



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 14 OF 2020

REPUBLIC.....PROSECUTION

VERSUS

AGNES NYAMOITA GESORA.....ACCUSED

JUDGMENT

Introduction

1. The 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 offence are that on diverse dates between 18th and 24th May 2020 at Kabila sub-location, Manga sub-county within Nyamira County the accused murdered Jackson Gesora Ong'era.

2. The accused pleaded not guilty to the charge and the prosecution called eight witnesses to prove its case. At the trial, the accused was represented by Mr Kaba Advocate while the prosecution was led by Senior Prosecution Counsel Desmond Majale.

3. The facts of this case are that the deceased, Jackson Gesora Ong'era went missing on 22nd May 2020. On 23rd May 2020 villagers spotted a body lying face down in a stream. The body was dressed in a red jacket with a hood covering its head and a pair of green trousers. Some of the people at the scene suggested that the body be turned for identification but the accused who is the deceased's wife cautioned them not to do so and advised that they should wait for the police. The court heard that at about 6.15pm it started raining prompting the people to leave. Later the police who had been informed of the incident went to the scene but they did not find the body as it had been washed downstream by the heavy rainfall. It was the prosecution's case that the deceased's clothes and a wallet containing his identity card were found when his body was retrieved from River Gucha on 24th May 2020. The court heard that an irate mob of over 100 people went to the accused's house suspecting that she had a hand in her husband's killing, pelted her house with stones and burnt it. She however managed to escape.

4. Peter Ong'era Charles (PW1) a nephew of the deceased testified that he was among the villagers who saw the body in the river on 23rd May 2020. He stated that at the time, he did not recognize it was the deceased; that, the next morning he joined a search party that went looking for the body after it was washed away from the initial spot; that, they found clothes stuck to the roots of a tree about 20kms from the initial spot; that, they pulled the clothes from the river and a wallet fell out from one of the pockets. PW1 stated that the wallet contained the identity card of the deceased and that on seeing this, villagers began questioning why the accused had not identified the body when it was first spotted in the river near her home. PW1 stated that afterwards, they got a call from a place called Kegati notifying them that a body had been found in a river in that location. PW1 stated that he was part of the crowd that went to confront the accused asking her why she had not disclosed that the body in the river was her husband's. He alluded to a strained relationship between the deceased and the accused and stated that the accused had deserted the matrimonial home for twenty seven years only to return two years prior to the incident with other children that she had begotten out of wedlock. In cross-examination the accused admitted that he too did not recognize the body in the river as that of the deceased. He narrated that when they confronted the accused she chased them with a panga.

5. Marita Kemunto Thomas, PW2 stated that the deceased was her brother. Like PW1 she spoke of a strained relationship between the accused and the deceased person. She testified that on 21st May 2020, the accused visited her and informed her that the deceased intended to move from the house to which she replied that there was no problem if he did. She stated that the accused seemed upset by the deceased's decision and said that she would demolish his house. PW2 further testified that the deceased used to complain that he was starving and that when she asked the accused if that was true the accused retorted that it was upon the deceased to bring food for her to prepare. She stated that the next day the deceased paid her a visit and she prepared a meal for him and that at 3pm he was surprised that she knew about his impending move and said he would die and his wife would suffer. PW1 stated that later on the 23rd of May, she was informed about the body in the river; that she went to the scene but she too did not recognize it was her brother as he had changed his clothes. She stated that on 24th May 2020 while in the company of her niece Alice she met the accused and told her how the person in the river was badly injured and that the accused responded by stating that Gesora's body was lying in the same position as that of her dead child. In cross-examination Pw2 stated that the accused had asked her for a ladder to carry out repairs in her house and retorted that the deceased was not to step into it once

the repairs were completed because the house belonged to her children.

6. Loriana Nyachio, Pw3, another sister to the deceased gave evidence that she went to the accused's house on Sunday, 24th May 2020 and asked her why she had not told them that Gesora was not at home and the accused's response was that the deceased would come and go as he pleased without informing anyone where he was going. She stated that she suspected the accused had something to do with the deceased's death because she did not get along with the deceased.

7. Christopher Tenga (PW4) told the court that the deceased and the accused used to quarrel about the house; that he got reports of the domestic squabbles from the accused herself and that on 24th May 2020, the accused locked herself in the said house when the villagers went to confront her after finding the deceased's identity card. He stated that the villagers pelted the house with stones asking her to tell them where her husband was and that in turn the accused armed herself with stones and a panga and it was only when the people threatened to burn the house down that she came out.

