



REPUBLIC OF KENYA



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**Republic v Simiyu & 2 others (Criminal Case 73 of 2018)
[2022] KEHC 16935 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 73 OF 2018
WM MUSYOKA, J
DECEMBER 23, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

LILLIAN NASAMBU SIMIYU 1ST ACCUSED

JANE NEKESA MBUNDO 2ND ACCUSED

EUGINE WITINGA ISAVI 3RD ACCUSED

RULING

1. Lillian Nasambu Simiyu, Jane Nekesa Mbundo and Eugene Witinga Isavi are charged with murder contrary to section 203 of the *Penal Code*, Cap 63, Laws of Kenya, as read with section 204 of the *Penal Code*. The particulars of the offence allege that on 25th day of July 2018, at Munyoki village, Lumakanda Location, Lugari Sub-County, within Kakamega County, jointly with others not before court, murdered Leon Wanga Kisaina, hereinafter referred to as the deceased. They pleaded not guilty to the charge, and a hearing ensued, where 10 witnesses testified.
2. PW1, Howard Peter Omutokok, was the father of the deceased. He and his wife had left the deceased, a minor of 3 years and 2 months, at the rural home, in July and went back to Nairobi. She was left under the care of their house-help or the minder of the deceased, Lilian Nasambu Simiyu, the 1st accused herein. On July 25, 2018, the 1st accused telephoned him to inform him that the deceased had disappeared. He and his wife came back to the village, and joined the search party. A body was eventually found in a river. A DNA was conducted which confirmed that it was that of the deceased. PW2, Martha Ongecha Otieno, was the mother of PW1, and grandmother of the deceased. She testified that on July 25, 2018, Calistus, an employee of PW1, came to her home asking for the deceased, who was not within. He went away but came back alter with the 1st accused, to report that the deceased had not yet come home or been traced. When they came back a third time, she realised the matter was



getting serious, and a search for the deceased began. When the child was not found at all a report was made to the police. PW3, John Namunyu Ambayi, was the grandfather of the 3rd accused. He testified that the 3rd accused had fraudulently used his national identity card to register a mobile telephone line, which he later used to solicit money from PW1 on the pretext that he would assist him trace the deceased. He knew nothing about PW1 and the circumstances of the disappearance of the deceased.

3. PW4, John Fredrick Otieno, was the father of PW1 and the grandfather of the deceased. On the day when the deceased disappeared, he had gone for a *matanga*, and when he came back he was told the deceased could not be found, and they began to search for him. PW5, Felistus Khaikata, a brother-in-law of PW1, testified that on that material day, Calistus had come to her home with the deceased, to cut banana leaves, they then went away. the deceased later came alone looking for his son so that they could play together, when he did not find him, he went away. Later the 1st accused came looking for the deceased, and she told her that the deceased had gone back home. When the child could not be traced, they began looking for him, until a body was found in the river, said to be that of the deceased, even though she did not accept that that was his body. Kathleen Jerima Chepkemboi testified as PW6. She was the spouse of PW1 and the mother of the deceased. She detailed how she and PW1 had left the deceased at the village with the 1st accused and went back to Nairobi, and how they were informed that he had disappeared, and how they travelled back home. She spoke about the searches for the deceased, until a body was later found, said to be that of the deceased. PW7, Godfrey Soita Masaba, was in the party that was searching for the deceased. PW8, Dr Hebord Bilendwa, conducted post-mortem on the body of the deceased. He described cause of death as strangulation. PW9, Richard Kimutai Lang'at, was a government analyst. He conducted DNA on samples from the deceased, PW1 and PW6, which established that the deceased was the biological child of PW1 and PW6.
4. PW10, Corporal Erick Ogutu, service number 77276, was the investigating officer. He detailed all the steps that he took in the course of the investigations. He stated that he arrested the 2nd accused because the 3rd accused mentioned her. When shown the statement of the 3rd accused he said that the same did not mention the 2nd accused. He further stated that the 3rd accused also mentioned the 1st accused, but upon being shown the statement he conceded that that statement talked of 2 different persons known as Lilian. He further conceded that the 3rd accused had stated that the Lilian who knew about the whereabouts of the deceased was Lilian the salonist, and not the 1st accused. He said that he was unable to get any connection between the 2nd accused and the 3rd accused, nor any of the people who had been calling PW1 with alleged information on the whereabouts of the deceased. He stated that the 3rd accused was linked with the matter by Calistus Wekesa Ngacho, the shamba boy of PW1. He said that the said Calistus recorded 2 statements. In the first statement, he talked of how the deceased and another child left him and the 1st accused at the home of PW1 and went to home of PW2 and PW4, never to come back. He stated that Calistus did not, in that statement, say that the 1st accused took the deceased to the home of the 2nd accused. He further stated that the said Calistus recorded a second statement, in which he said that the 1st accused went with the child to the home of the 2nd accused. He said that he relied on the statement of Calistus to charge the 1st and 2nd accused persons. he also said that the 3rd accused had also mentioned the 2nd accused. He further said that PW1 was also suspicious of the 2nd accused.
5. At the close of the prosecution case, the accused persons filed written submissions, on July 22, 2022, done by Mr Elisha Ongoya, who is on record for the 2nd accused. He submits that a case has not been established to require that the accused be asked to answer to the information before the court. He submitted that the entire case was built on the facts of a circumstantial nature, which do not point a finger of suspicion against the accused persons. He submitted that only PW9 attempted to raise suspicion. Regarding the 1st accused, he stated that she was arrested on the basis that she was mentioned



