



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 45 OF 2013

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

BONFACE AGOYI KWAVALAI.....ACCUSED

JUDGMENT

1. Bonface Agoyi Kwalalai is charged with murder contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on the night of 24th/25th day of August 2013 at Lirhembe Sub-Location in Kakamega South District within Kakamega County he murdered Beatrice Iganji, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 29th August 2013.

2. The hearing of the prosecution's case commenced on 24th October 2016. The prosecution called four witnesses.

3. The first on the stand was Rosemary Khasala Shilaho, who testified as PW1. She was the mother of the deceased. She testified that on 24th August 2013, she was at her home when the deceased told her that she would be travelling to Nairobi later in the evening. After that conversation, she left the homestead with the accused, who she identified as Bonny, and her other daughter called Hellen Litwachi. They had left to go to the accused's place. Later Hellen came back and informed her that the deceased and the accused had departed from the accused's house to a place she did not identify. At about 6.00 PM, Hellen went back to the accused's home with the deceased's baby. Hellen later came back at about 7.00 PM with the baby saying that the deceased and the accused had not yet returned to the accused's home. They later retired to bed, by which time the deceased had not yet arrived to pick her baby so that she could leave with him for Nairobi. The next morning, 25th August 2013, at 6.00 AM, a woman came to her home to report that the deceased had been killed, and that her body was lying just outside the accused's house. She went to the scene and found the deceased's body lying on the grass in front of the accused's house. She had a blunt injury on the head and had been stabbed on the thighs, and there was blood on both the head and the thighs. The body was later removed by the police to the mortuary, where she was later to identify it for post mortem purposes. She said the deceased had three sons, and had been a friend of the accused. During cross-examination, she stated that she did not witness the accused killing the deceased. She also stated that it was her other daughter who had informed her that the deceased had left the accused's house together with the accused. She said that the two were not married but were friends. She had never heard of any quarrel between them on any day.

4. Hellen Litwachi testified as PW2. She was the younger sister of the deceased. She testified that the deceased had come home on 24th August 2013, and instructed her to take her baby's clothes and escort her to the house of the deceased from where she was to leave the following morning for Nairobi. She did as instructed and escorted the deceased to the accused's house. They found the accused in the house seated there. The accused then left them there. The deceased then decided to follow him almost immediately. They allegedly informed her that they were going to Sigalagala to get vegetables. PW2 stayed upto 7.00 PM and left with the baby, when the deceased and the accused failed to show up, leaving the key to the house with a neighbour. The following morning a woman from near the house of the accused came to their home to tell them that the deceased was dead. She and her mother went to the scene to confirm, and found that indeed she was dead. She said that the deceased had three children, and had been friends with the accused. She said that the accused was not the stepfather of the said children. She had been married but the marriage broke down. She said that the deceased was to go to Nairobi. Her husband had sent her some money for fare. The accused had taken the money and her phone, and the deceased had quarrelled with him over that. She stated that when they left the house, the deceased was still asking the accused about the money and the phone.

5. On cross examination, she stated that when she left their home on the afternoon of 24th August 2013 with the deceased, the accused was not with them. She said that the accused did not come to their home that day, and she did not see him anywhere near the home. They found him in his house. The deceased had told PW1 that she was going to the accused's home for the evening and would leave from there for Nairobi in the morning of 25th August 2013. She confirmed that the deceased was not the accused's wife, but they were friends. She said that the deceased had left her husband after he married another woman, but the two had remained in touch. She stated that on 24th August 2013, the accused left his house first, and the deceased followed him, saying that they were going to Sigalagala. She could not confirm whether the deceased and the accused met after they left the house. She said that she did not see the accused kill the deceased. She said that the deceased died three kilometres away from the accused's house. The body was then dragged to the road. She said she noted injuries on the calves of her legs, which looked like cuts inflicted by a *panga*. During re-examination she stated that the body was three metres from the

house of the accused. She said that there was evidence that body had been dragged from the house to the road.

