



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT MERU

CRIMINAL CASE NO.27 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

MOSES MUGAMBI M'TUERANDU.....ACCUSED

JUDGEMENT

1. MOSES MUGAMBI M'TUERANDU ("the accused") herein has been charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya.**

2. The particulars of the offence are that **MOSES MUGAMBI M'TUERANDU** on 19th day of April, 2016 at BBC Area, Kithima location in Buuri District within Meru County murdered SK ("the deceased"). The prosecution called seven (7) witnesses to establish its case.

3. According to PW1, PW2 and PW3 the accused person visited their plot at BBC area in the morning of 19th April 2016 to buy tea from Everlyne Mwendwa Pw3. In the course of his visit he started talking to PW3 in parables and when the mother of the Deceased PW1 interjected, the accused person responded and asked whether PW1 wanted to be a prophet. The three witnesses said that after the accused had left PW1 and 3 proceeded to the road to go and see demonstrators and that when PW1 returned home she found her daughter the deceased herein was missing.

4. PW1 searched for the deceased but did not trace her and when she inquired from PW2, PW2 informed her that the accused person had returned to the plot and she sold to him porridge and returned to her house. That after a while Moses called her again for more porridge and when she got out she found Moses was with S and that the baby who had been left under the care of S was sleeping in the house. That after she had served the accused with a second cup of porridge she went back to her house to continue watching a program on TV. PW3 went further to state that when she got out of the house to pick the cup she found Moses the accused herein was holding the child's hand and showing her some money. That when he saw PW2, he pretended and gave a Ksh 20 coin to S the deceased to pay for the porridge that was served to him last. She said that the accused looked suspicious when she found him showing coins to the deceased. She said that she did not suspect any sinister motive and she went back to her house leaving Moses and S outside.

5. PW2 testified that it was around 3.00 p.m when PW1 and 3 returned that PW1 found her baby crying in the house and they realized the deceased S was not in the house. That when the search for S did not bear fruit, she told the mother that she saw Moses showing the child some coins when he returned to the plot to buy porridge.

6. PW1 reported to her husband PW4 and neighbors were mobilized to search for the accused as well as the deceased person. The accused person's house which was 30 meters away was found locked and according to PW1 a person known as Kaste restrained them from breaking into the house. When PW1 had gone to report the missing child at Maili Saba Anti-stock Theft police camp she received a phone call informing her that the child had been traced and when she returned to the scene in a compound where the accused was running a bar the child was found dead and stuffed in manila bag and a jumper navy blue in color which was identified by PW1, PW2, PW3, PW4 as the one the accused was wearing in the morning was used to cover the manilla bag.

7. Report was made to Subuiga Police Station and the police removed the body to Isiolo County Hospital Mortuary where post-mortem was carried out on 27th April 2016 by Dr. Joshua Kibera Chege, PW6.

8. From the examination PW6 concluded that the likely cause of death was manual asphyxiation, either through suffocation or smothering. He also found out that the anal orifice was dilated and measured 3 X 1 centimeter. Anal swabs were taken to be checked for DNA as well as samples from lungs brains and kidneys for lab tests. The post-mortem report was produced as EXP4.

9. This offence was investigated by PW5, Inspector Nderitu who handed over to PC Mark Bundi.

10. PW 7 Ruth Wangare Kahi, Government Analyst produced Government Analyst Report which was prepared after they received exhibit memo form with samples of anal swabs indicated as of S K the deceased, blood sample indicated as of the accused person. She said that the anal swab marked A was stained with semen but no blood was detected. That anal swab marked b was neither stained with blood or semen. On examination it was found that the anal swab generated a DNA profile of an unknown female and that because they were not provided with reference sample blood they could not confirm if the swab originated from the deceased. It is apparent that the blood sample indicated as of the accused person herein was not matched to the anal swabs that were taken from the deceased person to confirm whether the semen found in the anal swab marked A originated from the accused or any other person.

11. At the close of the prosecution case the accused person was placed on his defense. He gave sworn statement and said that he used to operate a club but later started doing casual jobs when the club business was not doing well. That on 18th April 2016 he went to irrigate tomatoes at the farm of Muriera. That on 19th April 2016 he again went to the farm to continue with irrigation upto midday when the flow of water was discontinued. That at 12.00 noon he proceeded to BBC area where he used to reside and because he was hungry and didn't have money he went to Muriera's home and found that Muriera had left Ksh.500 with his wife to give him. The accused said that he declined an offer from Muriera's wife to wait for food as he had a journey to go Nanyuki.

