



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

HCCR (MURDER) NO. 10 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

DUNCAN LEPARMOJI.....ACCUSED

JUDGMENT

By the information dated 7/3/2018, *Duncan Leparmoji* (accused) was charged with the *Offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.*

The particulars of the charge are that between the nights of 21st and 22nd February, 2018 at Lemisigio village in Samburu Central, unlawfully murdered Luwato Lesuyai(deceased).

The accused denied the offence and the prosecution called a total of eleven witnesses in support of their case.

Prosecution Case:

PW1 LL aged 11 years and **PW2 KLD** aged 9 years were in Luwatu's house. Luwatu was the mother of PW2 and an aunt to PW1. PW1 and PW2 said that it was night when Duncan came to Luwatu's house and chased them. They went to their grandmother's house, **PW3 Kipilon Lelenguya**. PW3 is the mother of the deceased, Luwatu. On their way to PW3's house, they heard Luwatu screaming. When they reached PW3's house, they informed her that Duncan had chased them and they had heard Luwatu screaming. Because it was at night, PW3 did not go to check on Luwatu. Both PW1 and PW2 knew Duncan as a person who always used to come to Luwatu's house. PW1 said Duncan had a torch and that he was able to recognize his voice.

PW3 on her part said that Duncan used to go to drink changaa with Luwatu, her daughter and he would spend nights in Luwatu's house; that they had frequent fights which she had sometimes witnessed.

PW4 TL aged 17 years is Luwatu's son. He had come back home from where he works as a herd's boy and was at his grandmother's house (PW3) when PW1 and PW2 returned home from Luwatu's house and reported that Duncan had chased them away and that they left Luwatu fighting with Duncan.

Very early on the next day, PW4 went to check on Luwatu, found the door to the house open, called out but on not getting a response, entered and found Luwatu on her bed covered with a blanket. Luwatu's forehead was depressed and a wire around her neck. PW1 said he accompanied PW4 to the scene. PW4 informed his uncle who reported to the Chief and police. PW4 also knew Duncan to be a boyfriend to his mother since his father had died and that they used to quarrel and fight frequently whenever Duncan came home.

PW5 Lodekaus Lempirikany is the Assistant Chief of Lemisigio Sub location. On 22/2/2018 about 9.00 am he received a call from an elder informing him that Luwatu had died. He proceeded to Luwatu's house as he knew her since childhood. He found Luwatu's body on her bed, a depression on her forehead as if inflicted by a hammer; with a little blood; a wire tightened around the neck and she looked as if she had been raped. He noticed that somebody had poured flour from the road to the house as if to cover foot prints. He informed the OCS Maralal who sent officers to the body and take to the mortuary. He made some enquiries and found that Luwatu was seen walking from Sirate with Duncan and they had bought some flour at a shop. He also learnt that Duncan had a relationship with Luwatu and that Duncan was at Luwatu's house that night. PW5 identified the scene in the photographs produced in court- P. Exhibit it 1 a,b and c.

PW6 Tutayon Leboyare of Lewisigio heard of Luwatu's death on the morning of 24/2/2018 at 7.00 am and proceeded to the scene. He saw the body. The deceased was injured on the forehead, back of the head and had a wire tightened round the neck; that blood was oozing from the back of the head. PW6 identified the body of the deceased in the photograph that was produced in evidence. P. Exhibit No 1 a, b & c. PW6 knew both accused and deceased as neighbours.

PW7 Saruni Lelenguya, a brother to the deceased got a message from his brother John that their sister Luwatu had been killed. He proceeded to the scene, found flour had been poured on the floor; there was a wire round her neck, injury to the forehead and another at the back. He said that the children who lived with Luwatu informed them that Duncan had chased them from the deceased's house that night.

Dr. John Karina Kuria of Samburu Sub County Referral Hospital conducted the post mortem on the deceased on 28/2/2018. He found that the deceased had a gaping wound on the frontal part of the head 6 x 6cm. The wound exposed the skull bone, bruises on the neck and marks of a rope round her neck resulting in ligature, strangulation with fractured dislocation of cervical spine 1 and 2 bones.

