



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.3 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

KMM.....ACCUSED

JUDGEMENT

1. The accused **KMM** was on 9.1.2013 charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It is alleged that on the 25th Day of December, 2012 he murdered **EKN**.
2. The accused was represented by several advocates at different stages namely Miss Amala, Mulyungi, Wambua Kilonzo and later Janet Jackson and Susan Advocates whilst the prosecution was represented by Mr Machogu and later Mr Mwongera.
3. The Prosecution called a total of eight (8) witnesses in support of its case. **Pw1** was **Dr Fredrick Otieno Okinyi** who testified of the post mortem examination carried out on the deceased on 7.1.2013. He stated that the body had multiple stab wounds on the neck and left chest wall and he formed an opinion that the cause of death was haemorrhagic shock due to stab wound to the heart and lungs. He produced the post mortem report as Exh.3.
4. **Pw2** was **Peter Muema Muthuku** who worked as a night guard at Mwala market testified that on 25.12.2013 he heard some noise near a disco and he joined his workmate and approached a nearby tree where they found a lady lying on the ground with a stab wound on her neck. He stated that he had known her as she used to work as a barmaid in one of the bars at the market and had earlier been married by the accused. On cross examination, he denied witnessing the incident
5. **Pw3** was **No. 2005013210 APC Winfred Ndinda** who testified that on the material day while on patrol she was alerted by noise at Mwala market and she rushed there where she saw a lady lying under a tree with a kitchen knife stuck on her neck. She testified that her superiors were alerted and that the body was picked up. On cross examination, she stated that she could not tell if the deceased had stabbed herself.
6. **Pw4** was **No. 235330 IP Peter Musau** who testified that the deceased had been his barmaid and that the accused had been his neighbour. He testified that the accused used to frequent the bar to harass the deceased and often issued threats against her. He testified that on the material day, the deceased informed him that the accused had come into the bar and taken drinks without paying for the same. He further added that his wife later called him and informed him that the deceased had been killed by the accused. He confirmed that the accused had married the deceased and they had two children but that the marriage was rocked with squabbles. He stated that at one time he had accompanied the deceased to a police station to lodge report of assault on her by the accused. He also confirmed that the accused had been threatening deceased after they had separated and that he used to assign one of his workers to be escorting her to her room due to those threats. On cross examination, he stated that the deceased had called him on the night in question and alerted him that the accused was pestering her to accompany him to a disco.
7. **Pw5** was **PNP** who testified that on the material day, she was informed that the deceased had been killed. She stated that the deceased had been hired by her husband to work as barmaid at their "Up London" bar. She added that the accused had married the deceased but had separated. She confirmed visiting the scene where she saw the body of the deceased with a kitchen knife stuck on her neck.
8. **Pw6** was **No. 76488 Pc Cornelius Busienei** who testified that on 26.12.2012, he received instructions to visit a scene of murder and he proceeded there where he saw the body of the deceased under a tree with a knife stuck on her neck. He testified that he received information that the suspect had turned himself in and that the suspect was the accused. He produced the kitchen knife as Exh.2. He also added that he escorted the body to the hospital and later organized for the post-mortem and then escorted exhibits to the Government chemist

9. Pw7 was No.243955 Pc Elishper Mwikali of Ngelani Police Post testified that on 25.12.2012 at 4.30 am, she was at the post when somebody turned up and introduced himself as KMM and informed her that he had had a disagreement with somebody whom he had stabbed on her neck with a knife. She testified that the reportee was the accused herein. On cross examination, she confirmed that they did not obtain a confession from the accused.

10. Pw8 was No. 2009014632 APC Barako Shongolo attached to Mwala Administration police who testified that on the material day while on patrol he was alerted by noise at Mwala market and he rushed to the scene where he saw a lady lying under a tree with a kitchen knife stuck on her neck. On cross examination, he stated that he did not witness the incident and further that he did not find the accused at the scene.

