



**Republic v Kaunyangi (Criminal Case 77 of 2016)
[2022] KEHC 414 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 77 OF 2016
TW CHERERE, J
APRIL 28, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

TIMOTHY KAUNYANGI ACCUSED

JUDGMENT

1. Timothy Kaunyangi (Accused) is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge are that; -

On diverse dates between 13th October -22nd October 2016 at Kiutine Village in Igembe North Sub-County within Meru County murdered Betty Kananu.

Prosecution Case

2. The prosecution case as narrated by PW1 Tabitha Kathuni is that Betty was her daughter. It was her evidence that on 13th October, 2016, one Francis Mutabari informed her that Betty had left home with Kaunyangi (Accused herein) to go and buy charcoal. That when Betty did not return home, she reported the matter to police and at a later date, Betty's body was recovered buried in shallow grave at Malanyene.
3. On 13th October, 2016, PW3 Francis Mugambi Mithika bought fertilizer from Mutabari's agro vet shop and instructed Accused who was a bodaboda rider to take it to his farm which he did and was paid KShs.200/- for the job. PW3 Francis Mutabari, confirmed that he gave fertilizer to Accused on 13th October, 2016 to deliver to PW2. It was his evidence that Accused rode away with Betty who was later found murdered. PW4 Joyce Mangwa Baariu, who operated a shop near Betty's shop at Kiutin market stated that on 13th October, 2016, Betty rode on Accused's motor cycle and informed her that she was going to buy charcoal. That was the last time she saw her alive because Betty was later found murdered



and buried. Together with Betty's body was recovered a Red Biker PEX2, white Panty as PEX3, black wig as PEX4 and a sisal rope as PEX5. Accused who was the last person seen with Betty was arrested and charged.

4. An autopsy on Betty's body was conducted on 28th October, 2016 and the Postmortem form tendered by PW5 Dr. Mohamed Abdi as PEXH. 5 reveals that deceased suffered amputation of both upper and lower limbs and had died of strangulation.

Defence Case

5. Accused in his sworn statement stated that he was a bodaboda rider at the material time. He recalled that on 13th October, 2016 at PW2 asked him to collect fertilizer from PW3's shop which he did and as he was loading it on the motorcycle, a girl he didn't know asked him to drop her at Malanyene and he agreed charging her Kshs. 50. He stated that he dropped her and went to PW2's shamba handed over the fertilizer and went back to his place of work at Kiutime market. That sometimes later, OCS Kiutine called him to the station and when he went on 15th October, he was interrogated about the girl he had carried at Kiutune market and he explained that he had dropped her at Malanyene. That a few days later when he received information that the girl had been found dead, he went back to the police station of his own free will and was arrested and charged. He denied killing the said girl.

Analysis and determination

6. Section 203 and 204 of the Penal Code under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”

7. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the death and that he was actuated by malice.

(a) The death of the deceased

8. The postmortem form PEXH.5 reveals that the deceased that deceased suffered deceased suffered amputation of both upper and lower limbs and had died of strangulation.

(b) Proof that accused person committed the unlawful act which caused the death of the deceased

9. None of the prosecution witnesses saw Accused commit the unlawful act that caused the death of the deceased. Accused on the other hand has denied the offence.
10. The foregoing notwithstanding, the evidence on record discloses that Accused was the last person seen with the deceased on 13th October, 2016. The law requires a person last seen alive with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased and the onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased (See *Stephen Haruna v The Attorney General of the Federation* {2012} LPELP 782).



11. In *Republic v E K K* [2018] eKLR Lesiit J (as she then was) in considering the last seen alive with doctrine cited with approval a Nigerian Court case of *Moses Jua v The State* (2007) LPELR-CA/IL/42/2006 where it was held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

12. The evidence on record reveals that the only reason that Accused was charged was that he was with the last seen with the deceased on the day she disappeared. There is therefore no doubt that Accused was charged on the basis of suspicion. In *Sawe vs. Rep* [2003] KLR 364 the Court of Appeal held:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

13. In *R v Kipkering Arap Koske & another* [1949] 16 EACA 135, the Court of Appeal for Eastern Africa had this to say:

“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. 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 on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

14. Accused explained that he met the deceased when she requested him to take her to Malanyene and in the normal course of his duties as a boda boda rider agreed and dropped her off at the requested place and proceeded to drop fertilizer at PW2's farm.
15. In my considered view, Accused has given an explanation that is reasonable and since the same remains uncontroverted, the circumstantial evidence adduced by the Prosecution is in the circumstances of this case insufficient to sustain a conviction.

c) Malice aforethought

16. The prosecution having failed to prove actus reus, it would be futile for this court to delve into the issue of malice aforethought.

Disposition

17. In the end, I have come to the conclusion Accused is Not Guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code and he is acquitted. He shall be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU THIS 28TH DAY OF APRIL 2022

WAMAE. T. W. CHERERE

JUDGE



Court Assistant - Kinoti

Accused - Present

For the Accused - Mr. Anampiu Advocate

For the State - Ms. Mwaniki

