REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 12 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

JUMA KITUKO MWAMBEGU.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Ms. Mwania for the accused persons

JUDGMENT

The accused person **Juma Kituko Mwambegu** has been charged with the offence of murder contrary to Section 203 of the Penal Code. The crucial facts are that on 25.8.2018 at Mongorani area, in Chumani, within Kilifi County, unlawfully murdered **Katite Thoya Ngumba**. He pleaded not guilty to the charge and particulars. Having denied the charge, **Ms. Mwania Tonia** advocate represented the accused whereas the prosecution was led by **Ms. Sombo.**

Factual background

This case concerned the death of **Katite Thoya Ngumba** who went missing on 25.8.2018 at Mongorani area, Chumani village Kilifi County. In his evidence **Tumaini Mzungu (PW1)** told the Court that the deceased had a love affair with the accused person. On the night the deceased was killed they had spent an evening meal together before both went to sleep. He said that the deceased and accused left for their rented house at Mongorani. Though, **(PW1)** expected her to attend a burial of their next of kin that was never to be as she was reported missing. He further stated that the people alarmed with the incident commenced a search of her whereabouts. It came to pass her decomposed body was to be retrieved in a nearby bush.

In cross-examination by **Ms. Mwania** for the accused **(PW1),** explained that earlier on accused had borrowed Kshs.500/= from the deceased which he never paid back. He could remember that the accused also used to threaten the deceased arising out of the demands made for him to pay back the debt.

PW2 – Benson Ngamba the next as a witness testified that in the month of August 2018 he received a telephone call about the deceased missing from her residence. It was therefore agreed that as a family they report the matter to the clan elders and Bamba Police Station to assist in the search. Finally her body was found in the bush with some multiple injuries which may have caused her death.

PW3 – CPL Antony Wambua police detective, gave evidence that on 29.9.2018 he received instructions from the D.C.I.O to investigate the circumstances surrounding the death of the deceased. He also recorded witness statements including participating in the post-mortem examination at Kilifi Hospital Mortuary. Thereafter, the evidence provided pointed to the accused as the last person with the deceased before her body was recovered in the bush.

At the close of the prosecution case **Ms. Mwania** submitted that there was no evidence that the accused killed the deceased. She relied heavily on the evidence of (**PW1) – Tumaini Mzungu**. She also argued and submitted that the case for the state was severely weakened for lack of corroboration. In assessing the evidence this Court ruled against a motion of no case to answer to sustain the case for the prosecution by placing the accused on his defence.

According to the accused defence he denied the charge and any adverse inference linking him with the offence. First of all, he told the Court that for about five (5) years he used to work for the family of the deceased. He denied any romantic relationship as adverted to by **(PW1) Tumaini Mzungu** in her testimony. In substance the circumstantial evidence tendered for the prosecution solely is dependent on velacity and credibility of the single identifying witness herein **(PW1).**

Analysis

It is now time to determine, whether or not upon the evidence, by the prosecution, accused actually participated in committing the offence of killing the deceased beyond reasonable doubt.

The phrase no doubt means evidence which establishes all elements of the offence to the satisfaction of the Court. The context underlying the shades of meaning qualifying the phrase of beyond reasonable doubt being of a higher degree of certainty is clearly expounded in the cases of **Woolmington v DPP {1935} AC) in Miller v Minister of Pensions {1947} 2 ALL ER 372 that Court held at page 373:**

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of possibility proof beyond reasonable doubt does not mean proof beyond the shadow a doubt. The Law would fail to produce the connectivity if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course, it is possible, but not in the lease probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

The position under our Law therefore for the accused to be convicted of murder contrary to Section 203 of the Penal Code, the prosecution must proof the following elements beyond reasonable doubt:

> ***(a). The death of the deceased.***
>
> ***(b). That her death was through unlawful acts or omission of the accused.***
>
> ***(c). That the accused had malice aforethought.***
>
> ***(d). As such, the quality of the evidence placed the accused person at the scene of the murder.***

It seems clear that this is a case build on circumstantial evidence. In this, the words should be remembered in the case of **R v Hillier {2007} 233 A.L.R 63, Shepherd v R {1991} LRC CRM 332** thus:

> ***"The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."***

Similarly, the Court of Appeal had occasion to consider the requirements to be met before placing reliance on circumstantial evidence in **Simon Musoke v R 1 EA 715** where it observed that:

> ***"In a case depending exclusively upon circumstantial evidence, he (the Judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."* (See also R v Kipkering Arap Koske 16 EACA 135, Musili Tulo v R {2014} eKLR).**

Bearing these principles in mind, I move to examine whether the elements of the offence have been proven beyond reasonable doubt. As I endeavor to analyze the value and credibility of the prosecution witnesses in this regard on the velacity of circumstantial evidence one must not lose sight of the direction given by **Supreme Court of Uganda in Kalunde Semakula v Uganda CR Appeal No. 11 of 1994** where the Court observed as follows:

> ***"Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cause suspicion on another. It is therefore necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

So what is the obvious dichotomy or combination of factors taken together to proof the charge.

