



IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL CASE NUMBER 22 OF 2017

REPUBLIC.....PROSECUTOR

VERSES

RODGERS ETARU OMUSE.....ACCUSED

JUDGEMENT

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence was that **on the 2nd day of October, 2017 at Bahati village, Kapsara location within Trans Nzoia County murderd ANNAH KHAOYA**.

2. The accused denied the charge. The prosecution called several witnesses to prove their case. The accused after being placed on his defence gave unsworn evidence. Before looking at the entire spectra of both sides evidence in this matter it shall be appropriate to summarise the evidence as presented during trial.

3. **PW1 EDAH KITAHI NAMACHI** the deceased mother testified that on the material day she sent her to fetch water from the river early in the morning around 7.30 am. She delayed coming back and she decided to follow her. On the way she found one shoe and the water tin which contained water.

4. She then decided to go and look for Benson Nyongesa her brother who was also a village elder. They both followed the footsteps and discovered the body in a bush. She screamed and many people came who included the accused. According to her the accused clothes were wet. He denied that he was plucking tea, while he was asked.

5. **PW2 BENSON NYONGESA** testified that he was a village elder and PW1 was his sister. He said that PW1 went and informed him about the incident and they both went searching for the deceased whom they found her body in the bush. He then called his colleagues village elders as well as the Chief.

6. The accused who was also at the scene was wearing wet clothes and when he was asked he was unable to clearly explain but instead took off and told her came back after he had changed the clothes. He said that he had seen him that morning when he went to fetch water and he told him that he was fetching firewood. People wanted to attack him but he was saved by the arrival of the Chief and Police Officers.

7. **PW3 ALEX BARASA** testified that he went to the scene when he heard the screams. The accused was there and was wearing wet clothes. The accused disappeared when asked concerning his abnormally wet clothes. He said that the footsteps from the scene were traced all the way to his house.

8. **PW4 DOUGHLAS NDERITU WAHOME** testified that he was in his house at around 8.30 am when he was called by the village elder. As he went to the scene he met the accused who was wearing wet clothes and according to him appeared unsettled. He directed him to the wrong direction when he asked him about the village elder.

9. At the scene he called the police who came and arrested the accused who had by then changed clothes and was carrying his child.

10. **PW5 FRED MASINDE WALUCHO** testified that on the material day at around 6am he was plucking tea when he saw the accused tussling with a lady whom she did not identify. He said that he was 150m away and a river separated them. He also stated that he had known the accused who used to quarrel with his wife. When he arrived at the scene the accused was brought and his clothes were already soiled. He said that he did not tell the family what he saw that morning as he feared that the accused may have been killed. He however told the village elder on the same day what he had seen.

11. On cross-examination he said that the accused was also known as Kiprop and that he did not recognise the person he was tussling with.

12. **PW6 DR FAUSTINE SHITOTE** from the County Referral Hospital carried out the post mortem exercise on the deceased body and concluded that the cause of death was cardiopulmonary arrest secondary to suffocation due to assault . She also found that she had been sexually assaulted.

13. As stated above when the accused was put on his defence he gave unsworn evidence denying the charge. He said that at around 7. 30 am one Barasa came to his place asking for a cigarette and did not have money to buy but he refused. He said that he had his debt of ksh. 360. He went away and after about 30 minutes he came back with Nderitu and told him to go to the scene where they found someone dead. Barasa said that he was a suspect and the deceased mother asked why he was being suspected. He told them that he had denied Barasa the cigarettes but his pleas were not heard. They searched his house and later taken to kachibora police station. He did not call any witness.

ANALYSIS AND DETERMINATION

14. The court has perused the proceedings herein as well as the written submissions by both counsels on record. What is evidently clear is that there was no eye witness to the incident. That the deceased met her death through strangulation and sexual assault.

15. The only nexus between the accused and the offence is the fact that he was found wearing wet clothes that morning and the deceased body was also covered in mud. What then was the accused doing around the scene? Was it a coincidence that just like all the other members of the public he found himself there after hearing the screams?

16. PW5 stated that he was on his farm which was 150metres away when he saw the accused tussling with a woman. This line of evidence was not contradicted at all. What seemed to cut across the prosecution case was that the accused was seen wearing wet clothes that morning yet he was not seen plucking tea and when people got more interested he took off and went to change the clothes.

17. It should also be noted that the incident took place early in the morning and there was dew and had rained the previous evening. The deceased body was also wet. There was no denial that the accused took off when there was inquiry from the village elders and the rest of the public.

18. In my view, circumstantially, the accused was placed at the scene that fateful morning. He was seen by several people including PW5. I do not find any reason why he had wet clothes that morning yet he was not plucking tea. In his unsworn defence he did not deny that he had wet clothes neither did he offer any explanation over the same.

19. This question of circumstantial evidence was well captured in the case of *Sawe Verses Republic (2003)KLR 364*, where the court stated that,

“In order to justify on circumstantial evidence, the inference of guilt ,the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt...”

20. His defence being unsworn was of no much probative value as he was not cross examined. More importantly, he appeared restless all through which created more suspicion from the public at large.

21. The sum total of my findings are that the accused although not found at the act sexually assaulted the deceased and thereafter killed her by suffocating her as found by the post mortem report. The wet clothes was a lead in all these.

22. I therefore find that the prosecution has established its case against the accused beyond reasonable doubt and that the accused is hereby found guilty pursuant to the provisions of Section 203 of the Penal Code.

Dated, signed and delivered at Kitale this 23rd day of May, 2019.

H.K .CHEMITEI

JUDGE.

23/5/19

In the presence of:-

Mr Omoria for State

Mr. Ingosi for Accused

Accused – present

Court Assistant – Kirong

Judgment read in open court.