8. Julius Moturi Ntambo (PW5) stated that the deceased was his uncle and that on 21st March 2020 at around 11am he was in the shamba when the deceased called upon him and told him of his marital woes. PW5 stated that the deceased complained that he did not have peace at home; that the accused was threatening him and had threatened to break his leg; that she had not changed despite returning after 27 years; that she accused the deceased of practising witchcraft and further that her children with the deceased were demanding that she sends away the children she bore out of wedlock. PW5 testified that they were to discuss these issues with his other uncle on the 25th March but the deceased intimated that he might not be alive by then. PW5 stated that the deceased told him that if anything happened to him the accused was responsible for it. PW5 stated that he however did not report the threats to the police at the time. He confirmed that the deceased and the accused lived in the same homestead but in separate houses and that they also lived with their 14 year old grandchild.

9. PW5 further stated that when the body was first sighted he was told by Carol, the deceased's daughter that the body might be her father's as she recognised his clothes. Pw5 stated that he called the assistant chief to inform him of his suspicions and was directed to the deceased's home to inquire as to his whereabouts. He stated that he found the accused taking tea outside her house together with Loriana Nyachio and Alice Omuya and made the inquiry and the accused confirmed that the last time she had seen the deceased he was wearing a red jacket and green trousers which she noted were similar to those worn by the body in the river but when he asked her why she had not said anything at the scene she retorted that those were not questions to ask her and that he could inform his uncles of the development himself; that, shortly thereafter the deceased's clothes and wallet were found leading to the fracas that culminated in the burning of the accused's house. The body was later recovered from the river at Kegati area and was taken to Christa Marianne Mortuary in Kisii. Pw5 admitted that he did not recognize the body that was in the river as that of his uncle.

10. PW5 further testified that he witnessed the post-mortem conducted by Dr Benjamin NdBile (PW8) on 2nd June 2020. He stated that he was accompanied by his uncle James and a Police Officer from Manga police station. PW5 testified that the doctor informed them that the deceased had died as a result of head injuries and that it is possible that he could have been killed elsewhere and dumped in the river.

11. Inspector Joseph Mugo (PW6) testified that on 23rd March 2020 at about 5.20pm he received a call from one Sergeant Andali of Omogochoro Police Post who informed him that he had received information from the area Assistant Chief regarding a case of drowning at Ekeronyo Stream. PW6 stated that he mobilised officers and proceeded to the scene. He stated that it started raining heavily on their way to the scene and by the time they got there the river had overflowed and they did not see the body. On 24th March 2020 at 5pm he got a call from Corporal Esther Ondari of Omochore Patrol Base informing him that a house had been set ablaze. He proceeded to the scene and witnessed that a house belonging to the accused had been completely razed down by fire. He stated that villagers burnt the house upon suspicion that she was involved in her husband's death. The next day he learnt that the body had been found and that the accused and her grandchild were receiving treatment at Obomo Medicare following the attack on her the previous day. He stated that he went to see the accused and she narrated how they were attacked and that later he documented her narration as an arson report. Pw6 testified that he did not see the deceased's body. He admitted that he could not tell if the accused was involved in his disappearance and killing and stated that the case was taken over by the Directorate of Criminal Investigations (DCI).

12. The Investigating Officer, Samuel Maiyo (Pw7) testified that he went to the river where the body was sighted at Gucha Stream on 23rd May 2020 at around 2.00pm but it had disappeared. He stated that it was however found the next day at Kebati area about 7km from where it was first sighted; that he observed the body and concluded that it was a case of drowning but that after the post-mortem was conducted it was confirmed that this was a case of murder. He testified that he interviewed some family members and learnt that some had seen what appeared to be bloodstains in the deceased's house. He stated that he proceeded to the said house in the company of Sergeant Andali and they were shown some blood stains. Pw7 stated that he collected samples of the same and forwarded them to the Government Chemist in Kisumu for analysis together with a blood sample taken from the deceased. He produced the Exhibit Memo as P.Ex1. Pw7 averred that their investigations linked the accused to the death of the deceased for the reasons that she and the deceased lived in the same homestead albeit in different houses but she did not bother to report the deceased missing and also because Gucha stream is 500 metres from their home and when members of the public wanted to turn and identify the body the accused discouraged them despite recognizing his clothes. Pw7 concluded that somebody murdered the deceased and organized for him to be taken to the stream. He stated that the relationship between the accused and deceased was strained after their long estrangement and that when she returned she was barred from the deceased's house and lived in the kitchen. He stated that the accused planned to eliminate the deceased so that she could have freedom to do whatever she wanted with his land.