12. He said that he went to eat at a hotel at Mama Mwendwas. He said the hotel was adjacent to the club he used to run and also where he used to stay. He said that Mwendwa was making chapatis and when he ordered for uji Mwendwa was surprised why drunkards don't like taking tea. He said that he took two cups of porridge and chapatti and when he finished he gave Kagendo money. He said that Kagendo sent a child who was around to take money and cup from him after which he left to go to the nearby tarmac road to board a matatu for Nanyuki. He testified that when he arrived at Nanyuki he boarded another vehicle to Kanyoni but he found Mzee Gicharu who was connecting him to work at Mt. Kenya Safari club was not at home.

13. The accused person said that he started working at Mt. Kenya Safari Club on 20th April 2016 and it was not until 15th May 2016 that he was arrested by a police officer who questioned him about BBC area in Isiolo and also asked if he knew Mwit PW4 herein. The accused person said that the jumper that was produced in court did not belong to him and that the one he was wearing in court produced as EXD1 was the one he was wearing even he went to take porridge on 19th April 2016. He said that he could not tell whether the body of the deceased was recovered at his club or not because he was not taken to the scene on arrest. He further said that he did not commit the offence and that the last sample taken from him did not connect him to the offence.

14. In cross-examination the accused person said he bought the jumper in 2015 but he was not issued with a receipt. He said that the club from where the body was recovered was not operating by the time the offence was committed in 2016. He said that he differed with his wife Teresa when the club business collapsed. He admitted that the club was adjacent to the hotel where he was taking porridge but could not tell whether he was the last person seen with the deceased as he gave her money and the cup to take to Kagendo and left. He said he had not had a chance to get documents to show that he had been invited to work at Mt. Kenya Safari Club as he was in remand custody since he was arrested. The accused stated that he had not differed with any of the witnesses who testified for the prosecution. He said that the club where he operated with his wife was open and did not have a fence.

15. The accused person's advocate filed final submissions in which it was argued that the jumper or jacket produced as EXP1 was not proved to belong to the accused and the accused person provided evidence in terms of EXD1 which demonstrated that EXP1 did not belong to him

16. The accused person's advocate also submitted that the coins that PW2 allegedly saw the accused showing to the deceased were used to pay for the porridge taken and there was no evidence of any sinister motive and that PW2 did not raise any alarm, panic or see any cause for alarm as everything was normal and there was nothing unusual and cannot link the accused person to the commission of the offence herein.

17. It was further submitted that in consideration that there was a huge demonstration/ protest within BBC area and the fact that the deceased would normally go out of their ungated plot to play there was strong likelihood that she might have been attacked by any of the members of the public. It was also submitted that the Government Analyst Report exonerated the accused person and confirmed that the anal swab generated a DNA profile of an unknown female. It was further argued that the deceased's body was not found in the accused's business premises or residence but rather in a public place on an unbuilt plot and therefore the prosecution had failed to link the accused person to the body of the deceased.

18. It was submitted that the prosecution's evidence is based entirely on circumstantial evidence and doctrine of last seen but the same falls short of the threshold requisite on circumstantial evidence and doctrine of last seen. The Court of Appeal cases of **Sane Vs Republic [2003] eKLR** and **Republic Vs Elizabeth Anyango Ojwang** were relied on to submit that there was no iota of evidence laying any inference of guilt on the part of the accused person. It was also argued while relying on the case of **Anjan Kumar Sarima Vs State of Assam Criminal Appeal 560 of 2014** that there was no evidence corroborating the claim that the accused was last seen with the deceased and that he is the one who committed the murder.

