. When he came she asked accused 1 what had happened and he told her that deceased had quarreled with one Maya and that he had removed Maya from deceased's house. She informed police who came and commenced investigations.

In cross-examination the witness stated that accused and deceased used to drink together and had done so even the previous day. She confirmed accused told her that he had gone to drink and when he came back he found the mother, the deceased dead.

PW4 Ignatius Wekesa was informed of the death and went to the scene. He found the body of deceased in the house. **PW5 Robert Wafula Juma** a son of the deceased was informed that deceased had died. He went to her house where he confirmed the same. He confirmed that deceased used to stay with accused 1. He testified that he did not know who killed her. **PW6 Stanley Kundu Waswa** received report of the death of deceased. He went to the scene and found many people who were demanding that accused 1 be released to them to discipline him because they said he is the one who killed the mother.

PW7 Sgt Patrick Kuloba attached to Mayanja Patrol base received information of the death of deceased. He went to the scene. He found the deceased in the house lying on a mattress with injuries marks on the neck. He received information that deceased was last seen with accused 1 drinking. He was treated as a suspect as he had earlier assaulted her and they used to quarrel.

He also found that the deceased had soiled herself and due to the marks on the neck he suspected that she was strangled.

PW8 NO. 73407 Sgt Peter Njire the Investigating officer testified that they visited the scene and found deceased in her house together with the accused 1 who was a suspect. He commenced investigations. He then received information that accused 2 Mary Wayele had thrown away a bottle containing alcohol. They however did not recover the bottle. He also received information that the previous day accused 1 was drinking with the deceased and one Maya and accused and deceased left together.

He confirmed that Maya has not been arrested as he ran away.

PW1 Catherine Waswa a niece of the deceased received information that deceased had died. She went to the scene and found deceased was lying on a mattress and there was a net string on her neck and blood in her mouth. She knew the deceased stayed with accused 1. She received information from one Esau that accused had said deceased had money and he had gone to ask her for the money. When he came back he told Esau that deceased had died. She then saw accused 1 come with a bottle of changaa where she gave to accused 2 and she noted that the bottle was blood stained.

Dr. Wanambisi Caleb Watta (PW2) who produced the post mortem report prepared by **Dr. Brian Inimi Kanyai** testified that on examination Dr. Brian found the deceased had multiple bruises on the chest, right hand and right thigh. There was also right lung collapse and loosening of cervical vertebrae. He formed opinion that cause of death was due to Asphyxia due to strangulation.

The accused 1 and 2 on being placed on their defence gave sworn evidence. **Accused 1 Moses Juma Wekesa** testified that the deceased was his mother. On 4.12.2019 at 9 a.m. he passed the house of the deceased and saw flies from her house. He knocked the door but she did not answer. He pushed the door and entered the house. In the house he found the deceased already dead. He informed the chief who called the police who commenced investigation and concluded she was strangled. PW1 and PW8 then caused him to be arrested and later charged with the present offence. On cross examination by M/s Omondi, accused stated that accused 2 Mary Walela is his neighbor. He confirmed he used to stay with deceased at the home and had been with her the previous day when deceased bought him busaa for Sh. 50. He stated that one Maiya had threatened the deceased.

Accused 2 Mary Nasimiyu Wayele testified that on a date she cannot remember she heard people screaming from the home of deceased. She went there and found many people. She stayed outside and saw police take away the body. She denied that she did receive any bottle of changaa and throw it away.

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

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

The ingredients of the offence of murder which the prosecution must prove beyond reasonable doubt are:

- a) The death of the deceased.***
- b) The unlawful cause of death***
- c) That in causing death the accused committed it with malice aforethought.***
- d) That there is direct or circumstantial evidence placing the accused at the scene of the crime.***

On the fact and cause of death, PW2 Dr. Wanambisi Caleb Watta who produced the post mortem prepared by Dr. Brian Inimi Kanyai testified that on examination of the body, he found deceased had multiple bruises on chest, right hand, and right thigh. Upon opening the body, he found the right lung had collapsed and there was loosening of the cervical vertebrae. He formed opinion that cause of death was due to lack of air in lungs (asphyxia) due to strangulation. This witness confirmed not only the fact of death but also the cause of death.

The deceased died as a result of lung collapse due to strangulation. The unlawful act causing death was strangulation. Who committed the unlawful act?

PW1 Catherine Naswa testified that she received information about the death of the deceased. She went to her house and found her already dead. At the scene he found accused 1 having a bottle of changaa which he gave to accused 2 who threw it away. She testified that when she observed it, it was blood stained. This bottle was never recovered. She did not state that she saw accused strangling the deceased.

PW3 Elizabeth Wamalwa PW4 Ignatius Wekesa, PW5 Robert Wafula and PW6 Stanley Kundu Waswa all received information that deceased was dead. They went to the scene and found deceased already dead. None of them testified that they saw either accused 1 Moses or accused 2 Mary inflict the injuries on deceased.

PW7 Sgt Patrick Kuloba who visited the scene found the deceased already dead. On observing her he saw there were marks on the neck and saw that she was strangled. He received information that her son accused 1 was the suspect.

PW8 Sgt Peter Njiru the Investigating officer who also visited the scene found many people including the accused 1. He as informed that accused 1 had been with the deceased the previous day drinking together with another person called Maiya who was never traced. He was informed of a bottle of changaa that was blood stained but did not recover it.

None of all these prosecution witnesses testified on seeing either accused 1 or accused 2 or both strangling the deceased. In short there was no direct evidence or eye witness evidence adduced by the prosecution.

The prosecution in the absence of direct evidence can tender circumstantial evidence to prove a charge against an accused person.

In **George Kamau Wambai –vs R (2020)eKLR Criminal Appeal No. 180 of 2016(R)**

We entirely agree with the submissions of counsel for the appellant that his conviction turned solely on circumstantial evidence.

While considering how to test circumstantial evidence, this court in the case of Republic V Kipkering Arap Koskei & Another 16

EACA 135 stated “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...”

In *RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226*, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect".

For prosecution to succeed to prove a charge of murder against accused person it must prove facts from which this court can make an inference that it is accused and no other who committed the offence. In this case PW5 relied on the fact that accused 1 stays in the same home with deceased, and that they had together with one Maiya been drinking together the previous day.

These circumstances do not lead to any evidence as to how the deceased was strangled. The circumstantial evidence proved falls short of the threshold in ***Sawe –vs- Republic***.

I therefore do not find that prosecution has proved the charge against the Moses (accused 1) and Mary (accused 2) beyond reasonable doubt. I find **Moses Juma Wekesa** (accused 1) and **Mary Wayele alias Siefu** (accused 2) not guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and acquit them under Section 215 C.P.C.

Accused 1 Moses Juma Wekesa and accused 2 **Mary Wayele alias Siefu** be released forthwith unless otherwise lawfully detained.

DATED AT BUNGOMA THIS 31ST DAY OF MARCH, 2022

S.N RIECHI

JUDGE