



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: R.E. OUGO J.

CRIMINAL CASE NO. 6 OF 2019 (MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KERAGE MACHANA.....1<sup>ST</sup> ACCUSED

ROBIN NYANGU NYABUTI alias VINCENT KAMZEE.....2<sup>ND</sup> ACCUSED

JUDGMENT

1. **John Kerage Machana** (1<sup>st</sup> Accused) and **Robin Nyangau Nyabuti alias Vincent Kamzee** (2<sup>nd</sup> Accused) are 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 set out in the information dated 25<sup>th</sup> March 2019 are that, on the night of 22<sup>nd</sup> and 23<sup>rd</sup> day of March 2019 at Bokeira sub-location Iyabe location within Kisii South sub-county in Kisii county the 1<sup>st</sup> accused and 2<sup>nd</sup> accused murdered Sarah Osebe Machana. The prosecution called 5 witnesses to testify in support of its case.

2. **Fredrick Mwangi Ombui (PW2)** recalled that on 22<sup>nd</sup> March 2019 at about 6.00 p.m. he went to visit the 2<sup>nd</sup> accused to take *changaa*. He found the 2<sup>nd</sup> accused, the 1<sup>st</sup> accused and his wife DW3 and an old man known as Omwenge. By the time the deceased joined them, at about 6.30p.m., Omwenge had left and the people present were PW2, Tom, the 2<sup>nd</sup> accused, the 1<sup>st</sup> accused and DW3. The 1<sup>st</sup> accused then left and the deceased also left at about 7.30p.m. PW2 testified that the deceased and the accused persons were his neighbours. He had known them for 3 years. He informed the court that the deceased was the 1<sup>st</sup> accused person's mother.

3. PW2, Tom, the 2<sup>nd</sup> accused and DW3 continued drinking. The 2<sup>nd</sup> accused told DW3 that she should close the gate once Tom and PW2 had finished. PW2 did not see the 2<sup>nd</sup> accused again that night. He, Tom and DW3 continued drinking until 10.00p.m. PW2 left with Tom who escorted him home.

4. The following day on 23<sup>rd</sup> March 2019 at about 6.00am, PW2 heard screams from the neighbours. He woke up and ran to where the screams were. He found people gathered around the deceased. He testified that the deceased's body was found in the compound of PW3 about 2 kilometres from where they had been drinking.

5. **Agnes Ochere Osoro (PW3)** found the deceased's body that Saturday morning at about 6:00 a.m. next to her husband's grave. She went closer and realized that it was the deceased. She raised an alarm and many people arrived at the scene. The police later came to collect the body. PW3 testified that the 1<sup>st</sup> accused was the deceased's son and the 2<sup>nd</sup> accused was her neighbour. She testified that she had known both of them for a long time. During cross examination, PW3 testified that she lived with her 6 children in the plot. The compound to her home had no gate. She testified that she had not heard anything that night.

6. **Modesta Kwamboka (PW4)** testified that the deceased was her mother and the 1<sup>st</sup> accused was her elder brother. She stated that they were only 2 siblings in the family. She told the court that the 1<sup>st</sup> accused stayed with their mother in the same homestead. They had a land dispute as her brother had wanted the deceased to sell land but she had refused.

7. **P.C. Gilbert Sidayi (PW4)** testified that at the time of the incident he was stationed at DCI Kisii South and was the investigating officer in this case. He recalled that on 23<sup>rd</sup> March 2019 at around 8.00 a.m., a report was made at Gesonso that there was a body of an aged woman lying dead within Gesonso area. The DCIO Mr. Langat instructed him and CPL Irene Chelono together with other police officers to visit the scene. They went to the scene and found the body identified as the deceased's. The scene was photographed by scenes of crime personnel

from Kisii and the body taken to the mortuary where a post mortem was conducted. PW4 testified that the 1<sup>st</sup> accused had accompanied them to the mortuary. He appeared tensed and when they tried to interrogate him, the 1<sup>st</sup> accused told them that he had a story he wanted to tell them on the incident. They took him to their office at Gesonso and he confessed how the incident had taken place.

8. PW4 testified that from the accused person's confession they went to his home and recovered a T-shirt which had blood stains. The 1<sup>st</sup> accused also led them to the home of the 2<sup>nd</sup> accused person where they recovered a blue jeans which also had blood stains. Since the 1<sup>st</sup> accused had confessed how he and the 2<sup>nd</sup> accused committed the offence, they arrested the 2<sup>nd</sup> accused. The blue T-shirt and blue jeans were taken to the Government analyst in Kisumu who found that the blood resembled blood they had extracted from the deceased. He produced the pieces of clothing as exhibits but stated that he did not have an inventory for them. PW4 testified that the 1<sup>st</sup> accused was the son to the deceased. That there was bad blood between him and the deceased as she was against the selling of a parcel of land to the 2<sup>nd</sup> accused person.

