



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO 7 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

SAMUEL GITAU KAMAU.....ACCUSED

JUDGEMENT

The Charge

1. On the night of 10th June 2016, at about 11:00 pm, Samuel Gitau Kamau entered his house to find the lifeless body of his wife lying partially on the bed. He raised an alarm and neighbours responded immediately. After due investigation, however, Samuel Gitau Kamau was suspected to have had a hand in the death of his wife and was arrested and charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on the 10th day of June 2016 at Githurai Village in Mkunumbi Sub-location, Lamu West Sub-county within Lamu County murdered Lucy Wachu Njuguna.

The prosecution case

2. The prosecution called 10 witnesses and produced 11 exhibits in support of its case. According to prosecution witnesses, the deceased and a group of women from the neighbourhood being Zipporah Wangechi Njoroge (PW4), Edith Wanjiku (PW5), and Eda Anjoke (PW6), were at Jerusha Muthoni's (PW3) house on the evening of 10th June 2016. They had been invited by PW3 to go and cook mandazi and chapati for a function scheduled for the following day. They cooked and while they ate at around 10:00 pm, the accused arrived at PW3's house and asked for his wife, the deceased. They left together and in the company of Zipporah Wangechi (PW4) who was also going to her home. When they reached the accused's gate, the accused and his wife turned into their homestead while PW4 proceeded onward to her own home.

3. The deceased's minor son, Joseph Kamau (PW1), told the court that his father came home on his motorcycle when he was already asleep. He woke up and when the father inquired where the mother was, informed him that she had gone to Mama Maureen's house. The accused's mother, Jane Wandia Njuguna (PW2), told the court that her son, whose home was within her homestead, called her in the night asking for a torch as there was no light in his home. She gave him the torch and after a short while she heard him screaming in his house. She responded to the scream and on entering the accused's house, found his wife dead. She saw an injury on her neck.

The defence case

4. The court found a *prima facie* case established against the accused. Put on his defence, he denied the charge. He stated in his sworn defence that he went to get his wife from Mama Maureen's (PW3) house and left her in the house when he went to get his motorcycle. He said that when he got back, he found the house dark, and went to get a torch from his mother and upon entering the house, found his wife dead.

The law

5. This being a murder charge, the prosecution is required under **section 202 of the Penal Code** to prove beyond reasonable doubt death and the cause thereof; that the death was unlawful; and most critically that it was the Accused who caused the death of the deceased. Further, it must be proved, as required by **Section 206 of the Penal Code** that the Accused acted with malice aforethought in causing the death of the deceased. See **Woolmington v DPP [1935] E.A. 462; Republic V. Gachanja 2001 KLR 428.**

Death of the deceased and the cause of death

6. There was indisputable evidence which the court believed that the deceased died on 10th June 2016. The accused raised an alarm and upon

responding, his mother (PW2) and neighbours, including PW6, saw her body on the bed. Her father, Elijah Njuguna Wakara (PW7) and his friend, David Njuguna Kagangi (PW8) identified the body at the Mpeketoni Mortuary on 16th June, 2016.

The cause of death

7. There was evidence that the deceased suffered an unlawful death. Dr Jilo Amana (PW9) conducted the post mortem on 16th June, 2016. He observed a cut around the neck and injuries on the right side of the face above the head. Dr Jilo Amana formed the opinion that the cause of death was hypoxia due to strangulation.

8. I accepted the pathologist's expert opinion on the cause of death. He concluded that the deceased was strangled to death. I had no reason to doubt the opinion. His opinion, in fact, accords with the testimony of the witnesses who saw her body and observed injuries on her neck. Besides, photographic evidence was presented to the court [Exhibit 2 a – d] by PW9. The photographs clearly showed injuries on the deceased's face and a cut around her neck.

Whether the accused caused the death of the deceased

9. This case rests wholly on circumstantial evidence as none of the prosecution witnesses saw the accused killing his wife. It is the law, however, that a case need not be proved by direct evidence alone. In **Erick Odhiambo Okumu v Republic Criminal Appeal No. 84 of 2014 [2015] eKLR**, the Court of Appeal stated that:-

“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (supra): “Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics”.

10. The guiding principles in analysing circumstantial evidence as stated by the Court of Appeal in **R .V. Kipkering Arap Koske & Another 16 EACA 135** are that:-

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 tendency unerringly pointing towards 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 none else.’

A further test to be applied is that the court must be sure, before drawing the inference of guilt from circumstantial evidence, that there were no co-existing circumstances that would weaken or destroy the inference of guilt. See **Musoke V. R. (1958) E.A. 715**.

11. In the present case, evidence given by PW3, PW4, PW5 and PW6 showed that the deceased was in their company on the evening of 10th June 2016. It was their clear, corroborative and uncontroverted evidence that the accused went to Muthoni's (PW3) house and asked for his wife with whom he left for their home. They left together with Wangechi (PW4) with whom they parted when the couple entered their gate. It was also the uncontroverted evidence of the Accused's mother (PW2) that she found the deceased dead in the deceased's house when she responded to the alarm raised by the accused. The accused was therefore the last person seen with the deceased and he must be deemed to have knowledge of what happened to the deceased after they entered their homestead and before he raised the alarm.

