



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CRIMINAL CASE NO. 74 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

SAMMY WAINAINA MBURU.....ACCUSED

JUDGMENT

1. **SAMMY WAINAINA MBURU (the accused)** faces a charge of murder Contrary to **Section 203** of the **Penal Code** as read with **Section 204** of the **Penal Code** that on 19.10.2011 at **KAPLUM** village, **OLEINGUSE** location in **WARENG** district within Rift Valley, he murdered **BETTY WANJIRO MBURU** (deceased). The accused denied the charge.

2. The deceased was the accused's mother and 18 year old **SAMWEL WAINAINA** (PW3) a nephew to the accused, told this court that he lived with the deceased (who was his grandmother and the accused (who was his uncle).

On 19.10.2011, he left home to go to school and the accused followed and offered to escort him to school. When he returned home for lunch at 1.00pm, he found his grandmother's body lying dead on the ground, with the head resting against a sufuria Ex.3 which had a collection of blood. He saw the clothes she was wearing which he described as a white dotted skirt and told the court, it was not the pink skirt presented in court as Ex.5.

He raised an alarm and a neighbour rushed to the scene in response.

3. PW1 explained that initially he just lived with the deceased, but later on the accused joined them, and in the course of time became violent because he wanted the deceased to give him land to sell but the deceased wanted him to have the land to till.

PW2 stated:

“There was a lot of hostility between grandmother and accused, and infact that morning he kept saying that he would have to kill someone.”

4. He however conceded that the portion was not included in his statement to police.

On cross examination he confirmed that he did not witness the killing.

5. **SAMUEL KIBIWOTT BITOK (PW2)** the chief of **OLENGUSA** in **KESSES** Sub-county received a phone call from one **MZEE DANCUN MUNYIRI MWANGI** reporting that deceased had been found lying dead. He proceeded to the scene and observed that she had blood on her body and clothes, and she appeared to have been hit on the head by a blunt object. Next to her was a blood stained jembe and a blood stained black jacket. He too pointed out that the flowered skirt presented to court was not at the scene but that the deceased was wearing the pink skirt (Ex.5) which had mud stains.

6. The accused was not at the scene, and a search was mounted for him, PW2 traced him in Kondoo as he was walking away, on the same day and escorted him to the police station. On cross examination he stated:

“I cannot know who killed her, but we suspect it is accused. How it happened or who did it, I do not know. Relations between accused and deceased was good but we used to question accused's mental status because of his conduct on several occasions. I suspected accused because in the African mind, if such a thing happens to one's parent, you would expect the son to be present.”

The two prosecution witnesses (PW2 and PW3) identified a cream coloured blood stained jacket which they said belonged to the accused. However it was not clear whether the said jacket was found at the scene, or on the accused's body and whether he had worn it that day.

7. A post mortem conducted on the deceased's body by **DR. MACHARIA BENSON** (PW4) found that the deceased had laceration on the forehead, upper part of the right ear, and the back of the head.

8. Internally the skin covering the skull was bruised and there was bleeding over the brain. The cause of death was intracranial bleeding due to blunt force trauma to the head as per post mortem report.

Ex.6 blood samples were taken from the body and given to police, but it is not clear what became of them.

9. In his sworn defence the accused told this court that he used to live in Ol Kalou, but on 05.10.2011, he joined his mother and PW3 at Kondoo. He remained there during which period he visited his siblings in Eldoret for a week and returned to his mother's home on 18.10.2011.

10. The deceased made supper which they ate, then retired to sleep. The next morning after breakfast he left together with PW3 (who was going to school and he was going to Mathare to repair a shaving machine. When they left, deceased was still sleeping.

11. After repairing the machine, he began his journey home at about 5.00pm, and on the way at **CHIRCHIR** area, he met 4 young men who told him

“It is you we are looking for.”

They asked him whether he knew what had happened to his mother, and insisted he had killed her. He had maintained this version of events even when he recorded his statement under inquiry on alibi warning and which is produced as Dexh.1.

12. It was his evidence that he had good relations with his mother and stated that he was not wearing the shirt produced in court and identified by PW2 and PW3 as his saying the shirt doesn't belong to him and when he left home, he had left it hanging on a chair in the room. He therefore could not tell how it got to have the blood stains.

He concluded thus:

“If I had killed my mother, how could I have been going back to our home when the chief intercepted me. I had left home to make my daily living not fleeing after an offence.”

13. On cross examination he explained that the house had a kitchen, living room and bedroom, and he had left the coat(jacket) in the kitchen after supper, as he was feeling tired.

He also explained that neighbours used to go to their house to collect milk at about 8.00 – 9.00 am as it was the deceased who used to milk the cow.

He stated he had gone to repair a shaving machine for **PAUL NJOROGE** when he could not avail as a witness because he did not have his phone number.

14. No one witnessed the murder of the deceased, and it is common ground that both accused and PW3 left home in the morning. No one saw the accused returning home, nor is there any evidence to show that apart from the accused, other persons may not have had access to the home. PW3 attempted to suggest a motive – that there had been existing hostilities between the accused and the deceased over land issues – yet this seems known only to him, as the area chief also confirmed that the relationship between the accused and deceased was good.

15. This is compounded by the fact that there seemed to be confusion regarding the items of clothing found at the scene, and those attributed to the accused were not taken for analysis to confirm that they were stained with blood from which source.

The prosecution case was hinged on circumstantial evidence, but the chain of events had too many gaps/loopholes, making it a weak limb and not fully pointing to the guilt of the accused to the exclusion of any other reasonable hypothesis – it is possible that someone else got access to the home and killed deceased especially because there is no evidence that when PW3 and accused left, they locked the doors.

16. Consequently the evidence is not sufficient to sustain a conviction and I return a finding of **NOT GUILTY**.

The accused shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20th DAY OF FEBRUARY 2019

H. A. OMONDI

JUDGE