13. When challenged about recognition of the body Pw7 admitted that there were several people at the scene none of whom recognised the deceased when his body was first seen. He also admitted that he did not establish how the body was moved to the stream; that nobody claimed to have seen the accused moving it; that he could not remember which family member told him about the blood stains and that he visited the house after three weeks. PW7 further stated that there were tiny spots in the accused's house which he suspected to be blood. Pw7 however admitted that no photographs were taken at the scene. He stated that he did not know the process of retrieving blood although he had cotton swabs when he went to the scene. When Counsel for the accused pointed out a discrepancy in the exhibit memo form which stated that the blood sample from the deceased was collected on 27th May 2020 whereas the post-mortem was conducted on 2nd June 2020 Pw7 was at pains to explain the discrepancy. He said it must have been an error. He stated that whereas he prepared the memo he did not have his original notes.

14. When the accused was put on her defence she gave sworn testimony and vehemently denied killing her husband. She stated that she too wanted to know how he died. She stated that on 18th May 2020 her husband woke up, took a bath and left as he usually did. She stated that it was not his habit to say where he was going. She stated that he returned on the 19th and stayed till the 21st of May 2020 and that on the 22nd of May 2020 which was a Friday she was sleeping in her house with her grandchildren and while she was still in bed one of them went and asked her where the deceased was going so early. She stated that she replied that perhaps he was going to drink busaa at Mosigisa as he usually did. She stated that later that day she went to Kisii General Hospital then to Gekome to follow up on payments for internally displaced persons and in the evening she bought vegetables from Kisii Town and returned home at around 7pm. She stated that upon arrival she asked her grandchild if the deceased was back and was told that he had not returned; that, she asked the grandchild to make a call to the deceased but the deceased was unreachable on phone. She testified that the following day her daughters one from Nyamira and the other from Keumbu paid her a visit and her sister in law Loriania also came over. She stated that she disclosed to Loriania and one Christopher that the deceased had not spent the night at home. She further stated that before they finished their meal she heard people shouting that a body had been found at the river and she went to the scene carrying one of her grandchildren on the back. She stated that at the river she saw a body lying on its belly but it soon started raining and everybody ran for shelter. She stated that she went back to the river when police arrived but the body was no longer there. The accused stated that the following day she, Alice and Loriania joined a group of people who went in search of the body. She stated that on their way back home they were informed by one Osoro that a pair of trousers had been recovered and there was a wallet in it; that Kwamboka Moenga Gesora removed the wallet and when he opened it there was an identity card. She stated that when she saw that it was her husband's identity card she started wailing while walking back home; that shortly afterwards, a young man named Peter Michira emerged with a panga and started slashing bananas at her home while she and her grandchildren wailed; that, he slashed bananas near her daughter's grave and also destroyed some jerry cans behind the house before people started pelting the house with stones. She stated that they destroyed the roof, smashed the windows, doused the house in petrol and set it ablaze forcing her and the grandchildren out. She stated that she sustained burns on her hand, leg and lips and that when she ran out she was beaten until she lost consciousness. She stated that she was taken to a clinic at Omogochoro and later to Kisii Referral Hospital. She denied that she and the deceased were estranged. She stated that she used to brew chang'aa as her husband was not gainfully employed and when the police were hot on her trail she and the deceased moved to Kericho where they became tea pickers; that after they settled the children in school the deceased returned to Kisii leaving her in Kericho but that he used to visit her and communicate with her on phone. She stated that she was his only wife. The accused claimed that she was asleep when the deceased left so she did not see the clothes he was wearing; that, since she got married in 1977 the deceased never got along with his brothers as he had received a bigger portion of land from his father. She contended that it was not unusual for the deceased to spend the night outside the matrimonial home but that the fact that his phone was off during the two days he went missing worried her and she shared this with Christopher, a brother of the deceased. The accused admitted that she and the deceased slept in different rooms but averred that she was on good terms with him.

Final Submissions

15. In his submissions Mr. Kaba, learned Advocate for the accused, stated that the evidence adduced by the prosecution was purely circumstantial and it did not link the accused to the offence. Mr. Kaba submitted that the prosecution's case was based on mere suspicion and was fraught with contradictions. He contended that suspicion however strong could not suffice to prove guilt given that the standard of proof is one beyond reasonable doubt. He urged this court to acquit the accused person.

16. Senior Prosecution Counsel Majale submitted that the prosecution had established a case which was not shaken by the accused's defence. He urged the court to find the accused guilty and convict her accordingly.

