



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 22 OF 2012

(FORMERLY NYERI HCCR NO. 19 OF 2012)

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KIIRU KIMANI.....ACCUSED

JUDGMENT

1. On the morning of 7th May 2012, the body of AW was discovered near the gate leading to MG's homestead.
2. The deceased had injuries on the neck; her inner wear was torn; and, there was a vaginal tear.
3. A witness (PW1) claimed that on the *previous* night, he found two people having sex by the roadside. He suspected the man to be the accused because of the jacket next to the couple. He had seen him earlier that evening in the outfit beckoning to the deceased.
4. The Republic brought *information* to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
5. The particulars are that on 6th May 2012 at [particulars withheld] within Murang'a County the accused murdered the deceased.
6. He pleaded *not guilty*. The prosecution called *five* witnesses.
7. PW1 was MW. The deceased is his aunt. The accused is his uncle. He was unaware of any affair between the deceased and the accused. On 6th May 2012 he left home at about 7:00 p.m. He was heading to Mariaini.
8. He met with the deceased and exchanged greetings. He said the accused emerged from [particulars withheld] and called the deceased using the names "*Sweetie*" and "*Wa Mother*". He said the accused was drunk and staggering. The accused started to push the deceased.
9. PW1 was about six meters from the two. He said he identified the accused from the electric light; and, from his voice. He heard the accused saying that he "*was a member of Thai and feared nothing*". He also identified a black jacket (exhibit 1) worn by the accused.
10. Later on his way home he saw two people lying by the roadside. It was near M's gate. He presumed they were engaging in coitus. The one on top had his trouser half-down. EK (PW3) emerged from the compound and shone a light on the couple. PW1 said he saw the jacket (exhibit 1) near the place where the two people were lying down.
11. PW1 did not identify the two or their gender. As he walked away, he heard the accused speak and say "*God forgive me because I have sinned*". He also heard him repeat that he was a member of *Thai*.
12. PW1 never disclosed the matter to anyone. The following day, he saw the body of the deceased where he had seen the two people lying down the previous night. The body was covered with a *leso*. He did not see the accused again until the hearing of this case.
13. Under cross examination, he said that when he first met the accused at the market, the accused was wearing a black jacket and a black hat. The jacket was buttoned. He said it was not the same with exhibit 1. He said he did not see exhibit 1 at the scene. But he insisted that the jacket he saw near the couple on the roadside was the same one the accused was wearing at the market.
14. He admitted that he did not see the face of the accused when PW3 shone the light on the couple. He only identified the accused by his voice. He said the deceased did not stop after the accused called her. He could also not tell whether the accused caught up with her.