9. During cross examination, PW4 testified that he and Irene Chelimo had both investigated the case. He admitted that his statement was dated 15<sup>th</sup> June 2019 and had been written after a period of 4 months from the date of the alleged offence when the accused persons had already been arraigned in court but proceedings had not started. In his statement, PW4 had indicated that the cause of death was as a result of strangulation. He however stated that they were relying on the doctor's report which had concluded that the cause of death was the injury in the abdomen as per the report. He stated that he had been relying on the 1<sup>st</sup> accused report that he had strangled his mother.

10. PW4 admitted that photos of the scene were taken but had not been produced because in his opinion, they were not important as they did not carry a lot of evidence which was sufficient to link the accused person. He also admitted that he had no search warrant when he recovered the clothes and that he took an inventory of the clothes he recovered but it got misplaced. He however stated that he did not need a search warrant as it was a matter of urgency and the accused persons were present. He stated that the 2<sup>nd</sup> accused's wife gave him the clothe in his presence and the 1<sup>st</sup> accused person gave them the T-shirt himself. PW4 further acknowledged that the DNA samples were not taken from the accused persons but stated that the clothes were retrieved from their houses and they were expected to explain how the blood got on the clothes.

11. The post mortem on the deceased's body was conducted by **Dr. Morebu Peter Momanyi (PW1)** at Bosongo Hospital Mortuary on 1<sup>st</sup> April 2018. He found that on the respiratory system, there was a fracture of the 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> right ribs. The digestive system had blood on the peritoneum cavity of about 1400 ml, with a crushed liver. He concluded that the deceased died from abdominal injury secondary to blunt force trauma on the abdomen. He stated that he had also taken a blood sample from the deceased which he had given to the police. In cross examination, Dr. Morebu stated that he was not aware that the deceased was epileptic. He explained that blunt force trauma could be caused by several objects, in several scenarios or circumstances but in this case a mild fall or common accident could not have caused the injuries and that one would have had to have fallen from a very high place to sustain such injuries.

**12. Richard Kimutai Langat (PW 5)** stated that he was a Government analyst working with the Government Chemist Department in Kisumu. On 4<sup>th</sup> April 2019, PW5 received a police memo form marked DCI, CB647/97/2019 under the escort of PW4 from DCIO Kisii. He marked the memo form under reference No. A64/2019. The memo form was forwarding a blood stained blue T-shirt recovered from the 1<sup>st</sup> accused marked 'A'; A blood stained blue jeans recovered from the 2<sup>nd</sup> accused marked A64/2019; Blood stained grass blades marked 'C' recovered from the scene and a blood sample taken from the deceased marked 'D'. He was instructed to determine the DNA generic relationship.

13. PW5 testified that on examination the blue T-shirt, the blue jeans and the grass blades were stained with human blood. He extracted the DNA from items A, B, C, & D and subjected them to DNA analysis. All items generated DNA profiles which he tabulated in his report. The DNA profiles generated showed that the DNA profile generated from the T- shirt, the jeans item 'B' and the grass blades 'C' matched the DNA profile of the deceased.

14. During cross examination PW5 explained the process he had used to extract the blood stains from the items. He stated that he had not received any samples from the 1<sup>st</sup> accused person. He also stated that although he did not know how the items had been preserved, he had received the samples in perfect order. He received exhibits from the DCI Kisii South under escort of PW4 and told his colleague, Lutta, to enter them in the register.

15. This court found that the prosecution had established a *prima facie* case against each of the accused persons and placed them on their defence. They both gave sworn statements in their defence. The 1<sup>st</sup> accused person, **John Kerege Mochama** testified that he went to DW3's kiosk on the 22<sup>nd</sup> March 2019, stayed there for 2 hours and went back to his place in Kilgoris. He left his mother at the kiosk. The following day at about 8:00 a.m., he got a call from a friend informing him that his mother had died and asking him to go home. He left work and arrived home at about 9:30 a.m. He testified that he found his mother body at PW3's place. The chief was already at the scene with police *askaris*. The 1<sup>st</sup> accused told the court that he was asked to carry the deceased's body to Hema mortuary. Later he was told to go to Gesonso to report. On reaching there PW4 handcuffed him and placed him in a cell.

