



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MARY SAMMY.....ACCUSED

JUDGMENT

1. **Mary Sammy**, the Accused, 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**. Particulars of the offence are that on the **25th day of April, 2011** at about **11.00 a.m.** at **Usenga Village, Kanzau Sub-location, Kisasi Location of Kitui District** within **Kitui County** jointly with another, murdered **Kinyamasyo Mweti** (Deceased).

2. Fact of case are that on the **20th day of April, 2011** at about 2.00 p.m. PW4, **Munanie Juma** the daughter-in-law of the Deceased was at her home when she heard noises emanating from the Accused person's kiosk. She rushed there to find the Deceased inside the kiosk but on the floor. He allegedly told her that he had been hit by the Accused with a stool on the chest and was in pain. The Accused was inside the kiosk counting money and she said that some money was missing. She returned home and continued with her chores. Thereafter her father-in-law went home, took a mat and slept. The following day he was taken to hospital for treatment. On the **23rd April, 2011**, PW5 **Musembi Mutunga** escorted the husband of the Accused, **Sammy** to the home of the Deceased. He allegedly told them that when he entered the kiosk of the Accused a small child was holding a purse which he took. It contained some **Kshs. 3,000/=** while **Kalekye**, **Mary's** sister arrived and denied having taken the purse. **Mary** accused him of having taken the purse. As a result, there was a confrontation and she hit him with a stool. As he was in pain, **Sammy** was ordered to give him **Kshs. 2,000/=** being part of the sum spent on treatment. On the **25th April, 2011**, relatives of the Deceased made the assault report and subsequent passing on at the police station. The Accused and her worker were arrested and charged.

3. When put on her defence the Accused stated that she left her sister **Kalekye** at the kiosk going to a meeting. She left her in charge and with some money. She was to pay for some goods that were to be delivered. She returned at **1.00 p.m.** The goods had not been delivered and **Kalekye** had not taken the money from where she left it. She checked for the money which was missing. **Kimwele Nyuka** who was at the kiosk proposed that they carry out a search. The Deceased wanted to leave but had to be searched. The money was found in his possession inside the pants. PW4 went to the scene and she (Accused) informed her that her father-in-law had stolen the money. She (Accused) left for **Nzangani** to purchase some goods. Later, she returned and found **Kalekye Kimwele** and her children. **Kimwele** made food and all of them, the Deceased inclusive ate prior to leaving for his home. On **25th April, 2011** she was arrested. She called her sister **Kalekye Lina Muthui** as a witness who confirmed in material particulars what she stated and denied having seen the Accused assaulting the Deceased.

4. Elements of the offence of murder were stated in the case of **Anthony Ndegwa Ngari vs. Republic (2014) eKLR** as follows:

- (a) That death of the Deceased occurred.
- (b) That the Accused committed the unlawful act which caused the death of the Deceased, and,
- (c) The Accused had malice aforethought.

5. The Deceased was a relative of the Accused and some of the witnesses who testified. No report of assault was made to the police when the alleged incident occurred. The post-mortem on the body was conducted by PW3 **Dr. Patrick Mutuku** having been identified by two (2) relatives of the Deceased, **Lazarus Muema** and **Kimanzi Kithole**. He examined the body and formed the opinion that the Deceased died of asphyxia. A certificate of death No. **066502** was issued. This was a fact of death of the Deceased.

6. The Prosecution's case was that the death was caused by the Accused. There was no eye witness to the act that allegedly happened to the Deceased. The Accused stated that there was a disagreement between her and the Deceased on the **20th day of April, 2011** as the Deceased

had allegedly stolen her money but she claimed that he left after they had dinner and to reach his home one has to pass through a thicket. It was confirmed by PW4 that ultimately the Deceased went home.

7. PW2 **Elizabeth Mbote** the daughter of the Deceased went home at **5.00 p.m.** on **23rd April, 2011** and found the Deceased unwell. He allegedly told her that he had been assaulted by the Accused. She took him to hospital and x-rays done showed he had a problem with his chest therefore he bought him drugs. Thereafter they summoned the husband of the Accused, **Sammy** and other family members. It was decided that **Sammy** refunds the sum spent on medical expenses. That night they took the Deceased to hospital but he passed on.

8. **Section 33(a)** of the **Evidence Act** provides thus:

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;”

9. The Deceased passed on after having made a statement. And when the question of the cause of his death came up, the arrest of the Accused was pegged on the altercation she had with the Deceased and also the statement that the Deceased made. This is therefore a case that is pegged on a dying declaration and circumstantial evidence.

10. In the case of **Kihara vs. Republic (1986) KLR 473** the Court of Appeal stated thus:

“Though there is no rule that dying declarations must be corroborated, [the] court needs to caution itself that in order to obtain a conviction on a dying declaration, it must be satisfactorily corroborated, Republic Vs Said Abdalla (1945) 12 EACA 67, Republic Vs Mugundulwa s/o Jalu & Others (1946) 13 EACA 167 at 171. Particular caution must be exercised as to when and where the attack took place and also about the identification of the assailant and the weapon used. It may be that the dying person may not remember all that and may not be telling the truth.” At P.476 to 477.”

11. In the case of **Philip Nzaka Watu vs. Republic (2016) eKLR** the Court of Appeal stated that:

“Notwithstanding Section 33(a) of the Evidence Act, Courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the Deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable while it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial Court must proceed with caution and to get the necessary assurance that a conviction founded on death declaration is indeed safe ...”

12. The Deceased became unwell a day after the altercation he had with the Accused and subsequently died. He had told PW4 who found him on the floor that he was feeling pain on the chest where it was alleged the Accused hit him using a stool. The question I must determine is whether there is some other evidence to confirm the fact that the resultant death was due to the assault?

13. There having been no eye witness called by the Prosecution to the act of assault, evidence adduced was circumstantial in nature. In the case of **Ndurya vs. Republic (2005) KLR 135** the Court held that:

“Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person’s guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellants.”

14. In the case of **Musili Tulo vs. Republic (2014) eKLR** the Court of Appeal stated that:

“It follows that the evidence linking the appellants to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements: -

i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of a definite

iii. 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 none else.”

15. To establish the cause of death a post mortem was conducted on the body of the Deceased. This was done by PW3. Per the examination done, on external appearance of the body, the Deceased had a healing bruise on the left ear and the left side of the neck. Internally, the lungs were congested and enlarged. There was fluid oozing from the nostrils exerting pressure from the lungs. The liver and spleen were enlarged. He formed the opinion that the cause of death was cardiopulmonary collapse due to asphyxia. Further, he stated that the fluid in the lungs must have been inhaled. On cross examination he stated that the bruises on the neck and ear had not caused the death of the Deceased.

16. The cause of death as stated by the Medical Doctor who examined the body of the Deceased clearly shows that the death that ensued was not due to an assault. The allegation was that the Accused hit the Deceased on the chest with a stool and he was in pain. The chest is the major hub of the circulatory system as it houses *inter alia* the heart and lungs. Per the report, the cardio-vascular system had no injury. PW3 opined that the fluid in the lungs must have been inhaled.

17. This being the case, the circumstantial evidence on record does not unerringly point at the Accused as the guilty person. There must have been other co-existing circumstances that definitely did destroy the inference of guilt on the part of the Accused. Therefore, there is no proof beyond any reasonable doubt that she is the one who committed the act that caused the death of the Deceased.

18. In the result, the Prosecution has failed to discharge the burden of proof bestowed upon it. Hence the Accused is not guilty and is acquitted of the offence of murder.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 24th day of April, 2019

L. N. MUTENDE

JUDGE