15. PW2 was ZG. He is the deceased's husband. He testified that that on 6th May 2012, the deceased left home to attend church at [particulars withheld]. She did not return home. The following day, he was attracted to the scene by some screams. It was a ten minutes' walk from his house.
16. Members of the public were milling around the body. He identified it as that of his wife. She was fully dressed. However, her panties were torn. He said there were no visible injuries. The body was covered with a *leso*. He said there was evidence of a struggle at the scene. He also identified the body at Kiria-Ini mortuary for post mortem purposes.
17. PW3 was EK. Between 8:00 p.m. and 9.00 p.m. on the material night, he was leaving MG's house. The latter had requested him to repair her television. When he opened the gate, he noticed some activity. He shone a light from his mobile phone. A person was lying on top of another. He asked them "what [was] happening". But the two had covered their faces. He said he saw PW1 standing near the two people.
18. PW3 went his way. After about 20 meters he heard someone talking; but he could not tell who it was. The following day he heard about the murder. He went to the scene. The body was at the same place he had seen two people having sex by the roadside. There were signs of a struggle at the scene.
19. PW4 was RW. On the material night at 9: 00 p.m., she was at her house. She heard somebody passing near her house. He sounded drunk. He was saying: "*Jehovah wamemaliza*". The witness said the voice was that of the accused.
20. The following morning, she heard some screams. She went to the scene and found the body of the deceased outside the gate to the homestead of M.
21. Under cross-examination, she said that she knew the accused; they used to talk to each other. The accused hailed from Ireke while the witness resided in Mariaini. On the material night she could not tell where the accused was going or coming from.
22. PW5 was Police Constable Isaac Kiruri. On 7th May 2012 at about 6.30 a.m., he received the murder report from Chief Inspector Sanya. He accompanied the latter to the scene. The body was lying on a path next to a homestead. It was near a tea farm. It was covered by a sheet of clothing. The dress had been pulled up to the waist. Her panties had been removed from one lower limb and were on the left limb. He noted some swelling around the neck suggesting strangulation.
23. PW5 did not recover anything of interest at the scene. The police removed the body to Kiria-ini Mission Hospital Mortuary. A post-mortem examination was conducted later.
24. After gathering information from witnesses, PW5 proceeded to the home of the accused at Kangema and arrested him. It was the same day at about 1:30 p.m. He saw a navy-blue jacket similar to the one mentioned by a witness (exhibit 1).
25. On 10th May 2012 he attended the post-mortem examination. It was conducted by Dr. Guandaru. The pathologist also collected samples for a high vaginal swab. A blood sample was also taken from the accused at Murang'a District Hospital. PW5 submitted both samples to the Government Chemist for analysis.
26. Under cross examination, PW5 said the jacket was hanging on a rope inside the house of the accused. The accused lived alone. He however admitted that his statement made no mention of the recovery.
27. PW5 was recalled to the stand. On this occasion, and after laying some basis, he produced both the *Post Mortem Form* (exhibit 2); and, the report of the Government Analyst (exhibit 3). They were produced under section 77 of the **Evidence Act** with *no* objection by the defence.
28. Under further cross examination, he said that the body was half naked; and, that is why it had been covered with a *leso*. He said that no photographs were taken by a Scene of Crime Officer. He said the jacket was not recovered at the scene. It had rained in the night; and, the scene had been trampled upon by the public.
29. When the accused was placed on his defence, he gave *sworn* evidence. He also called *one* witness.
30. The accused protested his innocence. He knew the deceased for well over ten years. He said that at about 6:00 p.m. on the material evening, he was at [particulars withheld] taking a beer styled *Kane Extra*. He took two and a half beers. He left at 6:30 p.m. He then saw the deceased. He testified further as follows-
- "I called her 'Wa Mother'. I crossed the road. I met my friend Macharia Simon (DW2). He is my cousin. We went into Mathunga Bar. It was after 7:00 p.m. I took 2 or 3 Guinness and Kenya cane. I do not know how I got home. I woke up the next day at 10:30 a.m. I was still in my shoes. I had blue jeans and a blue T-shirt and a blue jacket. I also had a white shirt.*
- "At 12.00 p.m., officers knocked on my door. They arrested me. They picked my jacket from the line in the bedroom. This is my jacket (exhibit 1). PW1 and deceased were together where I saw the deceased the previous evening. I was not involved in her death. I learnt of the accusation in custody."*
31. Under cross examination, he denied that he strangled the deceased. He disagreed with the evidence of PW1 and PW4. He however conceded that he was drunk; and, did not know how he got home. He denied that he called the deceased "*Sweetie*" or followed her. He insisted that he was wearing a jacket but not the one produced as exhibit 1.

32. DW2 was Macharia Simon. He is a cousin of the accused. His testimony went as follows-

“I went to Mariani shopping centre. I went into Gathunga Bar. I was taking White-Cap. I saw the accused crossing. I called him. I bought him Guinness. I had seen accused drunk before. It was raining, so I could not drive. I thus led him on foot through Kwa R to his home. We got there at 11.00 p.m. I got keys from his pocket, opened for him and I took off.

“Accused was wearing a long blue jacket. This is the jacket (exhibit 1) that he was wearing. PW4 (Regina)...we passed near her house. Accused was singing gospel songs. I was with accused from 6:30 p.m. to 11:00 p.m. I am the one who took him home.”

33. Learned counsel for the defence elected *not* to file final submissions. He relied instead on his earlier submissions at the close of the prosecution’s case. Learned Prosecution Counsel also elected *not* to file submissions. She equally relied on earlier submissions made at the close of the prosecution’s case

34. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

35. There are three key ingredients that *must* be present: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*.

36. *Malice aforethought* is the *mens rea* or the *intention* to kill another person. Section 206 of the **Penal Code** defines it as follows;

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually 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 not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

37. From the *Postmortem Form* there is no doubt about the death. The cause of death is also *known*. It resulted from “*asphyxia secondary to strangulation*”.