11. The court established that the accused had a case to answer and placed him on his defence. He opted to tender a sworn testimony. He told the court that on 25.12.2012, he was at home with one Joshua Wambua who used to work at a hotel in Mwala market that was 20 minutes' walk from his home. He told the court that he was arrested on 25.12.2012 and taken to Masii Police station where he remained for 2 weeks during which period he was assaulted and denied meals. He told the court that he presented himself to the police station where he was forced to confess to having murdered the deceased. It was his testimony that he was placed in the same vehicle as the deceased where he was assaulted hence causing him to fall on the body of the deceased thus explaining the bloodstains on his t-shirt. He denied killing the deceased as he had loved her. On cross examination he told the court that the deceased was his former wife who had left for her parents' home; that the deceased worked at a certain bar and who used to visit him at his house. He denied visiting the bar on 25.12.2012 where the deceased worked but however admitted that the bloodstains on his t-shirt belonged to the deceased.

12. The defence closed its case. Learned counsels were directed to file and exchange written submissions.

13. Mr Muia learned counsel for the defence submitted that there was no direct evidence linking the accused with the offence. It was pointed out that there was only circumstantial evidence and in placing reliance on the case of **R v Elly Waga Omondi (2015) eKLR**, it was submitted that what was stated to be a confession was made to persons who were police constables and which did not meet the test of a confession and was not admissible as confessions. Counsel took issue with the fact that the accused was held in detention for two weeks; that he was arrested on 25.12.2012 and brought to court on 9.1.2013 which period was well over the 24-hour period stated in the constitution. It was submitted that the accused was arrested based on suspicion and in placing reliance on the case of **Neema Mwandoro Ndurya v R (2008) eKLR** it was the argument of counsel that the prosecution did not prove its case. The court was urged to acquit the accused.

14. In reply, Mr Mwongera learned counsel for the prosecution submitted that the evidence of Pw4 and Pw7 placed the accused at the scene of crime. It was submitted that the cause of death was proved vide the testimony of Pw1 and the injury was indicative of malice aforethought. It was submitted that the accused was identified by Pw4 and the evidence of Pw7 spoke to the fact that the accused admitted to committing the offence. It was submitted that the evidence of the accused could not shake the prosecution case. It was therefore the submission of counsel that the prosecution's case was proved beyond reasonable doubt. Counsel urged the court to convict the accused of murder under section 322 of the Criminal Procedure Code.

15. The burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R. 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

16. If there is a strong doubt as to the guilt of the accused, it should be resolved in the favour of such accused person. Therefore, the accused person must not be convicted because he has put a weak defence but rather that prosecution case strongly incriminates him and that there is no other reasonable hypothesis than the fact that the accused person committed the alleged crime. See **Woolmington v DPP [1935] AC 462**.

17. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under section 203 as read with section 204 of the Penal Code are:-

i. That the deceased is dead;

ii. That the death was caused unlawfully;

iii. That there was malice aforethought; and

iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

18. The post-mortem report on the examination of the body of the deceased has not been objected to nor controverted. Dr Fredrick Okinyi (Pw1) noted multiple stab wounds on the body of the deceased. He formed the opinion that the cause of death was haemorrhagic shock due to stab wound to the heart and lungs. This ingredient of the offence has easily been proven by the prosecution.

19. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held :

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

20. The deceased in this case was found to have died from haemorrhagic shock due to stab wound to the heart and lungs. None of the prosecution witnesses gave direct evidence as to witnessing the attack on the deceased but however there is certainty as to what was caused the death. Given the nature of injuries suffered by the deceased that resulted in her death as indicated in the post mortem report it can safely be inferred that death was the desired outcome of whoever the assailant was. Indeed, the pathologist stated that he noticed multiple stab wound on the body of the deceased and which could be taken as intended by the assailant to snuff out the life of the deceased.

21. It was upon the prosecution to ensure that the allegation that the accused assaulted the deceased was with malice aforethought and not excusable.

22. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. The evidence of Pw4 was to the effect that the deceased called him and briefed him that the accused had come into the bar and taken drinks without paying for the same. Again, his wife later called him and informed him that the deceased had been killed by the accused; the evidence of Pw7 was to the effect that the accused confessed to the murder. However, the accused has in effect retracted what is said to be his confession. In the case of **Tuwamoi v Uganda [1967] EA 84**, *Duffus, Ag. V-P* stated:

“We would summarise the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.”