PW8 formed the opinion that the cause of death was cardio pulmonary arrest due to asphyxiation and torture. He produced the post mortem report as P. Exhibit 1. PW8 said that the body had bruises all over the body which was evidence of torture.

PW9 Andrew Lenyasunya, a neighbour to Luwatu said that after Luwatu's husband died, she started engaging in drinking as a result of which her children went to live with him; that only one small child remained with her; that Luwatu had a love affair with Duncan, the accused and they were usually together; that Luwatu had complained that whenever she got money from her place of work at the quarry, Duncan would take it from her and he advised her to leave Duncan. However, on 22/02/2018, he was informed by Luwatu's brother that she had been found dead. PW9 went to the scene on learning of the death and said that Luwatu was injured on the forehead, wire round her neck and another injury at the back of the head.

PW10 PC Rajab Wanga of Maralal Police Station went to the scene with the OCS. He took photographs, noted an injury to the deceased's forehead, a wire round the neck and the body was covered in blood and that they took the body to the mortuary. They learnt that the Luwatu was last seen in company of her boyfriend one Duncan who was later arrested by members of public on 24/2/2018.

PW11 PC Kennedy Otieno said he assisted PW10 with investigations, recorded witness statements and that he saw accused at the Police Station after his arrest.

Defence Case:

When called upon to defend himself, the accused opted to testify on oath and called two other witnesses. He told the court that he worked on construction sites at Lemisigio, lived with his sick blind mother (DW2) and a brother (DW3); that he would work daily till 5.00pm, go back home, prepare super, eat at 7.30 pm and sleep. That his brother Nicholas owns a motor cycle with which he does transport business; that he would leave in the morning and return in the evening; that on that day Nicholas came back home at 6.00 pm, ate and went back to work at 9.00 pm and they slept at 11.00 pm. Next day, he repeated the usual routine of preparing breakfast for his mother and left for work. He was arrested at his work place and did not disclose why. He was later charged for this offence which he denies. He denied having had any relationship with Luwatu and or going to her house. He denied that he had ever drunk alcohol since birth leave alone with Luwatu.

DW2 Julieta Lepermoji is the mother of the accused and one Nicholas (DW3). She is blind, she knew Luwatu. She recalled the day before Duncan's arrest, that he came home about 5.00 pm, prepared supper and she was awake until about 11.00 pm, that Nicholas went to work with his motor cycle. She was left with Duncan; that Duncan never goes out at night because he is the one who takes her out for short call when necessary. Next morning, Duncan made tea then went to work whereas Nicholas came and went to sleep. She was later informed that Duncan had been arrested; that her house has two rooms. She sleeps in one while her sons in another and she calls out when she needs help; that on that night she went for a call three times. DW2 also denied that Duncan ever takes alcohol. She denied knowing that Duncan and Luwatu were involved in a romantic relationship.

DW3 Nicholas Leparmoji, a brother to Duncan, lives with Duncan and his mother (DW1 and DW2); that he works as a motor cycle rider while Duncan worked as a casual labourer. On 21/2/2018, they both went to work and returned home. He found Duncan cooking, they ate and talked till 10.00 pm and he went back to work. He came back home next day and Duncan had made tea and left for work. He took tea and went to sleep till 2.00 pm and later heard from people that Duncan had been arrested for murder. He denied that Duncan and Luwatu were lovers. He could not tell what takes place in his absence.

Accused's Submissions:

Mr. Mathea learned Counsel for the accused and Ms. Rugut Counsel for the State filed written submissions. Mr. Mathea raised three issues for consideration.

i. Whether the prosecution proved its case beyond reasonable doubt;

ii. Whether the raised alibi was disproved;

iii. Whether or not the court should acquit the accused.

On the first issue, counsel argued that Under Section 203 of the Penal Code, the prosecution has to prove;

1) The fact of death of the deceased;

2) Proof that the cause of death was as a result of an unlawful act or omission on the part of the accused and;

3) That the accused had malice aforethought.