6. Dr Dixon Mchana Mwalidundi testified as PW3. He was the pathologist who carried out an autopsy on the body of the deceased on 27th August 2013 at the Kakamega government hospital mortuary. He noted that her clothes were torn, bloodstained and soiled. He observed that she had minor multiple injuries on her forehead, four of them averaging one centimetre. There were multiple bruises on both forearms, and a large bruise on the outer side of her left thigh, about sixteen centimetres long. Both legs were fractured just below the knee. He also established that she had a fracture on the neck involving the second and third neck bones. He opined that she died of the unstable neck fracture with evidence of blunt force trauma following assault. During cross-examination, he stated that from the lividity at the back of the body it appeared as if she had died a day before the post-mortem. He said he could not tell who killed the deceased. He opined that a fall could show defence injuries, but said that was not the case with an accident which exhibits friction injuries. He said the injuries were probably caused by a blunt object, adding that a fist could be a blunt object. He confirmed that the vital organs were intact. He did not try to establish whether the deceased was drunk.

7. PW4, Chief Inspector of Police (CIP) Kenneth Otieno Ogotu, followed. He was attached to the Directorate of Criminal Investigations (DCI) at Kakamega South at the time. He said that he received information on 25th August 2013 at about 6.30 AM that somebody had been killed in his jurisdiction. He rushed to the scene and found a crowd milling around the body of a female, who was later identified as the deceased person the subject of this case. The body was lying about ten metres from the home of the accused. Blood was oozing from the body. After a short while the accused was brought to the scene by Inspector of Police (IP) Kariuki, then the Deputy Officer Commanding Station (OCS), Malaika Police Station. The accused led them into his house, which they found in a messy state, with clothes and utensils scattered on the floor. They found blood on the kitchen floor, which had been covered with soil. The body was removed to the morgue. They collected a soiled pair of long trousers, blood from the floor and soil from the nearby area. They also recovered blood from the body of the deceased, during post-mortem, for deoxyribonucleic acid (DNA) analysis and comparison. He recorded statements from witnesses, and escorted the accused to hospital as he had claimed to have had been assaulted. The accused was later charged with the murder of the deceased. He said that by the time he was transferred results from the Government Chemist had not been available. During cross-examination, he stated that the deceased died on the night of 24th and 25th August 2013, although he said that he could not tell exactly when the death occurred. He said that he was in charge of the investigations, although the first page of the post-mortem form was filled by IP Kariuki.

8. No other witnesses testified thereafter. PW4 testified on 10th April 2018, and, when the prosecution sought adjournment of the matter, the court declined on grounds that the matter had been adjourned severally previously at the instigation of the state and that on 26th February 2018 the court had granted the prosecution the last adjournment. The prosecution closed its case. The court set the matter down for ruling on whether or not the accused had a case to answer. The accused was put on his defence on 29th May 2018.

9. The accused gave his sworn defence statement on 24th September 2018. He testified that he was not related to the deceased, and that she was not his wife. He said he had his own wife with four children. He said that he had no sexual relationship with her. He said that on 24th August 2013, he was at his place of work at his goldmine. He had left his home at 8.00 AM and returned at 5.00 PM. He said that he did not meet the deceased on that day. On 25th August 2013, as he was preparing to go to his gold mine, he saw people coming to his house at about 7.30 AM. They were in the company of police officers, they enquired from his sister where he was and she pointed at his house. The police officers then began to question him about where he had spent the night and whether he had been with the deceased, whereupon he told them that he had not met her that day. He was thereafter removed to the Malaika Police Station and onwards to the Kakamega Police Station. He stated that PW2 had told the court that she and the deceased had come to his house looking for him, but upon failing to find him the deceased went to the trading centre. He said that he did not see the body of the deceased near his house. He said that he did not know how the deceased died, and that he did not kill her. He added that he had no dispute with her, did not even know her. He said that he was being prosecuted over things he did not know.