by Calistus, yet that Calistus never testified, and recorded 2 inconsistent statements with the police. Regarding the 2nd accused, he submitted that PW9 charged him because she had been mentioned by Calistus and the 3rd accused, yet Calistus never testified, he recorded 2 contradictory statements to the police, PW2 had testified that Calistus came to her home 3 times asking for the deceased and it was on the third visit that he came with the 1st accused which was consistent with his first statement to the police, the 3rd accused did not mention the 2nd accused in his statement, the 3rd accused is a co-accused person, and his evidence ought to be subjected to corroboration, and that the case against the 2nd accused was based on mere suspicion which is not good enough in law. Regarding the 3rd accused, he submitted the 3rd accused had demanded and received money from PW1 on pretext that he could produce the deceased, yet no concrete evidence was presented of the monetary transactions, of call data linking the 3rd accused to PW1.

6. At this stage I am required, in law, to decide whether to put the accused on their defence or not. I should determine whether the republic has made out a *prima facie* case to warrant putting on them on their defence. What amounts to a *prima facie* case was stated in *Ramanlal Trambaklal Bhatt vs R* (1957) EA 332 (Sir Newnham Worley P, Sir Ronald Sinclair VP & Bacon JA), as one in which a reasonable court, properly directing its mind to the law and the evidence, could convict, if no explanation was offered by the defence. See also *Republic vs Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR (Nyakundi J).
7. The elements of the offence of murder, as set out in section 203 of the *Penal Code*, are the fact of death, the cause of the death, the role of the accused person in the cause of the death, and the fact that the death is caused by the accused with malice aforethought.
8. From the material before me there is *prima facie* proof that the deceased in fact died. His lifeless remains were traced at the river, and was seen by PW1. He did not believe that was his body, and the same was subjected to DNA testing by PW8, who confirmed that indeed that was his body. A post-mortem was conducted on those remains by PW9. On cause of the death, the evidence on that was presented by PW9. He attributed the death of the deceased to neck strangulation.
9. The remaining 2 considerations are whether the accused had any role in the causation of the death, and if they had any, whether the same was with malice aforethought. On the role of the accused in the causation there is scanty evidence. The entire cause is founded on mere suspicion. None of the witnesses testified to witnessing any of the accused persons strangling the deceased to death. None of them were proved to have been the last persons to be seen with the deceased. PW10, the investigating officer, stated that he charged the 1st and 2nd accused persons on the basis of a statement made by one Calistus, the shamba boy of PW1, and that, indeed, is the only reason why the 2 are in court. That Calistus was not called to the witness stand to breathe life to the allegations made in his statement. The republic is, therefore, prosecuting the 2 accused persons on the basis of a statement of a person who it has not procured to stand in court and be subjected to scrutiny on the contents of that statement. That alone should be enough to dismiss the charge against the 2 accused persons. Secondly, the said Calistus recorded 2 statements, in one he did not implicate the 2 accused persons, in a later one he implicates them. PW10 then decided to rely on the second statement rather than the first. The 2 statements, being inconsistent cannot stand. In any case, the maker was not called to the stand, and the 2 statements themselves were not authenticated, by being placed on record as exhibits. They cannot, therefore, be basis upon which to judge the 2 accused persons.
10. According to PW10, he charged the 2nd accused, secondly, because she was mentioned by the 3rd accused. Curiously, when PW10 was confronted with the statement of the 3rd accused, he conceded that the 3rd accused did not mention the 2nd accused at all. To that extent, there cannot be any basis



