



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL CASE NO. 1 OF 2019.

REPUBLIC.....PROSECUTOR

VERSUS.

SARAH BARASA OMODING.....ACCUSED

JUDGEMENT

The Accused **SARAH BARASA OMODING** is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya. The particulars of the offence being; On the 25th day of December, 2018, at Mabusi market, Mabusi Location, Bumula Sub-County within Bungoma County murdered FLORENCE NEKESA SIMIYU.

On 25.12.2018 Pw1 Peter Nambale Wafula was at his home asleep when he received a telephone call from the accused who is a wife of his brother's son called Moses Wekesa Simiyu. Through the telephone call she reported to him that she had killed Florence Nekesa Simiyu the deceased whom she found having sex with her husband at the shop. He went to the scene together with the village elder. At the scene he found the accused and her husband. He asked accused to show him where deceased was. She opened the door to the shop and he saw the deceased lying down on the floor with injuries on the head. Moses Wekesa the husband of accused informed him he was in another part of the shop when he heard accused and deceased fighting in another room. In the room he found a broken jembe stick which was suspected to be the murder weapon. He informed the O.C.S. Bumula who came and took the body to the mortuary. Accused and her husband were arrested.

Pw2 Patrick Simiyu the husband of the deceased was with the deceased at his home selling changaa when the deceased and Moses Wekesa the husband of the accused left at 2a.m. The reason they left together was for Moses to give deceased Kshs.1,000/= for changaa he had bought people. One Mercy wanted to accompany them but Moses chased her away. Later Mercy informed him that deceased had been killed at the shop, which is about 1km from his home.

Pw3 Mercy Nakhumicha a minor aged 15 years and daughter of the deceased testified that Moses the accused's husband came and drank changaa at their home. He then left with her mother the deceased to give her Kshs.1000/=. She tried to accompany the mother but Moses chased her away. She went back to the house and informed the father (Pw2). Later she received information her mother had been killed.

Pw4 Geoffrey Wamalwa received a telephone call from the accused at 4.10a.m. asking him to go to Mabusi Market. He went there and found the Chief (Pw1) already at the scene. They found Accused and her husband present. Accused's husband told him accused had killed the deceased. The accused's husband Moses opened the shop where they found the deceased lying down. They found a broken jembe stick, which was blood stained. The shop appeared disturbed as there were shop items scattered.

Pw8. No. 56337 P.C. Charles Ongera the Investigating officer received a report of Murder. He was instructed by O.S.C. to visit the scene. At the scene he found the Chief (Pw1) where he recovered the broken jembe stick which was blood stained. They found accused present whose clothes were blood stained and recovered the same which he produced as exhibit.

The accused upon being placed on her defence gave sworn evidence. She testified that on 24.12.2018 she was at the shop with her husband and later at 6.30p.m. went to prepare supper. She prepared supper and waited for her husband who came at 9p.m. He ate and left. At 12a.m. she heard noise outside as of people who were drunk. At 2a.m. she left her house and went to the shop which is about 5 minutes walk. On arriving at the shop, she saw a person lying down. She screamed thinking it was her husband. While screaming she fell down on the steps and injured herself. The husband came and advised her to call the chief who came and found her and the husband at the scene. Shortly later the police officers came and arrested her and her husband. She admitted she knew the deceased but denied knowing that she had sexual intercourse with her husband.

Mr. Wekesa for the accused filed written submissions. He submitted that there was no eye witness to the murder and the prosecution is relying on circumstantial evidence. Such evidence he submits must be strong, consistent and not contradicted to form a basis of a conviction. He submits that in this case the accused and her husband were arrested but only accused was charged. He submitted that the evidence of the Chief (Pw1) that accused called him and informed him that she had killed the deceased had been denied by accused who testified that she only reported the incident. He submitted that the accused's husband was never charged and yet the DNA Report on the

blood stains on the Murder weapon showed the blood of deceased an known male person. He submits that accused has explained the presence of blood stains on her dress. Finally, Counsel submits that no motive for the murder was established.

Pw7 Dr. Dickson Muthana Mwalodindi performed the Post Mortem on the body of deceased on 31.12.2018. He found the deceased had a deep laceration on the forehead, bruises on hands, back and chest, on opening up the body he found there was bleeding under the brain covering. From the examination he formed opinion that cause of death was due to a blunt injury to the head. This witness therefore proved the fact and cause of death.

None of the prosecution witnesses who testified stated that they saw accused inflict injuries on the accused. The prosecution therefore sought to rely on circumstantial evidence.

The prosecution can prove a fact by direct evidence, where the witnesses will testify to what, he saw, heard, or observed. It can also prove by circumstantial evidence which is evidence based on inference not on persons knowledge or observation. It is evidence of some collateral facts from which the existence or non-existence of the fact in question may be inferred as probable consequence.

In *Abanga alias Onyango -Vs- Republic Criminal Appeal No. 38/1990* the court of appeal on issue of circumstantial evidence stated;

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

(a) The circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established.

(b) These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

(c) 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 no one else.

The accused in her defence testified that she had gone home to prepare supper leaving her husband at the shop. The husband came, had supper then left. She stayed in the house and at 12a.m. she heard people taking who appeared drunk. She went to check on her husband at the shop, when she found the deceased having been murdered. From her evidence therefore she was at the scene of the murder at their shop. Accused admits in her evidence that she is the one who called the chief (Pw1) and informed him about the incident. She also called the village elder Pw4 Godfrey Wamalwa who went to the scene. Pw1 the Chief testified that accused had called him and informed him that she had killed the deceased when she found him having sexual intercourse with her husband at the shop. In responding to the information, the Chief went there and accused showed him where the body of deceased lay on the floor dead with injuries on the head.

The prosecution adduced evidence which proved that (1) The accused was at the scene of the murder which was at their shop (2) She had woken up from her house at 2a.m. and went to the shop in search of her husband. (3) The accused found the husband who had left with the deceased to the shop. (4) That the accused called Pw1 and informed him that she had killed the deceased. (5) The motive was that accused husband was having sexual intercourse in the shop with the deceased. (6) The accused led the Chief to where the body of the deceased lay.

All these sets of facts taken cumulatively form a chain so complete pointing to the accused and no one else as the person who killed deceased.

I am therefore satisfied that the prosecution has established the charge of Murder against the accused person. I therefore find the accused Sarah Barasa Omoding guilty of the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict her accordingly.

Dated at Bungoma this 27th day of October, 2020.

S.N. RIECHI

JUDGE.