Counsel submitted that whereas the death of the deceased is not in issue the identity of the person who caused the death has not been proved; that the death occurred at night in the deceased's house which had no light; that in the decision of **Cheophas Otieno Wamunga Vrs Republic (1989) EKLK**, the Court of Appeal held that where the circumstances for identification are not favourable, the court must test the evidence with great care. Counsel urged that neither PW1 nor PW2 told the court the amount of the light emanating from the torch allegedly carried by the accused; no specific feature on the accused that they identified or what led PW1 and PW2 to believe that the murderer was the accused. Counsel further urged that by the manner in which the murderer entered the house, the children must have been so frightened that it would have been difficult for them to identify the murderer. For the above proposition, Counsel relied on the case of **Kimotho Kiarie Vrs Republic (1984) EKLK**. Counsel therefore concluded that the identity of the assailant was not proved beyond reasonable doubt.

Counsel argued that the accused's alibi that he reached home at 5.30 pm and never left till the next day accorded the investigation officer an opportunity to inquire into the alibi but he did not nor did he impeach it; that the prosecution was contented with the accused's testimony which had been raised when he recorded his statement with the investigating officer; that the alibi was also corroborated by the testimony of DW2 and DW3 and hence the charge of murder was not proved to the required standard and the accused should be acquitted.

Submissions by the State:

Ms. Rugut submitted that the death of the deceased was proved by the evidence of PW3, 4,5,6,7 and a post mortem report produced by PW8.

Counsel further submitted that PW1 and PW2 saw the accused enter the deceased's house with a torch. They were also able to see him using a fire that the deceased was lighting and that PW1 said he recognized Duncan's voice; that PW3 confirmed the events of the night that it was routine for Duncan to chase the children away once they got into a fight with deceased; that the alibi defence was not true because PW1 and PW2 placed Duncan at the scene.

As to whether Duncan had malice aforethought, counsel urged that the action of putting a wire round the deceased's neck and using it to strangle the deceased clearly proved malice aforethought as he must have known that the act would lead to death. Counsel urged the court to find that the offence of murder was proved.

Analysis and determination:

I have considered the evidence on record, submissions of both Counsel. This being a charge of murder under **Section 203 of the Penal Code**, the prosecution has to prove beyond reasonable doubt the following ingredients.

- i. The fact of the deceased's death;*
- ii. That the death was caused by the unlawful act or omission of the accused;*
- iii. That the accused had malice aforethought.*

Whether Luwatu is deceased:

On the first issue, PW4 was the first to find that his mother (Luwatu) was dead, when he went to check on her early on 22/2/2018 after PW1 and PW2 reported to PW3 & 4 that they had heard Luwatu screaming. PW4 noted that the deceased was injured on the forehead (a depression), a wire tightened round her neck and another injury to the back of the head. PW5, Assistant Chief of the area, PW6, PW7 who all visited the scene on the said morning corroborated PW4's evidence. PW8 the doctor who conducted the post mortem on the deceased(Luwatu) on 28/2/2018 found the deceased having sustained a gaping wound on the frontal head 6 x 6cm exposing the skull, bruises all over the body, and the cervical spine 1 & 2 vertebrae bones were fractured. The doctor formed the opinion that the cause of death was due to cardio pulmonary arrest secondary to asphyxiation due to strangulation and torture (P. Exhibit no 2). There is overwhelming evidence that Luwatu died as per PW8's evidence, she was murdered.

Whether the accused caused the death of Luwatu:

Nobody witnessed the murder of Luwatu, the deceased. It is PW1 and PW2 who mentioned the accused. They stated that Duncan entered the house and chased them away only for them to hear Luwatu screaming soon thereafter.

In the **English case of Republic Vrs Taylor Weaver and Donovan (1928) 21 CR. Appeal R 20**, the court observed that circumstantial evidence is the best evidence to prove a fact. The court said"

"Circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

The same principle was upheld in the East African case of **Tumuheire Vrs Uganda (1967) EA 32** where Sir Udo Udoma (CJ) said

"It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed circumstantial evidence is in a Criminal case, often the best evidence in establishing the commission of a crime by a person as in the present case."