16. During cross-examination, the accused testified that he had left the kiosk at 5:30 p.m. He denied that Risper had seen him at her place with his mother at 7:00 p.m. He testified that when he helped the police officers carry the deceased's body, he was arrested at 10.30 a.m. the same day and still had his clothes on. He was adamant that he had not changed clothes that day and the clothes that had been taken to Kisumu were not his.

17. The 2<sup>nd</sup> accused, **Robin Nyangau Nyabuti**, denied killing the deceased. He stated that the clothes that had been produced before the court were not his and that he had not signed anywhere that the items were recovered at his place.

**18. Risper Bosibori (DW3)** denied that the police had ever recovered clothes at her place. She also denied signing anywhere for the police

that they recovered clothes from her place. She testified that she had never seen the 2<sup>nd</sup> accused wear the clothes that had been produced in evidence before the court. When cross-examined, DW3 stated that the 2<sup>nd</sup> accused was her husband and the 1<sup>st</sup> accused was her neighbour. She denied that the 1<sup>st</sup> accused or his mother were at her place on 22<sup>nd</sup> March 2019 drinking *changaa* from 5.00 pm to 5.30 pm.

19. Counsel for the 1<sup>st</sup> accused person filed written submissions which I have duly considered. She urged that the prosecution had a duty to prove its case beyond reasonable doubt, which was a duty that stemmed out of the presumption of innocence inherent in our adversarial system of criminal justice. It was not enough for the prosecution to show that the defendant was probably guilty. Counsel urged this court to find that the prosecution had failed to prove its case against the 1<sup>st</sup> accused and acquit him. Mr. Otieno for the state did not respond to the submissions filed by the defence.

### **ANALYSIS AND DETERMINATION**

20. For the offence of murder under **section 203** of the **Penal Code** to be proved, the prosecution must establish the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

21. The fact and cause of the deceased's death are not in issue. It was not disputed that the body of the deceased was found lying at the scene on 23<sup>rd</sup> March 2019. The cause of the deceased's death was established by the evidence of Dr. Peter Momanyi Morebu (PW1) who conducted a post mortem on the body of the deceased on 1<sup>st</sup> April 2018. The doctor observed that the 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> right ribs of the deceased were fractured and the digestive system had about 1400 ml on the peritoneal cavity, with a crushed liver. His conclusion was that the deceased died from abdominal injury secondary to blunt force trauma on the abdomen. He ruled out strangulation or a common accident as the cause of the deceased's death.

22. The other hurdle that the prosecution had to cross over in a bid to establish its case against the accused persons was that they were the persons who had inflicted the deceased with the fatal injuries. The prosecution sought to rely on circumstantial evidence to prove this element of the offence of murder.

23. Whether the court will accept circumstantial evidence is dependent on if those circumstances unerringly point towards guilt of the accused person that there is no other plausible inference to be drawn other than the guilt of the accused. In ***Joan Chebichii Sawe v Republic Criminal Appeal No. 2 of 2002 [2003] eKLR*** the Court of Appeal held;

“... 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 explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other 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.”

24. The prosecution's case was that the deceased was last seen alive with the accused persons. PW2 testified that the deceased and the accused persons were drinking at the 2<sup>nd</sup> accused person's establishment the night before her body was found dead in PW3's compound. PW2 testified that he arrived at the drinking den at 6:00 p.m. He found the accused persons, DW3 and an old man known as Omwenge. The deceased person joined them later that night. After some time, the 1<sup>st</sup> accused left and the deceased left at about 7.30 p.m. PW2 testified that the 2<sup>nd</sup> accused had asked DW3 to close the gate and he did not see him after that.

25. His evidence was that the accused persons and the deceased left the establishment at different intervals that night. The 1<sup>st</sup> accused left the drinking den alone, he was followed by the deceased and the 2<sup>nd</sup> accused person also went away on his own. From his evidence it would appear that the accused and the deceased were cordial to each other as he did not speak of any altercation between the accused persons and the deceased. What happened in the period between when the deceased left the drinking den and when her body was found at 6:00 a.m. the following morning was not established in evidence. Although the body of the deceased was found in her compound, PW3 testified that she had not heard anything on the night in question.

