



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case No. 12 Of 2013

REPUBLIC

VERSUS

SIMON GICHERU MBEU.....1ST ACCUSED

TIMOTHY MWATI MWANGI.....2ND ACCUSED

RULING

1. The accused were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; they are accused of having jointly murdered Priscilla Muthoni Kahumbi on the night of 26th and 27th April, 2013 at Thairu Location in M
2. Mukuruweini sub-county within Nyeri County; both accused had a mental assessment test conducted and the report was marked as 'PEXh.4'; they were found fit to stand trial and both the accused pleaded not guilty to the charge;
3. At the hearing hereof the accused was represented by Learned Counsel Ms Nderitu whereas Ms. Gicheha was the Prosecuting Counsel for the State; the prosecution called a total of fourteen (14) witnesses in advancing its case and at the close of its case counsel submitted that she was relying on the evidence on record and that the prosecution had fulfilled the requirements of a prima facie case and therefore the accused persons had a case to answer; counsel for the accused was invited to make submissions as to whether the prosecution had made out a case to require the accused persons to be called upon to defend themselves; counsel submitted that she too would be relying on the evidence on record and there was neither direct evidence direct nor independent witness linking the accused to the death; Counsel submitted that the accused had no case to answer and urged the court to acquit them.

ANALYSIS

4. The prosecution in a charge for murder has to prove the three key ingredients of the offence; which are the fact and cause of death; that the accused caused the act of death; and that they had malice aforethought;
5. **On the fact and cause of death;** It was not in dispute that there was a death; the deceased was an old lady aged 90 years who was killed and her body found dumped behind a neighbour's house; the post mortem report was produced by Dr. Kimaru Paul (**PW12**); the witness produced the same under the provisions of Section 33 of the Evidence Act as the maker Dr. Sheila Mwangi had left employment at Mukuruweini Sub-County Hospital and her whereabouts were unknown; and trying to procure her attendance could not be done without causing an unreasonable amount of delay in disposal of this matter;
6. The report (**'PEXh.5**) showed that deceased had been raped as the body had external injuries and blood stains on the labia majora region of her genitalia; but the doctor who conducted the post mortem report established that the cause of death was due to strangulation; and indeed the fact that a death occurred was corroborated and proved by the medical evidence of PW12, post mortem report;
7. **Who caused the death;** the question that arises is whether the accused persons caused the death of the deceased; Bernice Wacera Thungo (**PW1**) told the court that the deceased was her neighbor and that she received a call from a young man by the name Jairo Njokia who told her to head to a neighbour's house as a person had been murdered and the body was lying outside the house; she headed there and indeed found a body of a woman lying face down; she went back to deceased's house and attempted to look for her by calling out her name but got no answer; she went to the nearby neighbour's home to enquire if the old lady had been seen; she then suspected that the body could have been the old lady's and she screamed alerting the other neighbours who converged at the home; the Assistant Chief, James Gathu (**PW9**), was alerted who instructed her to report the matter; she later entered the house with a police officer who called other officers from Mukuruweini Police Station who took pictures of the deceased and interrogated the villagers on whether there was anyone who had witnessed the incident; the evidence of Mary Wambui Gachanja (**PW5**) also a neighbor was that she was called by **PW1** and her evidence was similar in nature to that of **PW1** on the search for the deceased and the calling and summoning of the police;