to rely on that statement to hang the 2nd accused. Furthermore, it is trite that accomplice evidence is of little probative value, unless it is corroborated. See *Kinyua and Ibrahim M'Inanga vs The Republic* [1976-80] 1 KLR 1678 (Madan, Miller & Potter JJA). However, in this case, there is no accomplice evidence by the 3rd accused against the 2nd accused, and even if there is, no corroboration has been provided.

11. Regarding the 3rd accused person, PW10 said that he was charged because had demanded and received money from PW1, on the pretence that he was in a position to link up PW1 with the deceased, or to provide information on how he could trace him. The demands were alleged to have been made by telephone, and the money paid through a telephone money transfer, yet no concrete evidence was presented of the telephonic connections between PW1 and the 3rd accused, through call data from the relevant telephone service provider, nor of the payments from transaction statements from the relevant mobile money service provider.
12. PW10 further said that the other basis for charging the 2nd accused was suspicion by PW1 that she was somewhat connected to the 3rd accused, on account of something she said about PW1 not contacting the police as the persons calling PW1 had warned him against that. PW10, himself, stated that he could not trace any connection, from mobile telephone logs, connecting the 2. He had no evidence at all that connected the 2
13. The standard of proof in criminal cases is put at beyond reasonable doubt. That standard has not been met in this case, as there is no evidence of any kind that connects the accused persons to the offence that they stand charged with. It is all founded on suspicion, yet it is trite that suspicion alone, however strong it could be, cannot be a basis for a conviction. See *Mary Wanjiku Gichira vs Republic* [1998] eKLR (Oguk, J).
14. Other persons were mentioned. Calistus appears to have known a lot about the disappearance of the deceased. He mentioned such persons as Foreman and Lilian the salonist. Statements were recorded from the said Calistus, but he was not presented as a witness. Foreman was arrested, but released. He was not presented as a witness. The other Lilian was never arrested, and PW10 was not clear on what steps he took to trace her. It would appear that PW10 did not do much, in terms of investigations, to get to the bottom of the matter, and it would appear that he was more inclined to depend on the word of PW1, rather than use his skills as a detective or investigator. Calistus, being an employee of PW1, just like the 1st accused, and having had access to the deceased in equal measure with the 1st accused should have been treated in the same manner with the 1st accused, as it would appear from the record, he knew more about the affair, but was, for some unknown reason, left off the hook.
15. As the prosecution has not established a sufficient connection, whether direct or circumstantial, between the accused persons and the death of the deceased, I hereby find and hold that I do not have, before me, material upon which I can convict them, were they not to offer any explanation. I am not satisfied that a *prima facie* case exists to warrant their being put on their defence. That being the case, I, accordingly, find the accused, Lillian Nasambu Simiyu, Jane Nekesa Mbundo and Eugene Witinga Isava, not guilty, and acquit them, under section 306(1) of the *Criminal Procedure Code*, Cap 175, Laws of Kenya, of the charge of the murder of Leon Wanga Kisaina, contrary to section 203, as read with section 204, of the *Penal Code*. They shall be set free, if they be still in remand custody, unless they are otherwise lawfully held.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23rd DAY OF DECEMBER 2022

WM MUSYOKA



JUDGE

Mr Erick Zalo, court assistant.

Ms Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr Biketi, Advocate for the 1st accused person.

Mr Ongoya, Advocate for the 2nd accused person.

Mr Elung'ata, Advocate for the 3rd accused person.