19. The defense therefore urged the court to acquit the accused person.

20. From the evidence of the Prosecution and the Defence, the issues for this court to determine are whether the prosecution has proved the four ingredients of the offence of murder as provided for under Section 203 of the Penal Code to wit:

1. The fact of the death of the deceased.

2. The cause of death.

3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and lastly

4. Proof that the said unlawful act or omission was committed with malice aforethought.

21. The fact of that S K died has been confirmed by all the prosecution witnesses and the cause of her death was confirmed by PW6 Dr. Joshua Kibera Chege who concluded that the 9 year old deceased died out of manual asphyxiation with a dilated anal orifice measuring 3X1 centimeters. The analysis of Ruth Wangare Kahiu found that the anal swab marked A contained semen an indication that she was sodomised. The body of the deceased was recovered stuffed in a manila bag and covered with a navy blue jumper and placed against a fence within a compound where the accused person was running his club. The nature of the cause of the death and the manner of disposal of the body is an indication that the deceased died as a result of an unlawful act on the part of the perpetrator of the murder. The perpetrator of the heinous act must have been actuated with malice aforethought.

22. When the body of the deceased was examined to establish the cause of death swabs from the anal orifice were taken for purposes of DNA testing and specimen from the brain, lungs, kidney and gut were taken for histology. The investigating officer forwarded these samples/specimens vide Exhibit Memo Form dated 20th of April 2016 seeking that the government analyst ascertain whether traces of DNA material from sample C indicated as the blood from the accused person can be seen from Sample marked A and B indicated as from the anal orifice of the victim. PW7 produced a report Exhibit 5b in which she concluded the anal swab marked A generated a DNA profile of an unknown female origin. She did not indicate whether the semen found in anal swab marked Exhibit A which the Exhibit Memo Form indicated was recovered from the victim had any connection with the blood Sample marked C indicated as of the accused person. The Government Analyst did not investigate what the Investigating Officer required of her and therefore her report cannot be used to conclude that the accused either committed the offence or did not commit the offence because his blood sample was not subjected to DNA analysis in relation to the semen found in the anal swab marked A.

23. Whether the perpetrator of the murder was the accused person or not has been challenged by the defense. The accused person admits having gone to the plot where the deceased person resided to buy porridge and admits that he gave money to the deceased to take to PW2 and left to travel to Nanyuki, he said he did not commit the offence. PW1, PW2, PW3 and PW 4 testified that the accused went to their plot in the morning and took tea from PW3 and that while there he engaged PW3 with a lot of parables which attracted the attention of PW1. It was the evidence of PW4 that when he left to go to work at 10.00a.m the accused was at their plot taking tea and that he was wearing the jumper that had been produced in court. PW1 and PW3 said they went to see if the demonstrations had ended after the accused had left their plot. It is therefore not true as the accused would like the court to believe that he went to that plot for the first time at midday. It is also not true that he found PW3 at the plot making chapatis when he visited the second time on the same day. The repeated visit by the accused person to the plot in question especially after PW1, PW3 and PW 4 had left has not been explained by him. PW2 said she left the deceased with the accused person outside her house after she had taken the money and the cup.

24. The prosecution witnesses testified to the fact that a navy blue jumper that they had seen the accused person wearing when he went to their plot on the material day twice was the one found used to cover the manila bag in which the body of the deceased had been stuffed and put against the fence. It is true that that may not be the only navy blue jumper of its kind either in BBC area or anywhere else and anyone can buy such a jumper but a further evidence that the body was found in the compound where the accused person used to operate a pub makes this court believe that the evidence that he committed the murder is corroborated by the prosecution.

25. I have perused through the proceedings and cross-examination of the prosecution witnesses but nowhere have I found that during the proceedings the accused person was having the navy blue jumper in court. It therefore came as a surprise and an afterthought when he produced a navy blue jumper in his defense and said that he had always had it even during his arrest.

26. Whether the accused person was contracted to irrigate Muriera's tomatoes on 18th and 19th of April and whether Mzee Gicharu connected him to work at Mt. Kenya Safari Club were allegations which were raised by the accused late in the proceedings and have not been supported by any of the persons mentioned. In any case these are events which occurred after he had committed the offence.

27. In conclusion I do find that the deceased death was caused by an unlawful act committed by the accused person and that such unlawful act was actuated with malice aforethought. The prosecution has therefore proved beyond all reasonable doubt that the accused person committed the offence. This court finds him guilty as charged and is convicted accordingly Under Section 322 of the Criminal Procedure Code.

HON. ANNE ADWERA ONG'INJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA SKYPE THIS 27TH DAY OF APRIL 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON. ANNE ADWERA ONG'INJO

JUDGE