8. The evidence of Nancy Wairimu (**PW2**) was that on the 27/04/2013 she woke up at 8.00am and as she headed to the toilet outside she found a body lying outside and it was face down; that she screamed and her grandmother and other people came; she confirmed that **PW1** arrived at the scene and together they tried to look for the deceased but she too suspected that the body was that of their neighbor; that the Assistant Chief was informed and the police summoned; under cross-examination she stated that she was the first person to see the body but did not know the cause of death or who had killed the deceased;
9. Jacinta Wangari Muchiori (**PW3**) a daughter-in law of the deceased attended the Post Mortem conducted on the 29/04/2013 together with her sister in law Salome Mugure Githinji (**PW4**) and a grandson; they were tasked with identifying the body of the deceased before a post mortem could be conducted; they were also accompanied with a police officer; her evidence was that the deceased lived alone and she too did not know how she died or who killed her; **PW6 (Beth Muthoni Mwangi)** stated that she knew the deceased who was a neighbor who lived alone; that she heard people screaming and headed to the home and found the body of the deceased which had been thrown behind the house;
10. David Kioho Njairu's (**PW7**) evidence was that on the evening of 26/04/2013 he met up at a bar in Kibicho Shopping Centre with his buddies the 1st and 2nd accused and George Kimani (**PW8**); they decided to head to their respective homes at about 7.00pm but the 1st accused was left straggling behind walking very slowly as he was very drunk; they lived about x2 plots or 200metres away from the deceased's home; the next day he heard of the incident from the neighbours; on the 1/05/2013 after the demise of the deceased he was arrested together with the other three friends; he was later released together with George Kimani but the 1st and 2nd accused were not released and were later charged; the only reason they were arrested was due to the proximity of their residence with that of the deceased but he did not know how the accused were connected to the death of the deceased; the evidence of **PW8** was that the 1st accused was his cousin and the rest of his evidence was similar in nature with that of **PW7**; he too stated that their arrest was due to the proximity of his house to the deceased; he was later released to assist the police with investigations and never knew the reasons leading to the arrest of the 1st and 2nd accused neither did he know how the deceased met her death;
11. **PW9's** evidence was as narrated by **PW1**; that he was called by **PW1** and he instructed her on the action to take; he also took the initiative to inform the area Chief and the OCS; he then proceeded to the scene and found the body of the deceased Priscilla Muthoni which had been dumped about 200 to 300 metres from her house; that he knew her very well and that she lived alone; that he was later called by a village elder who told him that he had a suspect in his custody; that he had arrested the 1st accused and had handed him over to the administration police; in the company of the administrative officers he had visited the home of the 1st accused and upon conducting a search they had found a shirt and a trouser (**'PEXh.1'** and **'PEXh.2'**) which had blood stains and were found hidden under a chair cushion seat; the 2nd accused was also arrested but he didn't know the reasons for his arrest;
12. **PW11** Peter Wamugunda who arrived at the scene after being called by **PW9**; and he found the body of the deceased half naked and proceeded to cover it with a blanket; he informed his superiors who arrived with the scene of crime who took photos of the crime scene; on the 30/04/2013 he got another call from **PW9** that he had a suspect who had been arrested by a community policing member; he re-arrested the 1st accused who led them to his house where he conducted a search and found **'PEXh.1'** and **'PEXh,2'** under a seat cushion; he escorted the 1st accused together with the exhibits to Mukuruweini Police Station; the 2nd accused was also arrested by a colleague upon information given by the 1st accused;
13. **James Mwangi Muita (PW13)** a community policing member for over 20 years, his evidence on the finding of the deceased's body need not be repeated as it is exactly the same as the other prosecution witnesses; the only evidence of added value is the reasons that led to the arrest of the accused persons; that he heard murmurs from the villagers on the suspect and all of them suspected the 1st accused as the culprit as he was a habitual petty offender; together with **PW9** and **PW11** they conducted a search of the 1st accused's home where they found the exhibits; he identified the 1st accused as the person he had arrested;
14. **PW14** PC.Gasambi Hassan was the Investigating Officer; his testimony was upon receiving information on the finding of the body he proceeded to the scene of crime in the company of the Officer in Charge of Station Mukuruweini and AP.Inspector Wachira; he called the scenes of crime officers from Nyeri who took pictures of the dead body which was then moved to Mukuruweini Sub-County Hospital Mortuary; he later accompanied **PW3** and **PW4** when the post-mortem was conducted; he was given blood samples by the doctor who conducted the post-mortem which he sent to the Government Chemist for DNA sampling;
15. Later on the 30/04/2013 he was informed by the Officer in Charge Mukuruweini Police Station that two (2) suspects had been arrested at the AP Police Post; he proceeded to re-arrest the two suspects and went to their respective houses and recovered clothing from the home of the 1st accused; from the 2nd accused he recovered no clothing in the house but he was made to undress and the clothing he had on at the time of arrest were taken; the witness stated that he took into possession the clothing found in the 1st accused and whatever he was wearing at the time of his arrest right up to his underpants;
16. He collected the deceased's stained clothing (**PEXh.14**) and all the accused persons clothing (**PEXh.1, PEXh.2, PEXh.6, PEXh.7 and PEXh.8, PEXh.9, PEXh.10, PEXh.11, PEXh.12 and PEXh.13**); he escorted the two accused to Mukuweini Sub- County Hospital and they consented to the taking of their blood samples; he then prepared an Exhibit Memo (**PEXh.19**) and escorted all the exhibits and blood samples to the Government Chemist for analysis; he also escorted the accused for psychiatric assessment and later charged them with the offence of murder;
17. On the 13/03/2017 he received the Report (**PEXh.20**) from the Government Chemist; the report was to the effect that the blood stains found on the accuseds' clothing did not generate the deceased's DNA profile and this was the only evidence he had been depending on to make a case against the accused persons;
18. After evaluating all the evidence on record this court finds that none of the evidence tendered by the prosecution witnesses links either accused to the offence; there was no eye witness to the unfortunate incident; the evidence of **PW9** and **PW13** was based on murmurs and

suspicion that had arisen due to the fact that the 1st accused's had bad habits; the only evidence that would have been that scintilla of evidence that would have warranted putting them on their defence would have been the results from the Government Chemist blood stains found on the accused's clothing; unfortunately the blood stains did not generate the deceased's DNA profile;

FINDINGS AND DETERMINATION

19. For the forgoing reason this court finds that from the evidence on record the prosecution has not established a prima facie case against the accused that warrants them to be placed on their defence to answer to the charges;

20. The accused are therefore hereby acquitted under the provisions of Section 306 (1) of the Criminal Procedure Code.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 27th day of June, 2019.

HON.A.MSHILA

JUDGE