23. In the case of **Ogero Omurwa v Republic [1979] eKLR** it was stated by the Court of Appeal that;

“We now come to the distinction that has been made over the years between a statement “retracted” and a statement “repudiated”. The basic difference is, of course, that a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to recant, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words, that the statement was not a voluntary one. On the other hand, a repudiated statement is one which the accused person avers he never made.

The court went on to state that

“We have had some difficulty in tracing how this distinction arose. The first reported decision in East Africa relating to retracted confessions appears to have been in 1935. We refer here to the decision of this Court in *R v Muthiwa (1935) 2 EACA 66* in which this Court held that it would be unsafe to convict on the retracted confession in that case and it adopted as a correct statement of the law the rule of practice referred to by Sir Grimwood Mears CJ in *Emperor v Shambu* and the judgment quotes this rule as follows (1932) ILR 54 All at page 358): “The evidentiary value of a retracted confession is very little and it is a rule of practice, as also a rule of prudence, that it is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars”.

This rule was more fully explained and modified by later decisions and before referring to the decision in 1936 which first made the distinction between a retracted and a repudiated statement, we would refer to some of these decisions. We would first refer to *R v Keisheimeiza (1940) 7 EACA 67* and to the following extract from the judgment of the Court delivered by Whitley CJ: “We would refer to the judgment of this court in the case of *R v Robert Sinoya (1939) 6 EACA 155* in which the authorities are reviewed and the opinion was expressed that the danger of acting upon a retracted confession in the absence of corroboration must depend to some extent upon the manner in which the retraction is made. We agree that in ordinary cases as a general rule when a confession is definitely and categorically retracted it is unsafe for the Court to act upon it without corroboration but if after enquiring into all the material points and surrounding circumstances the Court is fully satisfied that the confession cannot but be true there is no reason in law why the Court should not act upon it (*R v Durgaya, 3 Bom LR 141*).

24. Although the accused is stated to have confessed to have committed the offence, there is no independent evidence that points towards his participation. The evidence taken as a whole clearly shows that the accused was the ex-husband of the deceased and that they were not on good terms. The mere fact that the two knew each other and had frequent disagreements does not amount to proof of culpability. In the case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135**, regarding circumstantial evidence the court held that:-

“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 hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other hypothesis of innocence is always on the prosecution and never shifts to the accused.”

Even though the prosecution seems to hinge its case on circumstantial evidence, I find that they have not met the four part criteria namely:

- The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- The circumstances taken cumulatively, should form a chain so complete that there no escape from the conclusion that within

all human probability the crime was committed by the accused and none else.

25. As indicated earlier, the available evidence that the prosecution sought to link the accused with the offence is not sufficient to enable this court to accept what was stated to be a confession that the accused killed the deceased. I find that the circumstantial evidence on record is too scanty and not sufficient to point to the fact that the accused committed the dastardly act; the same creates some doubt in the prosecution case as regards identification of the accused as the perpetrator. It is trite law that if doubt is created in the prosecution case then the same ought to be resolved in favour of the accused. What emerged from the evidence is that the accused is alleged to have confessed to the murder but the investigating officer did not see it fit to ensure that a confession was recorded from him so as to come up with a watertight case. Even though it transpired from the evidence that the accused had married the deceased and had separated, it was not proper to blame him for the murder as any other person could as well have had a motive and opportunity to commit the crime other than the accused. Suffice to add that none of the witnesses saw the accused with the deceased or even near the scene. The claim that the accused turned himself in at Ngelani police post where he confessed to have killed somebody must be treated with caution since throughout his incarceration at Masii Police station no confession was secured from him. This then leads me to come to the conclusion that the prosecution's case is solely based on suspicion. It is trite law that suspicion alone however strong cannot be taken to sustain a conviction in the absence of other corroborating evidence. In the present case no such corroborating evidence was available and hence it will be unsafe to convict the accused on the available evidence.

26. Accordingly, therefore, I find that the evidence elicited from the testimony of the prosecution witnesses has not established the offence of murder against the accused beyond reasonable doubt. I find him not guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He is accordingly acquitted of the charge and he should be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 16th day of February, 2021.

D. K. Kemei

Judge