38. I entertain *no* doubt that the death was *unlawful*. The only live question now is whether the accused, of *malice aforethought*, killed the deceased.

39. There was no *eye witness* to the murder. The entire case for the prosecution hinges upon *circumstantial evidence*. In **R v Kipkering arap Koske & another** 16 EACA 135 (1949) the court held-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

40. The first key question relates to *identification*. PW1 saw the accused emerging from [particulars withheld] and calling out to the deceased by the names “*Wa Mother*” and “*Sweetie*”. It was about 7:00 p.m. The accused *admitted* that he saw PW1; and, that he called out the deceased using the name “*Wa Mother*”. There was electric light. I have no doubt that PW1 positively identified the accused and the deceased at that point.

41. PW1 said the accused was wearing a *black* jacket. He said he saw the *same* jacket next to the couple that was having sex outside M’s gate. He admitted that he did *not* see the face of the accused when PW3 shone the light on the couple.

42. Earlier at the shopping centre, PW1 heard the accused saying he “*was a member of Thai and feared nothing*”. As PW1 left Muthoni’s gate, he heard someone saying “*God forgive me because I have sinned*”. He also heard him repeat that he was a member of *Thai*.

43. The accused is PW1’s uncle. They were not strangers. I am thus satisfied that PW1 identified the voice of the accused at both the shopping centre and somewhere near the *locus in quo*.

44. I am fortified further by the evidence of PW4. On the material night at 9: 00 p.m., she was at her house. She heard somebody passing near the house. He sounded drunk. He was saying: “*Jehovah wamemaliza*”. She knew the accused; they used to talk to each other.

45. In **Limbambula v Republic** [2003] KLR 683, the Court of Appeal stated that evidence of voice identification is receivable so long as the

person giving the evidence is familiar with it, recognizes it and there is no *mistake in testifying to that which was said and who said it*.

46. I thus entertain no doubt that the accused is the person who was heard by PW1 and PW4 between 8:00 and 9:00 p.m. on the material night near the scene or outside PW4's house. I thus do not believe the accused or DW2 that they were still at Gathunga Bar at that hour. Furthermore, both were drunk.

47. However, there was *no* positive identification of the accused as the man who was lying on top of the deceased outside *M's gate*. For starters PW1 said that the deceased did *not* stop after the accused called her. Secondly, he could *not* tell whether the accused caught up with the deceased. Thirdly, the couple had covered their faces. They were not talking. Neither PW1 nor PW3 saw the face of the accused or the deceased. PW1 only heard the voice of the accused as he (PW1) walked away from *Muthoni's gate*.

48. Doubt would have been erased by the report of the Government Analyst (exhibit 3). However, the vaginal swab revealed *no* seminal stains from the accused.

49. The only other connection is the jacket (exhibit 1). PW1 said the accused was wearing a *black* jacket. The jacket produced in court was *navy blue*. It was recovered in the house of the accused. DW2 said it was the jacket worn by the accused on the material night. At the time PW1 saw the jacket at the scene, it was dark. He was relying on light from a mobile phone. He may well have mistaken its colour.

50. Granted the circumstances, it is *probable* that the accused was the person lying on top of the deceased; or, the one who strangled her. But I *cannot* confidently say that the death is *incapable of explanation upon any other reasonable hypothesis*.

51. I have reached the conclusion that the entire corpus of *circumstantial* evidence does not *irresistibly* and *exclusively* point to the guilt of the accused. *R v Kipkering arap Koske & another* [supra], *Sawe v Republic* [2003] KLR 364.

52. The chain of events is *incomplete*. The totality of evidence raises *suspicious* against the accused. But there is no *concrete* evidence, *beyond reasonable doubt*, that the accused *perpetrated* this heinous crime.

53. The Republic has thus failed to discharge its *burden of proof*. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332. The fundamental elements of the charge of *murder* have not been laid out.

54. I accordingly enter a finding of *not guilty*. The accused person is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 25th day of February 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Ms. Gichuru for the Republic.

Ms. Dorcas, Court Clerk.