



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL CASE NO 32 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

PKK.....ACCUSED

(Formerly Eldoret High Court Criminal Case No. 38 of 2015, Republic v Philip Kipkech Kabutei)

RULING

Procedural history

The issue before me is whether the accused has a case to answer or not, in terms of Section 306 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63), Laws of Kenya; in respect of the deceased, KK, which is alleged to have occurred on 16/08/2015. The prosecution called five (5) witnesses in support of the charge. All prosecution witnesses testified before Muriithi, J. I thereafter took over the trial of the accused.

The accused after his rights under section 200 (3) as read with section 201 (2) of the Criminal Procedure Code (Cap 75), Laws of Kenya, were explained to him, informed the court that he wanted his trial to proceed from where it had reached; which position was confirmed by his advocate.

Thereafter the prosecution informed the court that they were going to call three witnesses. In the end I refused to grant the prosecution a further adjournment to call them since it was a 2015 case.

As a result, the prosecution was forced to close their case. Before the prosecution closed their case Mr. Mong'are for the prosecution informed the court that he had perused the evidence of those who had testified and that there would be no prejudice if he closed their case.

The case for the prosecution

The prosecution called Joshua Tomno Kipkochoi (PW 1), who is the chief of Ewolel Soy location within Marigat sub-county. PW 1 testified as follows. The deceased was a resident of his location. On 16/08/2015 at about 2.00 pm he was in his office, when he was called by EK, a daughter of the deceased. She told him that there was an incident in their home. He went there and found the deceased was in a store; which had been locked from outside. The store was used for keeping goats. The deceased was aged between 80 to 90 years old.

PW 1 who was accompanied with village elders broke the store. He found that the deceased had been cut on the neck and was lying face downwards.

PW 1 asked EK as to who was staying with the deceased. EK told him that the deceased was staying with the accused. The accused is the grandson of the deceased. PW 1 started looking for the accused whom they found inside the water tank. Once inside the tank one cannot come out unassisted. They took a rope and assisted the accused to get out of the tank. The accused had removed his clothes. The police were informed, who arrived on the scene and arrested the accused and also took with them the body of the deceased.

PW 1 identified the body of the deceased to the doctor who performed a postmortem examination on the body of the deceased.

In cross examination PW 1 testified that the accused told him that he was in the water tank because one IK threatened to kill him. PW 1 arrested IK (not called as a witness) to the police station. IK denied seeing the accused.

PW 1 continued to testify that the accused told him that he heard the deceased screaming and he ran away to hide in the tank.

The prosecution also called WKK (PW 2), who is the son to the deceased. PW 2 testified as follows. The accused is his son. On the material date he was in church when he was called home. Upon arrival he found that the accused had been arrested. PW 2 also saw injuries in the neck of the deceased. He also testified that the accused used to live with the deceased.

PW 2 further testified that his son now the accused started having health problems in 2004. PW 2 took the accused to hospital for treating and was treated. He later recovered.

PW 2 finally testified that he identified the body of the deceased to the doctor who performed the postmortem examination upon that body.

In addition to the foregoing, the prosecution called IKK (PW 3), who is the grandson to the deceased. PW 3 testified that on 16/08/2015 at about 12.00 noon he had gone to pick maize in his shamba near the house of the deceased. While there he noted that the goats were still in their pen, which was unusual. The deceased used to open for the goats at about 9.00 am. The deceased used to live with the accused. The accused helped the deceased with herding the goats and fetching water. PW 3 then opened the pen to allow the goats to go and graze. As he stood outside the pen, PW 3 saw flies getting into the store where the deceased used to sleep. He then saw blood below the door.

PW 3 forced open the door to the store using a panga and saw the deceased lying on the hide skin in the store. PW 3 found that the deceased had died. PW 3 also testified that he used a panga from the kitchen and forced open the door to the store. Upon checking PW 3 found that the deceased had died.

Thereafter PW 3 and PW 1 decided to look for the accused since he lived with the deceased. They did not find him in his house after breaking it. The accused lived in his house outside the compound and in that fateful morning it was locked. In cross examination PW 3 testified that the accused had been insane but that he later recovered.

PW 3 called the chief (PW 1). They told PW 1 that the deceased lived with the deceased. They then looked for the accused. They found the accused inside the water tank and arrested him. They called the police who arrived and re-arrested the accused. The police then took the body of the deceased to Kabarnet hospital mortuary.

In his recalled evidence PW 3 identified the hide which the deceased used to sleep upon. The hide was produced as exhibit 1. PW 3 also identified the panga which was produced as exhibit 2. The panga was recovered from below the hide used as a sleeping mat by the deceased. The panga was used by the deceased.