26. The 1<sup>st</sup> accused person proffered an alibi in his defence. He testified that after leaving the establishment, he boarded a vehicle and went to his place in Kilgoris. The 2<sup>nd</sup> accused simply denied killing the deceased. The accused persons assumed no burden to prove their *alibis*. The burden of proving guilt remained on the prosecution. This court will weigh the alibi defence against the evidence given by the prosecution which is required to prove its case beyond reasonable doubt. (See ***Wangombe vs Republic [1980] KLR 149***)

27. The other piece of circumstantial evidence that the prosecution sought to rely on was the accused person's garments which were found to contain the deceased's blood. The deceased's blood sample was extracted by Dr. Morebu (PW1). The investigating officer, PW4, testified that they recovered the blood stained clothing from the accused persons, following the 1<sup>st</sup> accused's confession. He testified that after his confession, they went to the 1<sup>st</sup> accused person's home and recovered a T-shirt. The 1<sup>st</sup> accused led them to the 2<sup>nd</sup> accused person's home whose wife, DW3, handed them a pair of blue jeans in his presence. The government analyst received the blood stained blue T-shirt, jeans, glass blades and the blood sample from PW4 which he subjected to DNA analysis. His finding was that the DNA profiles extracted from the T-shirt, jeans and the glass blades matched the DNA profile of the deceased.

28. In the course of the trial, the court conducted a trial within a trial to ascertain whether the confession purportedly made by the 1<sup>st</sup> accused met the legal threshold set out in the **Evidence (Out of Court Confessions) Rules, 2009**. The prosecution called Chief Inspector David Kimutai Teres who had recorded the statement, Francis Rosanna Obiri, the third party who accompanied the accused to make his confession, the investigating officer, PC Gilbert Sidayi and the 1<sup>st</sup> accused person. In a ruling dated 20<sup>th</sup> February 2020, this court found that 1<sup>st</sup> accused person's confession which had been recorded on 23<sup>rd</sup> March 2019 was inadmissible in evidence for the reason that the prosecution had not

proved that the confession was voluntarily taken.

29. The position on illegally obtained evidence is that not all evidence acquired in a manner that leads to some form of prejudice will be excluded unless it renders the trial unfair or is detrimental to the administration of justice. (See *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others Presidential Election Petition No.4 of 2017 [2017] eKLR*)

30. In this case, the prosecution did not satisfy the allegation that the 1<sup>st</sup> accused person was not subjected to coercion, duress, threat, torture or other form of cruelty before recording his statement. The acquisition of the blood stained garments through an illegal confession diminished the probative value of the evidence. PW4 also failed to produce an inventory for the exhibits which would have corroborated his evidence on their recovery from the accused persons. In the case of *Stephen Kimani Robe and 2 Others v Republic NRB HCCRA No. 236 of 2012 [2013] eKLR*, the court held that,

“The purpose of an inventory is to keep record of exhibits recovered during investigations. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence.”

31. The accused persons refuted the claim that the blood stained garments were recovered from them. DW3 also denied PW4’s testimony that she had handed him the 2<sup>nd</sup> accused’s clothes. She also said she had never seen the accused in the garments produced as exhibits. The prosecution did not produce other evidence to corroborate PW4’s evidence, that he had recovered the garments from the accused persons. PW4 had also indicated in his statement that the cause of death was strangulation, based on the confession of the 1<sup>st</sup> accused yet Dr. Morebu had ruled out strangulation as the cause of the deceased’s death.

32. Although there was a lot suspicion that the accused persons may have killed the deceased for what was said to be a land dispute, the inculpatory facts presented by the prosecution did not satisfy the test to justify and inference of guilt. Suspicion however strong cannot be the basis of a conviction. There were significant grey areas in the chain of evidence which weakened the prosecution’s case. The whereabouts of the deceased from when she was seen alive to when she was found dead was not ascertained. The 1<sup>st</sup> accused person’s confession was found to be inadmissible and the evidence linking the accused persons with the blood stained garments presented by the prosecution was inconclusive. The totality of the evidence presented by the prosecution was insufficient to sustain a conviction. I therefore find that the prosecution failed to prove its case beyond reasonable doubt.

33. I hereby acquit **John Kerage Machana** and **Robin Nyangau Nyabuti alias Vincent Kamzee**, for the murder of Sarah Osebe Machana. They are discharged from these proceedings unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 26<sup>TH</sup> DAY OF FEBRUARY 2021**

**R.E.OUGO**

**JUDGE**

**In the presence of:**

**Accused No. 1 In person**

**Accused no. 2 In person**

**Mr. Muriuki Senior State Counsel Office of the DPP**

**M/s Nduhukire For the 1<sup>st</sup> Accused**

**Mr. Kaba For the 2nd Accused**

**Ms. Rael Court Assistant**