(a). The death of the deceased

In respect to this evidence given by PW1, PW2 and PW3 confirms that the deceased **Katite Thoya Ngumba** died on or about 25.8.2018 when she went missing from her house. As per the post-mortem report **exhibit 1** – the decomposed body recovered happened to be that of the deceased. There is therefore sufficient circumstantial evidence adduced to proof death as a threshold issue under Section 203 of the Penal Code.

(b). Unlawful death of the deceased

English Law defines murder to be:

> ***"when a man of sound memory, and of the age of discretion unlawfully killeth within any country of the realm any reasonable creature in reriem natura under the king's place, with malice aforethought, either expressed by the party or implied by Law, so as the party wounded, or hurt, die of the wound or hurt within a year and a day after the same."*** **(Co wish 47).**

In several other cases like in **Smith {1959} 2QB 42 – 43,** the Court have held:

> ***"Where the earlier injury inflicted by the accused is held to be an operating cause, and a substantial cause, the accused person and that other person are both guilty of homicide."***

On the basis of Common Law principles proof of voluntary conduct under the Law that applies to the commission of crime can be found in the persuasive precedent by the **South Africa Supreme Court in S v Cunningham {1996} 1 SACR 631** where the Court pointed out as follows:

> ***"That in discharging this onus the state is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged actus reus and involuntary, that this was attributable to some cause other than mental pathology."***

Our Criminal Law as codified requires proof of acts and omissions at the very least on the part of the accused that take the form of an act of assault, striking, beating, shooting or stabbing in order to bring the conduct within the element of unlawfulness in the offence of murder. using this test the legally available evidence led by **(PW1)** shows.

> ***(a). That the accused and the deceased carried themselves to the public as boyfriend/girlfriend.***
>
> ***(b). That quite often they lived together in a rented premises at Mongorani.***
>
> ***(c). That prior to the deceased death they had an evening meal in the presence of the accused person.***
>
> ***(d). That it so happened accused and the deceased left for their house but the witness (PW1) expected her to attend a scheduled burial within the village. However, that did not happen.***

PW1 confirmed that on 25.8.2018 the deceased was not traceable either at her house or any known place. Her case was treated as that of missing person. In accordance with the evidence of PW1, PW2 and PW3 the deceased body was later to be retrieved from a thicket. The decomposed body was to be subjected to a post-mortem examination which report was produced as exhibit 1. The pathologist confirmed that upon examination of the deceased it was clear that she sustained severe injuries to the neck. In essence the head had been severed from the rest of the body. The opinion on the cause of death was opined to be head decapitation. The circumstances here adds to the first element that the deceased supposedly died out of unlawful acts of assault occasioning fatal injuries. Looking at the evidence in toto as presented by the prosecution there is primafacie evidence in this case that the deceased death was unlawful. Again the core element in murder charge is for the prosecution to establish.

(c). Malice aforethought.

Malice aforethought is defined in Section 206 of the Penal Code in the following terms:

> ***(a). An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.***
>
> ***(b). Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.***
>
> ***(c). An intent to commit a felony.***
>
> ***(d). An intention to facilitate the escape from custody of a person who has committed a felony.***

There are numerous authorities covering manifestation of malice aforethought in homicide cases on the charge under Section 203 of the Penal Code. For the offence of murder and proof of malice aforethought in **Rex v Tubere s/o Ochen {1945} 1Z EACA 63**, Eastern Court of Appeal observed:

> ***"In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."***

In the case of **Hyam v DPP {1974} A.C.** the Court held interalia that:

> ***"Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."***

Some of the compelling evidence to infer malice aforethought is to be found in **Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990)** where the Court held:

> ***"the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased."***

For present purposes, this element draws a distinct line between murder contrary to Section 203 and manslaughter under Section 202 of the Penal Code. The question is whether the prosecution has satisfied the criteria to proof malice aforethought. It is upon the answer to this question that in my view under Section 107 (1) as read with Section 108 and 109 of the Evidence act can the case be proved against the accused.

The facts of this case are simple and not in dispute. In the early hours of 25.8.2018 (**PW1) Tumaini Mzungu** spent some time together with both the accused and the deceased. Though the accused denied any love relationship with the deceased, the prosecution through the testimony of **(PW1)** proved that fact. The last person to be seen with the deceased remained to be the accused.

I have given serious thought on the circumstantial evidence provided by (PW1) a nephew to the deceased, I believe also the accused defence that he had spent considerable amount of time as an employee of the deceased family for the last five years. His account of his actions and defence failed to controvert the evidence by **(PW1)** partly that the deceased was his mistress and on 25.8.2018 they left together to spend a night together as they usually do in other days.