In addition to the foregoing witnesses, the prosecution called Dr. Hellen Mutai (PW 4), who produced the postmortem examination report that was prepared by Dr. C. N. Ngelechi who had performed a postmortem examination on the body of the deceased on 25/08/2015 at Baringo county referral hospital, Kabarnet. The findings of Dr. C. N. Ngelechi were as follows. The deceased was aged 80 years old and of good nutrition. There was rigor mortis, liver mortis and ago mortis. The body was pale. There was a cut penetrating wound in the left side of the neck. There were two more penetrating cut wounds on the right side of the neck. Additionally, there were two other wounds of 3 cm at the neck fold. There was a cut to the trachea at the neck level of C3 –C4. Additionally, there were major neck vessels cut with distortion of the neck anatomy in respect of the cardio-vascular area. There was palour of the brain tissue. There was a cut at level of C3-C4 in respect of the spinal column.

In his opinion, the cause of death was due to a lot of blood loss resulting from the cut wound to the neck. The report was put in evidence as exhibit 3.

Finally, the prosecution called No 50917 police Cpl Zebedao Wawire (PW 5), who attended the postmortem examination on the body of the deceased. PW 5 also took the accused for medical examination to Baringo hospital. It was established that he had a mental problem and had been going for medical treatment there. The accused was diagnosed to have a psychiatrist problem.

As I have already noted the prosecution were forced to close their case following a refusal of an adjournment that they had sought.

The submissions of the defence

Mr. Chepkilot for the defence declined to make any submissions at the close of the prosecution case.

The submissions of the prosecution

Mr. Mong'are for the prosecution also declined to make any submissions after closing the prosecution case.

Issue for determination

I have considered the totality of the prosecution evidence in the light of the applicable law. I find the following to be the issues for determination.

1. Whether the prosecution has made out a case to warrant the accused to be put on his defence in terms of section 306 (1) and (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

I find from the totality of the prosecution evidence that the entire evidence of the prosecution against the accused is purely circumstantial.

Stated differently, there is no eye witness who saw the accused inflicting the penetrating panga cut injuries in the neck of the deceased; which caused her death.

The evidence of IKK (PW 3), is that the panga was recovered from below the hide which the deceased used as a sleeping mat. When the death of the deceased was discovered in that morning, the accused had gone to hide in the semi-filled water tank. The accused was arrested from that tank by Joshua Tomno Kipkochoi (PW 1), who was the chief of the location in company of the village elders.

The evidence of PW 3 is that the accused lived with the deceased. PW 3 also testified the accused used to assist the deceased in herding the goats and in fetching water.

The question that the court has to ask itself is whether it can convict on the evidence produced by the prosecution if the accused does not offer any explanation.

The applicable law in this regard is that a case to answer is made out so as to require the accused to be put on his defence, if a tribunal properly directing itself on the law and the evidence can convict the accused if the accused does not offer any explanation. See Ramanlal T. Bhatt v R. (1957) EA 332

The answer to the foregoing question is in the negative. The reason being, that the evidence, does not point to the accused as the only person, who had the exclusive opportunity to inflict the fatal panga cuts in the neck of the deceased; since the evidence against the accused is circumstantial in nature.

Furthermore, the evidence of the chief (PW 1) is that the accused told him that he was in the water tank because one IK threatened to kill him. PW 1 arrested IK (not called as a witness) and took him to the police (station). IK denied seeing the accused.

I have borne in mind that there is strong suspicion against the accused. The suspicion against the accused consists of the following evidence. That, the accused used to live with the deceased. Further that the accused hid himself in the water tank during that fateful morning. The accused also told the chief that he had been threatened by one IK (not called as a witness). IK denied seeing the accused. The prosecution failed to call IK as a witness. I find that this was fatal to the prosecution case in view of the evidence that PW 1 initially treated him as a suspect based on the allegation of the accused that this IK had threatened to kill him. The lacuna created by the potential evidence of IK leaves uncontroverted the explanation given by the accused.

Furthermore, the evidence of No 50917 police Cpl Zebedao Wawire (PW 5), was that the deceased had a mental or psychiatric problems and had been treated at Baringo referral hospital which explains the conduct of the accused. The evidence of PW 5 supports the evidence of the father (PW 2) of the accused that the accused had mental health problems. This is further supported by the evidence of IKK (PW 3) who in cross examination testified that the accused had been insane but that he later recovered.

There is also further evidence that the accused used to live with the deceased, in addition to assisting her to herd the goats and fetching water for her.

The foregoing evidence raises the following questions. What reason would the accused have to inflict the fatal panga cut wounds in the neck of the deceased? Is it because of his mental condition? Or is it that another unidentified person inflicted those injuries? Or did IK inflict those injuries? The prosecution evidence has not provided answers to these questions.

The foregoing evidence clearly indicates that there is basis for strong suspicion against the accused but such suspicion alone is not sufficient to warrant the accused being put on his defence.

In the premises, I find that the prosecution has not made out a case to warrant the accused to be placed on his defence in terms of section 306 (1) of the Criminal Procedure Code, supra, with the result that the accused is hereby acquitted and set free unless held on other lawful warrants.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE THIS 18TH DAY OF OCTOBER 2021

J M BWONWONG'A

JUDGE

In the presence of:-

1. Mr Kinyua and Kemboi, court assistants
2. Mr. Makori for the Republic
3. Mr. Chepkilot for the accused.