In the case of **Abang'a alias Onyango Vrs Republic Cr.A 32/1990**, the Court of Appeal set out the principles to apply in order to determine

whether circumstantial evidence be a basis for a conviction. The court said:

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

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and fully established;**
- ii. These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;**
- iii. The circumstances taken cumulatively should form a complete 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.”**

This court will consider the evidence to establish whether it satisfies the above principles. PW1 and PW2 were alone with Luwatu on the fateful night. PW1 aged 11 years gave his evidence on oath. PW2 who was aged 9 years gave unsworn evidence. Both were subjected to cross examination. Both PW1 and PW2 told the court that it was at night when suddenly the door to Luwatu’s house was broken open and Duncan who had a torch entered and chased them out. The State Counsel did not lead any evidence to establish whether or not there was some form of light in the house before the intruder arrived. Both PW1 and PW2 said that Duncan who entered had a torch. It is the court that asked the witnesses what light was available in the house that enabled them see the intruder. However, the witnesses did not allude to how much light the torch produced, where the torch aimed at to enable them see the intruder and how long they were able to observe the intruder.

The identification of Duncan being under unfavourable conditions, the court warns itself of the dangers of relying on such evidence. In *R vs Turnbull and Others (1973) All ER 549*, the court considered the factors that the court should take into account when the only evidence turns on identification. The court said.

“...the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

In *Cleophas Otieno Wamunga (supra)*, the court held that the court had a duty to examine evidence of identification carefully and be satisfied that the circumstances of identification were **“favourable and free from possibility of error before it can safely make it the basis of conviction.”**

Again in *Maitanyi’s case*, the court said,

“It is at least essential to ascertain the nature of the available. What sort of light its size and its position relative to the suspect, are all important matters helping the test the evidence with great care.”

Although PW1 and PW2 claim to have known Duncan before and that he was a frequent visitor to the deceased’s house, yet the prosecution needed to ensure that identification was full proof as there was real possibility of mistaken identity. The prosecution did not even attempt to consider the conditions stated in the above case like how much light emanated from the torch, where was the torch shone in relation to the witnesses, how far the witnesses were from the intruder, how long did they observe him etc.

PW1 then told the court that he recognized Duncan from his voice. In the case of *Anjononi vs Rep(1980) KLR 59*, the court of appeal in considering voice identification had this to say;

“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

In the case of *Mbele vs Rep(1984) KLR 626*, the court of Appeal said further of voice identification

“In dealing with evidence of identification by voice, the court should ensure that,

(a) the voice was that of the accused and recognized it.

(b) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it.”

The court was not told exactly what the intruder uttered to PW1 and 2. The court was merely told that accused chased PW1 and 2. It was necessary for the court to be told the words uttered by the intruder for the court to determine whether it was possible for one to recognize the voice.

In the circumstances there was no basis to find that PW1 recognised Duncan by his voice.

PW1, PW2, PW3, PW4, PW6 and PW7 testified that they knew Duncan. PW4, PW6 and PW7 knew Duncan to have had a love affair with Luwatu. Though Duncan and his witnesses totally denied that fact, I am convinced that there was overwhelming evidence from the prosecution that there existed a romantic relationship between Duncan and Luwatu. PW3, PW4 and PW6 also told the court that Luwatu and Duncan were always quarreling and fighting. Infact PW6 specifically stated that Luwatu had confided in him that whenever she earned money from the quarry Duncan would assault her and take it by force.

I have no doubt that a romantic relationship existed between Luwatu and Duncan and there may have been fights between them before. However, whereas that may be reason to suspect Duncan for attacking Luwatu on the night of 21/2/2018, yet it was the duty of the prosecution to prove that it is indeed Duncan who broke into the house and fatally injured Luwatu and none else. As earlier noted, the identification and recognition evidence is too weak for this court to base a conviction on it. Duncan is indeed a prime suspect but suspicion alone cannot found a conviction. The circumstantial evidence does not unerringly point to the accused as the murderer.

For the above reasons, I give the accused the benefit of doubt. He is acquitted for the offence of Murder under **Section 322 of the Penal Code.**

Dated and Signed at NYAHURURU this 30th day of September, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms Rugut for state

Ms Muriithi holding brief Ms Mathea for accused

Henry – Court Assistant

Accused - present