



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 06 OF 2018

THE STATE.....PROSECUTOR

=VRS=

1. ACHOKI MWANIKI.....1ST ACCUSED

2. KEFA MWANIKI.....2ND ACCUSED

JUDGEMENT

The accused persons are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 23rd May 2018 at Bonyaiguba Sub-location in Nyamira South Sub-county in Nyamira County jointly with others not before court they murdered Consolata Kemunto.

Briefly the prosecution's case is that the deceased in this case was the wife of the 1st accused and a step mother to the 2nd accused; that early on the material day several members of a self-help group for which the deceased was the treasurer went to her shop to pay their contributions to the self-help group but as they could not find her they asked the 1st accused who was at the shop where she was. He allegedly advised them to look for her in the farm but on going there they did not find her.

Jackson Maroki (Pw1) and Mary Nyanganyi (Pw2) told this court that at 10 o'clock they gave up waiting for her and went their separate ways. Eunice Sarange Mwaniki (Pw5), the 2nd accused's wife, testified that she had seen the deceased the previous evening and that the deceased was in good health although sometimes earlier she had not been feeling well and the 1st accused had taken her for treatment. Pw5 stated that the deceased always milked the cows except when she was ill and the 1st accused would do it. After their encounter at the shop she left the deceased at her shop and she went home. She stated that she was present when the next morning the 1st accused told women who had gone to look for the deceased that the deceased had left early in the morning but he did not know where she had gone. When she herself asked the 1st accused where her mother-in-law was his answer was that he had left her in the house but when he returned to the house she was not there. A search that extended to the market was mounted but the deceased was not found. Her body was later to be found at Charachari River. It was following the discovery and upon retrieval of the body from the river that the 1st accused was arrested. Pw3 testified that the next morning when the 2nd accused came home he too was arrested. She stated that she witnessed her husband alighting from a bus that Friday morning.

Dr. Steve Onsase (Pw6) told this court that he performed a post mortem on the body of the deceased at Nyamira County Hospital on 27th May 2018. He testified that externally the body had abrasions and cut wounds on the supra orbital region, a cut wound on the right knee, another cut wound on the frontal parietal region and she was bleeding from the nose. He stated that she also had a fracture on the skull, bleeding in the brain and signs of lacerations on the neck. Pursuant to those findings he concluded that the cause of death was head injury with a fracture with a possibility of strangulation as well.

Sergeant Charles Kiprono (Pw7) produced photographs he took at the river when the body was being retrieved. He disclosed that the presence of many people at the scene meant that the scene was tampered with.

PC Matthew Omondi (Pw10), the investigating officer in this case testified that when the matter was reported to the police a team of police officers was despatched to the scene. He stated that on arrival they found the house where the deceased and the 1st accused lived had been burnt and reduced to ashes by irate villagers. The 1st accused had been arrested the previous day. Pw10 testified that he found the 2nd accused at home and when he interrogated him to establish if he was complicit, the 2nd accused told him that he had travelled home in a Nyamira Express bus which he had boarded in Nairobi the previous evening. Pw10 testified that the 2nd accused handed him a bus ticket but he nevertheless arrested him and took him to Nyamira Police Station for further interrogation. Pw10 testified that they interrogated some

other family members but they did not get any information on how the deceased met her death. All the family members said was that she disappeared on 24th May 2018. The 1st accused is said to have told the police that on the fateful day he left the deceased sleeping in their house and went to milk the cow but on going back he did not find her. Pw10 concluded the 1st accused's explanation was not satisfactory since the homestead was open and the place where he was milking the cow was **"accessible to the exit"** and he could have seen the deceased leaving or heard a commotion.

Pw10 further testified that in regard to the 2nd accused he sent the ticket No. 100694 to the Nyamira Express Bus Company for verification but the company denied having issued it. He stated that he interrogated the manager of the bus and a clerk Peter Momanyi who was responsible for issuing tickets for passengers plying the Nyamira route. Pw10 produced the bus ticket and called the manager George Kamanda Otinga (Pw8) who confirmed that he received a letter from the police asking him to verify whether the bus ticket emanated from them. He stated that the ticket did not have a date, the fare, the destination and that its serial number was typed unlike in their tickets. He stated that he looked at their ticket book and found they had not reached the serial number of that ticket and the series of the tickets in use on the day in issue was 348537. He explained that their manifest always bore the names of the passengers, the serial number of the tickets, place of departure, the destination and the fare paid. The manifest also indicates the name of the driver and the conductor. He stated that although the ticket the police had shown him resembled those of Nyamira Express its paper was lighter than theirs and had no passenger name or fare and therefore it could just have **"been made"**. He disputed that its holder had travelled on their bus. His evidence was echoed by Peter Momanyi Omariba (Pw9) who like him stated he had worked with the company since the year 2010. Pw9 stated that although he was the one issuing tickets in their Nairobi office on that day he did not issue the ticket in issue and it could not have emanated from their company. He stated that that series of tickets had been issued long before the date it is alleged was issued. He produced the ticket book that was in use and the passenger manifest for that day. P10 testified that it was upon scrutinizing the bus ticket that they became suspicious of the narrative by the accused persons and decided to charge them. He produced the ticket in evidence. Pw10 further stated that they established the 2nd accused had been at home the day before the incident although nobody came forth to verify it. It was also his evidence that the police also learnt that occasionally there was misunderstanding between the 1st accused and the deceased but that the deceased and the 2nd accused's relationship was strained because he had contributed money to build and stock a shop at home and the 1st accused had contributed by purchasing a cow but it did not please the siblings of the 2nd accused that the shop was mainly operated by the deceased. Pw10 contended that the 1st accused was the last person to be seen with the deceased.