According to **(PW1)** the deceased was expected at a burial scheduled to take place in their village, but unfortunately failed to attend. Incidentally, **(PW1)** was categorical and affirmed that the accused was the last person to be seen with the deceased, alive.

Further, when the report was made to the police following the deceased absence from her house, there is no reference from the accused as to the time he parted ways with the deceased. Repeatedly, a search was initiated ever since the disappearance which finally traced her body in the same neighbourhood but in the bush. Since that date from non-injury human being seen by **(PW1)** it emerged that really serious injuries were inflicted within the definition of Section 4 of the Penal Code.

In my view, criminal intent to commit murder may entail malice aforethought but is not restricted to pre-meditation. The model presented above is a planned and deliberate unlawful conduct targeted at the deceased to inflict grievous harm which finally caused death. Its ascertainable from the evidence of **(PW1)** and subsequent findings in the post-mortem examination report the felonious killing of the deceased was committed with malice aforethought (See the principles in **Tubere s/o Ochen (supra).**

To determine whether the elements for the offence of murder are attributable to the accused, its incumbent for the prosecution to present evidence on identification. The Law on this part of a single identifying witness as it stands today is well articulated in the case of **Abdalla Bin Wendo & Another {1953} 20 EACA 166:**

> ***"Subject to certain well known exceptions, it is trite Law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single identifying witness respecting identification when it is known that the conditions favoring correct identification were difficult. In such circumstances what is needed is other evidence whether it be evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."***

In the present case, (PW1) testified saying that both the accused and deceased left for their residence after an evening meal. He gave a full account that thereafter the deceased went missing, only for her body to be discovered having sustained fatal injuries. From the evidence above, there are no contradictions to be resolved in favour of the accused. The inference is as predicated on the testimony of **(PW1),** the accused and no one else killed the deceased.

Following the analysis of the evidence I am satisfied that **(PW1)** testimony is worthy of credit. He had known the accused prior to the 25.8.2018. On the material day he also had ample time and opportunity to recognize him in circumstances one can strongly rule out any error or mistake on recognition and being placed at the scene.

The summing up defence by the accused failed to give a reasonable explanation on the question of last seen circumstances and on the fateful day they spent the night together at Magorani. In my view, the recollection of the events by **(PW1)** was of high quality and taking the necessary caution and safeguards, there is no danger in giving it appropriate admission to make adverse findings against the accused.

That being the position, I take of this matter, the legal and evidential burden having been discharged on the part of the prosecution it shifts to the accused to explain how he parted company with the deceased.

To rule on this element I have the force of the Law under Section 111 of the Evidence Act which provides:

> ***"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception from, or qualification to, the operation of the Law creating the offence with which he is charged and the burden of proving any fact especially within any exception from, or qualification to, the operation of the Law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."***

In the case of **Stephen Haruna v The Attorney General of the Federation {2012} LPELP 782** the Court had to say thus:

> ***"The Law requires a person last seen with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased."***

The logic of this reasoning is inescapable for the accused did not explain anything on the alleged offence as framed and prosecuted against him by the prosecution.

In these circumstances, I am satisfied to exercise Judgment upon the matter that the state of facts and evidence inferred are compatible to proof the charge beyond reasonable doubt. It remained credible, cogent and irresistible to point at the accused.

For the above reasons, I find the accused guilty of the charge of murder and as a consequence convict him of the offence contrary to Section 203 of the Penal Code.

Sentence

During the sentencing hearing counsel for the convict submitted on his behalf that he is a first offender and regrets the offence. Besides that, the Learned senior prosecution counsel urged the Court to factor in the seriousness and gravity of the offence to mete out an appropriate sentence.

The brief history of this crime showed that the convict had at one time or another had a love affair with the deceased. First, the facts provided an account where they spent time together on 25.8.2018. Thereafter the deceased was reported missing. The effect of uncertainty engulfed the deceased family who in turn reported the matter to Bamba Police Station. Faced with this tragic incident a search led them to the bush where the deceased decomposed body was retrieved for further police action. In those circumstances and the findings made by the Court on the Last Seen Theory directly placed the convict at the scene of the crime. The Court is entitled in my Judgment to look as a whole the aggravating factors and mitigation by the convict. That comparative analysis of the convict conduct and corresponding mitigation sets the decision making process based on reformation and rehabilitation of the convict as one of the key goals in fixing the appropriate sentence. Similarly, to reflect the seriousness of the offence, to promote respect for the Law and to deter criminal conduct if the above view, I have taken is correct I sentence the convict to thirty-five (35) years imprisonment with effect from 27th September 2018.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state

2. Ms. Mwania advocate for the accused person