10. During cross-examination, he stated that his wife was away at the time, attending a funeral. She was said to have been away for two and half weeks. He said that on 24th August 2013 he was at work, and not with the deceased. He said that the prosecution witnesses lied when they said they saw him, adding that he could not tell why they lied. He said that he had never had any dispute with them. He said that it was a lie to say that he had a dispute with the deceased at his house that evening. He said it was the police who came to his house, and took him to the police station. He said that he did not tell the police that he had lived with the deceased since 2002, nor that he had gone out drinking with the deceased on the material day. He denied telling the police that they started fighting after she refused to cook for him.

11. At the close of the oral hearing the defence put in written submissions. The state indicated that it would rely on the recorded evidence.

12. In the defence written submissions, the accused stated that there was no direct evidence linking the accused to the killing of the deceased, saying that the prosecution's case was built on mere suspicion. He submitted that in law suspicion, however strong, cannot provide a basis for inferring guilt, which must be proved beyond reasonable doubt. He cited the decision in *Republic vs. Geoffrey Cheruiyot alias Erik Kiprotich Kirui* [2015] eKLR and *Sawe vs. Republic* [2003] KLR 364. The other issue raised by the defence is that the charge was defective. It was submitted that the information alleged that the offence was committed on the night of 24th/25th August 2013, and therefore to that extent it was defective, for the deceased could not have been killed twice, on 24th and then again on the 25th. Finally, it was submitted that the state had founded its case largely on circumstantial evidence. It was argued that no witness was presented who could positively testify to having seen the accused killing the deceased. Indeed, it is submitted, the evidence that the accused was the last person to be seen with the deceased was not established beyond doubt. On principles governing circumstantial evidence the defence cited *Republic vs. Samson Lotukei Loitasia* [2017] eKLR.

13. The elements of the offence of murder as defined in section 203 of the Penal Code are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought.

14. From the material before me there is *prima facie* proof that the deceased in fact died. PW1 and PW2, who were her closest relatives, being her mother and sister, respectively, saw her body at the scene before it was removed to the mortuary. PW1 was one of the two people who identified her body to PW3 for the purposes of post-mortem. PW3 conducted the post-mortem, and certified her dead. On the second

aspect of the crime, cause of the death, medical evidence was provided by PW3. He produced a post-mortem report (Police 23A), marked as P. Exhibit 1, which he signed on 27th August 2013. In the column for cause of death, he wrote that the unstable neck fracture secondary to blunt fracture force trauma following assault caused the death in layman's language, as emerged from the oral testimony of the witness, the cause of death was the trauma resultant from the neck fracture injury following assault.

15. The third element of the offence, would be the role of the accused in cause of the deceased's death. The record does not point to any direct evidence of the accused person's involvement in the death of the deceased. No eyewitness was presented who could say positively that he saw the deceased inflict the injuries identified by PW3 that caused the demise of the deceased. None of the witnesses who testified were present when she died, and therefore none of them linked the accused person directly to the death.

16. That would then mean that the prosecution's case built around circumstantial evidence. A trial court can convict on the basis of circumstantial evidence. The principles upon which a court may rely on such evidence were stated in *Sawe vs. Republic* [2003] KLR 364, where the Court of Appeal said:

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

17. In *Abanga alias Onyango vs. Republic*, Criminal Appeal No. 32 of 1990 (unreported), the Court of Appeal outlined the tests to be satisfied for a person to be convicted of an offence based entirely on circumstantial evidence. The Court of Appeal said:

"It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three test: (i) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (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 no one else."

18. The circumstances that bring out some link between the accused and the deceased, and his possible involvement in her death, are that the body of the deceased was found metres away from his house, that PW2 was allegedly with the two of them at the accused's house on the afternoon of 24th August 2013 before the accused and the deceased allegedly left for Sigalagala and that PW1 saw the two leave her homestead on the 24th August 2013 for his house.