The accused persons gave unsworn evidence. The 1st accused stated that he was with the deceased on the evening of 23rd May 2018 and that after eating dinner together they watched television for a while and then retired to bed. He stated that when the alarm went off at 5am he went to milk the cow after which he took the milk to the house. He stated that when he went back to the bedroom he did not find the deceased and the next time he saw her was at the river. He stated that the cow shed was constructed in such a way that when one was inside they could not see outside. He stated that he searched for the deceased in several places but did not find her. He stated that he and his wife loved each other and denied that it was him that killed her.

The 2nd accused stated that on 23rd May 2018 at 8am his wife called him and told him that his mother was missing. He stated that he called his wife the next day and she told him they were still searching. The same day at 5pm she called him and told her the body had been found at the river. He stated that he went to the county bus terminus and obtained a Nyamira Express ticket and travelled to Nyamira arriving home at 10pm. He stated that he never looked at the receipt so he did not notice it did not have a date. He confirmed that when he arrived he found police officers who took the ticket. He alleged he was beaten by police officers and stated he has a scar to-date. He stated that although the officers also took his phone they did not produce any evidence concerning it. He contended that he was in Nairobi on the day it is alleged he committed this offence. He stated that the fact that he lived in Nairobi was confirmed by the Chief and the village elder. Regarding the deceased, he stated that he loved her and she was like his mother. He denied that he killed her.

In his closing arguments Mr. Ondigo, Advocate for the accused persons submitted that the charge was not proved beyond reasonable doubt and the accused persons should be acquitted.

On his part, the Counsel appearing for the State told the court that he wished to rely on the evidence on record.

I have now had ample opportunity to evaluate the evidence in this case and now find that the charge against the accused persons was not proved beyond reasonable doubt. The evidence against them is circumstantial. In the case of **Mwangi Vs. Republic [1983] KLR 522** it was held: -

"1. An offence of murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed.

2. In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. The facts surrounding the first appellant's possession of the property of one of the deceased persons and his posing as the deceased were incompatible with the appellant's innocence and inconsistent with any other rational conclusion."

The evidence against the 1st accused is that he was the last person to have been with the deceased since they had spent the night together. It was also alleged that there was no way he could have failed to see her leaving the house from the cowshed if at all she did and further that he gave a suspicious account of where she could have been when members of her self-help group went looking for her. It is my finding however that he gave a satisfactory explanation in regard to all those facts. He stated that he left the house at 5am to milk the cow and left the deceased sleeping in their bedroom. In my view there is nothing sinister about that. Secondly, he explained why he could not have seen the happenings at the house from the cow shed his explanation being that the cow shed was constructed in such a way that one inside could not see outside. There was no evidence to rebut that. The investigating officer (Pw10) stated that the compound was open so one could see the house. He however did not state whether one could see outside while inside the shed. In the absence of evidence to the contrary this

court must believe the accused. Further, if the accused's "suspicious" behaviour was that he told those who went to look for the deceased to do so in the shamba that again is not an inculpatory fact that is incapable of any other explanation but his guilt. There was nothing sinister in him referring them to the shamba as to him that was a place she would most likely go. The evidence against the 1st accused is nothing more than strong suspicion that he was hiding something and could have had a hand in her disappearance. There is no evidence that he had irreconcilable differences with his wife save for the occasional misunderstanding which in my finding are common to married couples. Suspicion cannot support a conviction no matter how strong it is.

As for the 2nd accused it may be true that the bus ticket did not come from Nyamira Express but the fact that he travelled home on the same day the body was found is uncontroverted. His wife saw him disembarking from a bus that morning and the Assistant Chief of his area (Pw9) confirmed that he lived in Nairobi. The investigating officer's (Pw10) allegation that the 2nd accused had been seen in the village before the deceased was killed was not supported by evidence. Pw10 himself told this court that nobody came forward to say they had seen the 2nd accused. His (Pw10) testimony in that regard was therefore hearsay. He also told this court that his investigations revealed that it was not the 2nd accused but his siblings who were not very pleased that the deceased was solely operating the shop whose construction the 2nd accused had financed. It is my finding that if there was anybody who would have had a reason to eliminate the deceased then it was the 2nd accused's siblings but not the 2nd accused. To dislodge the 2nd accused's alibi the investigating officer would have done well to travel to Mukuru Kwa Reuben in Nairobi where the 2nd accused was staying to confirm that the accused was not in fact there when it is alleged he killed the deceased. The evidence regarding the bus ticket and the other evidence surrounding it would have been good evidence only if there was a witness(es) who alleged to have seen the 2nd accused at his home in Bonyaiguba on the material day and he claimed he had only travelled there the next day. As I have already stated there was no such evidence.

On the whole it is my finding that whereas there is evidence that the deceased was murdered and whereas this court had put the accused persons on their defence, it would not be safe to convict them on the evidence adduced. Accordingly, I find them not guilty of the offence of murder and acquit them. They shall be released forthwith unless otherwise lawfully held.

Signed, dated and delivered in open court this 26th day of July 2019.

E. N. MAINA

JUDGE