12. The burden of proof in criminal cases always rests with the prosecution and never shifts to the accused. See **Sawe R. Republic (supra)**. However, **section 111 of the Evidence Act** places a burden upon the accused to discharge a rebuttable presumption on matters within their special knowledge. **Section 111 (1) of The Evidence Act** provides as follows:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence”.

13. **Section 119 of the Evidence Act** further provides:-

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.

14. In this respect therefore, it was upon the accused to explain what he knew concerning the death of the deceased with whom he was last seen and whose lifeless body was found a few hours later on their matrimonial bed.

15. The accused stated in his sworn defence that he went to Mama Maureen's (PW3)house that evening to get their house keys from his wife

and that when the wife came out, she opted to accompany him back home. He stated that they left together with Wangechi (PW4). When they got home he told the wife that he was going to get his motorbike. He said that he got back home around 10:45 pm and found the door open and no lights on. He called out and no one responded. He went to his mother's (PW2) house and borrowed a torch. When he returned to the house, he found his wife on the bed. He ran out screaming and his mother responded.

16. I considered in depth the accused's defence. His narration of the events of the fateful evening bears many material admissions. He admits that he was the last person seen with the deceased on the night she met her death. He also admits that the only other person in their home that night was their 11-year-old son who was asleep in his room. These admissions are material and place the accused at the scene.

17. The accused also stated that he left home to go and get his motorbike and that he found his wife dead upon his return. This statement must be seen against his son's (PW1) testimony that his father first came home on his motorbike before going to Mama Maureen's to look for his mother. As stated earlier, PW1 was only 11 years old at the time. The court after conducting a *voire dire* examination, noted in the proceedings that he understood the importance of telling the truth. The court also observed that the child broke down as he identified the father in the dock.

18. I did not have the opportunity to observe the demeanour of PW1 as he testified before Ongeri J from whom I took over the case. However, I believed his testimony as recorded. This is because he had no reason to lie. He just narrated to the court the whereabouts of his parents at the material time. I therefore find his testimony that the accused had come home on the motorbike earlier before going to look for his mother credible.

19. In the converse, I find the accused's assertion that he left the wife in the house and only came back to find her dead incredible. There was no evidence that anyone else had intruded into the home and killed his wife while he was away. The accused's explanation to my mind was a poor attempt at creating an alibi. It did not dislodge the prosecution's evidence that he was alone with his wife in their house at the material time when the wife was strangled to death.

20. Looking at the above cited sections of the law and the evidence that the accused and the deceased were together in their house; and, that her body was found inside the said house on their matrimonial bed leads me to the firm conclusion that it is the accused and no one else that killed the deceased. He must have known what happened to the deceased. He was the last person with her and these being facts within his special knowledge; he bore a statutory burden to discharge a rebuttable presumption as envisaged in the **Evidence Act** and he failed to do so in his defence. I find the accused's explanation and conduct inculpatory. As stated by the Court of Appeal in **Rafaeri Munya alias Rafaeri Kibuka V Reginam (1953) 20 EACA 226** :-

“The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

21. The prosecution did not provide any possible motive for the killing of his wife by the accused. **Section 9(3) of the Penal Code**, however provides that: *“unless otherwise expressly declared by law, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility”*. As stated by the Court of Appeal in **Libambula v Republic [2003] KLR 683**:-

“Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”

22. In this case, the prosecution witnesses PW2, 3, 4, 5 and 6 who were the couple's neighbours told the court that they had never heard them quarrel or fight. While this may be true, it is also true that not all warring couples allow the public to know about their quarrels or fights. In any event, the fact that the couple may not have fought before does not exonerate the accused. The absence of motive notwithstanding, the circumstantial evidence unerringly point to the accused as the person who strangled the deceased, causing her death. Having dismissed the Accused's defence that he left the wife briefly in the house while he went to get his motor cycle and found her murdered, I have found no co-existing circumstances to weaken or destroy this inference of his guilt.

23. I have found that the circumstantial evidence pointed to the accused as the person who killed the deceased. The outstanding question is whether the prosecution proved the element of *mensrea*. **Section 206 of the Penal Code** provides circumstances from which malice afterthought may be inferred. They are:

(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)

24. In the present case, the evidence clearly brings the case within the provisions of section 206 (a) and (b). By strangling the deceased, the accused clearly intended to cause harm to her. I can safely conclude that he had the necessary intention to cause her death.

25. Having carefully analysed the evidence, I have no doubt in my mind that the Accused possessed the requisite *mensrea* when he caused the unlawful death of the deceased. I find the accused, Samuel Gitau Kamau guilty of the murder of his wife, Lucy Wachu Njuguna. I find him guilty of the offence of murder contrary to Section 203 of the Penal Code. I convict him accordingly.

Judgment delivered, dated and signed at Garsen This 30th October, 2019.

R. LAGAT KORIR

JUDGE

In the presence of:-

The Accused

J. Kambi - Court Clerk

Mr. Gekanana- for the Accused

Onderi - for the State