19. The first question would be whether there is credible evidence that the two were together on 24th August 2013. Or put differently, whether the accused person was the last person to be seen with the deceased. PW1 gave an account which was wavery. She said in examination-in-chief that the deceased left her home that day with the accused and PW2 for his. Then during cross-examination, she said that the accused person was not in her homestead but somewhere outside along the road, but within earshot, and that he joined the deceased and PW2 when they left the compound. PW2, who, according to PW1, left the homestead together with the deceased and the accused, was emphatic that the accused was not with them on the way to his house. Instead, she said they found him at his house at around 2.00 PM. The question to ask would be which of these two versions was the correct one. PW2 then said that once she and the deceased got into his house, the accused left his house alone. That must have been around 2.00 PM when they arrived. She went on to say that the deceased then decided to follow the accused, leaving PW2 in the house alone with the baby. Clearly, the two did not leave the accused person's house together. There is no evidence of what happened thereafter. There is no evidence whether the deceased caught up with the accused. There is also no evidence whether the two ended up at the same destination. Neither is there evidence that the two eventually came back to the house together. There is therefore a fairly lengthy gap between 2.00 PM when the accused left the house alone and later followed by deceased and the next morning when the deceased's body was found at his compound. It cannot really be said that they were last seen together as they did not leave the house together. Indeed, PW2 said that she could not tell whether the deceased caught up with the accused.

20. On the fact that the body of the deceased was found outside the house of the accused, I note that none of the witnesses testified as to seeing the accused anywhere near the body at the time the same was found. There was no evidence as to how the body came to be at the scene, or even how the deceased, while alive, came to be within the compound of the accused after she was sighted leaving the previous day going after the ACCUSED. PW4 talked of getting into the house and finding it in disarray, suggesting that there had been a struggle between the deceased and someone else, possibly the accused given that that was his house. No evidence was given of the neighbourhood of the accused person's house upon which it could be assessed whether a third person could not have intervened and committed the offence.

21. Applying the principles stated in *Sawe vs. Republic* (supra) and *Abanga alias Onyango vs. Republic* (supra), can one say that the circumstances from which an inference of guilt is to be drawn have been cogently and firmly established, that those circumstances have a definite tendency unerringly pointing towards the guilt of the accused, and that the circumstances taken cumulatively 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? I am not persuaded that the evidence on record meets that test. It cannot, therefore, be said with certainty, and it has not been established beyond reasonable doubt, that the death of the deceased was caused by the accused person. There are gaps that should be resolved in favour of the accused.

22. The fourth factor relates to malice aforethought. What constitutes malice aforethought is set out in section 206 of the Penal Code, Cap 63, Laws of Kenya, which states 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.”

23. Malice aforethought is the intention to be inferred from either some facts or conduct. In the instant case, no one witnessed the killing, and therefore there is no evidence of the actual killing from which one can draw an inference of an intention to kill from the conduct of the accused person. That leaves us with only the injuries sustained by the deceased. PW3 described the more serious injuries as fractures of both legs and of two bones of the neck. It was the neck injury that caused the death according to PW3. The injuries were grave and life-threatening. It would be safe for a reasonable person to conclude that the person who caused the injuries must have had an intention to cause her death or grievous harm, which would mean that there was malice aforethought. It can also be concluded that the person causing the injuries must have had knowledge that the injury he was inflicting could cause death or grievous harm. Even if the intention was not to cause death, there was intent to commit a felony. For all practical purposes all these circumstances point to presence of malice aforethought on the part of the person who caused the injury on the deceased which led to her death.

24. The accused submitted that the charge was defective. His contention was that it charged him with committing the offence on the night of 24th/25th August 2013 yet a person could not be killed twice, first on 24th and for a second time in 25th August 2013. The charge framed in the manner expressed by the accused person, and as is on record, would not be ambiguous for it properly refers to the night shared by the two dates. The charge would have been problematic were it to be framed without mentioning “the night.” I note that that was how it was initially framed, but it was amended subsequently by inserting by hand the words “night of” before the dates.

25. Overall, based on the facts as set out above I find that it would be unsafe to convict the accused of the charges that he faces. I accordingly find him not guilty and acquit him under section 306(1) of the Criminal Procedure Code, Cap 175, Laws of Kenya, of the charge of murder of Beatrice Iganji contrary to section 203, as read with section 204, of the Penal Code. He shall be set free unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF JUNE 2019

W MUSYOKA

JUDGE