Determination

17. The offence of murder is committed when a person causes the death of another by an unlawful act or omission with malice aforethought. (see Section 203 of the Penal Code).

18. The elements of the offence of murder were summarised as follows in the case of *Anthony Ndegwa Ngari v Republic [2014] eKLR*

“ i. The death of deceased.

ii. That there was an unlawful act or omission which caused the death of the deceased.

iii That the accused committed the unlawful act which

caused the death of deceased.

iv That the accused had malice aforethought.”

19. With regard to the cause of death, Dr Benjamin Ndibile (PW8) performed a post-mortem on the body of the deceased on 2nd June 2020. His findings were that the deceased had lacerations on the head and bleeding in the brain and that the cause of death was blunt force trauma. It is my finding that the death of the deceased, the cause of that death and that the death was by a human hand hence by an unlawful act were proved beyond reasonable doubt

20. Having established the fact of death and that the death was caused by an unlawful act the next question is whether the accused was the perpetrator of the unlawful act which culminated in the death of the deceased. I agree with Mr. Kaba, learned Counsel for the accused, that there was no direct evidence linking the accused to the death of the deceased and that the prosecution’s case rested purely on circumstantial evidence. In the case of *Abanga alias Onyango v Rep Cr. A No.32 of 1990(UR)* cited in the case of *Republic v Hillary Kathyaka Kyalo [2021] eKLR* the court had the following to say in regard to circumstantial evidence:-

“i. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

ii. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established

iii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iv. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

v. Similarly, in the case of *Sawe Vs Republic [2003] KLR 364* the Court of Appeal held that:

“1. 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 hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

21. Further, in the case of *Mwangi and Another v Republic [2004] 2 KLR 32* the court ruled that: -

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge.”

22. In the case of *Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR* the Supreme Court stated:-

“56.On its application, circumstantial evidence is like any other evidence. Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case, and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact, circumstantial evidence should never be given a derogatory tag. Jowitt’s Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:

“... with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused’s fingerprints, ... [or where there is] a ... DNA match between the accused’s control sample and genetic material recovered from the scene of the crime”(Underlining mine)

23. The prosecution witnesses PW1, PW2, PW3, PW4 and PW5 suspected the accused based on her perceived callousness and lack of concern for the disappearance of her husband. In their testimony, they all alluded to the strained relationship between her and the deceased and alleged that she mistreated him, refused to cook for him, did not report him missing and that she pretended not to recognize the body in

the stream as being that of the deceased yet she admitted to PW5 that she recognised the clothes on that body as those of the deceased. The accused explained that the deceased would habitually leave the matrimonial home for days without stating where he was going hence she was not surprised when he left on 22nd of May 2020 and did not return. Her evidence on this issue was not controverted and I see no reason to disbelieve her. The accused was also suspected for telling members of the public not to turn or interfere with the body in the river. It would appear from the evidence of the prosecution witnesses that they believed she knew that the body belonged to the deceased and that she was involved in its getting there. It is however instructive that despite being acquainted or closely related to the deceased all the witnesses admitted that they too did not recognize the body in the river as that of the deceased as it was facing downwards. In the premises it is not surprising that the accused could not also identify the body. In my view that fact cannot be counted as providing evidence that she killed the deceased. Further the disappearance of the body from the initial spot does not yield much given the fact that it rained heavily on that day and it was therefore highly probable that the body was washed downstream and the accused was not responsible for its disappearance. Moreover no witness alleged to have seen her taking the body to the river or moving it from the spot where it was first found.

24. It is also my finding that the evidence of the Investigating Officer was grossly wanting yet he was the one who should have shed light on this occurrence. While it was his evidence that he conducted investigations at the deceased's house three weeks after the incident and saw tiny spots of blood on the floor, no photographs of the scene were taken and whereas he alleged to have collected samples of the same and sent them to the government chemist for analysis, the report of the alleged analysis was not produced in court. It is my finding therefore that his evidence did not help to unravel the circumstances that led to the death of the deceased at all and that the evidence adduced by the prosecution falls short of the standard required to infer guilt upon the accused. While there may be strong suspicion that the accused killed the deceased it is trite that suspicion no matter how strong cannot be the basis for a conviction. In my view the inculpatory facts laid before this court do not irresistibly point to the accused's guilt and in light of the foregoing it is my finding that there is no evidence that the accused committed the offence. Accordingly I find her not guilty of the offence of murder and acquit her. She shall be set at liberty forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 28TH DAY OF OCTOBER, 2021.

E.N. MAINA

JUDGE