



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 40 OF 2017

LESIT, J

REPUBLIC..... PROSECUTOR

VERSUS

RICHARD NYAKINA OGOKO.....ACCUSED

JUDGMENT

1. The accused **RICHARD NYAKINAA OGOKO** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

“On the 23rd July, 2017 at unknown time at Ngong Forest Mutuini Block in Dagoretti South Sub-County within Nairobi County murdered LYDIA NYABOKE”.

2. The prosecution called a total of 7 witnesses while the accused gave a sworn defence and did not call any witness.

3. The prosecution is relying on circumstantial evidence as there was no eye witness of the murder. The brief facts of the prosecution case were that the deceased left her brother, PW2, with whom she shared a house at Park Road in Ngara area. She told PW2 that she was going to meet one, Richard whom she had been talking over the phone with. Richard had also spoken to PW2 over the phone on three occasions.

4. The deceased left around midday wearing a grey trench coat, a black skirt, a green blouse, a bracelet with name Edgar a braziere and a black hair band P.Exhibits 3 to 8. The deceased was not seen alive again. On the 26th July 2017, the deceased body was collected at Ngong Forest, Mutuini Block by PW5 after Forest Guard called him for it. PW4 took photos of the scene with body in situ. The deceased was wearing same clothes and accessories, P.Exh.3 to 8 as she wore when she left her house on 23rd July, 2017.

5. The post-mortem examination revealed that the deceased had been strangled through ligature strangulation to the neck. Around her neck was found a shoe lace, pieces of cloth torn from her blouse and a strap from her bra which the pathologist, PW6 opined was the ligature used to strangle her.

6. PW7 PC Muriuki investigated the case after the ‘Missing Person’ Report was made by PW2 and his family at Ngong Police Station on the 1ST August, 2017. PW7 arrested one Alois on the 17th August 2017 over the deceased phone. PW7 testified that Alois led him and his team to Evans, a relative of the said Richard. Evans led them to Ogembo in Kisii where he identified the accused to them as Richard. The accused led them to PW3 Nemwar who had the deceased phone.

7. The accused in his sworn defence made key admissions in this case. He admitted that he met the deceased on 23rd July 2017 as planned and that they boarded a vehicle in Town for Karen. After visiting his relatives with the deceased in Karen and Dagoretti they walked through a path which was a short cut from Dagoretti to Lenana Stage where they were to take a vehicle to Town.

8. The accused stated that he quarreled with the deceased as they walked on a path just the two of them. The reason for the quarrel was first because the deceased ignored a phone call twice. When he insisted she picks it, the accused heard a male voice accusing the deceased of lying to him by going to see someone else. Thirdly that when he confronted her about the relationship she held with the caller, the deceased told him widely that he was not the only person she gave her body to.

9. The other admission the accused made was that he beat up the deceased, then hit the deceased on the head as a result of which she fell down and lost consciousness. The other admission he made is that he left the deceased at the scene of fighting and carried away her phone with him. The fourth admission he made was that he was the source of the deceased phone to his brother Josphat and Nemwar but denied he ever received any money for it.

10. The accused faces a charge of murder which is defined under **section 203** of the **Penal Code** as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

11. In order to prove the charge of murder the prosecution has to adduce evidence to prove:

a) That the deceased died as a result of an unlawful act or omission.

b) That the accused was the one who committed the act or omission that led to deceased death.

c) That at the time the accused did the act or omission which caused the deceased death, he had formed the necessary malice aforethought

12. **Section 206** of the **Penal Code** describes the various circumstances which constitute malice aforethought, an important ingredient for the offence of murder, as follows:

“206. Malice aforethought

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.”

13. Mr. Businge defended the accused at the trial. However, he did not file any submissions in the matter despite the court deferring the judgment to give him an opportunity to do so.

14. Ms Onunga, Learned Prosecution Counsel filed submissions. I have considered her submissions and the suggested issues for determination.

15. As I have stated in this judgment the accused has made certain admissions under oath in his defence. I have already set out the admissions. That narrows down the issues for determination to the following:

i. Whether the prosecution has adduced evidence to establish that the accused and the deceased met on the material day.

ii. Whether the prosecution has established that it is the accused action which led to the deceased death.

iii. Whether the prosecution has adduced evidence to prove that the accused had formed the necessary malice aforethought to cause the deceased death.

iv. Whether the prosecution has established a motive for the deceased death.

v. Whether the accused is entitled to any defence in this case.

16. The burden lies with the prosecution to prove the charge against the accused person beyond any reasonable doubt. This burden never shifts to the defence subject to statutory presumptions as stipulated under **Section 111(1)** and **Section 119** of the **Evidence Act** among other provisions of the law.

17. Regarding evidence that the accused and the deceased met and whether the meeting resulted in her death. The evidence of the brother to the deceased, PW2, the deceased left late morning to meet a man called Richard for the first time. According to PW2 the two had been communicating over the phone for about a fortnight and their discussions which were during the night were acrimonious over personal opinions each held. PW2 had never met Richard in person but spoke to him three times and in one of those occasions he was trying to mediate between the deceased and the accused over an argument they had.

18. The deceased body was collected at Ngong Forest, Mutuini Block by PW5 after Forest Guards alerted him. That was 3 days after she went missing.

19. The prosecution adduced evidence through PW3 that on 3rd July 2017 the accused offered the deceased phone, P.exh.2, to him to buy for KShs. 5,000/- but managed to negotiate downwards to 4500/=. PW3 said that on that day he did not have sufficient funds so he first paid 4300/= and promised to pay the 200/= balance later. PW4 was found with the phone on 18th August, 2017 by PW7.

20. The phone was produced as P.Exht. 2. It was identified by PW2 brother of the deceased as the phone the deceased was carrying with 2 Sim cards on the day she disappeared. The phone was identified by PW3 as the one he bought and paid for in part from the accused.

21. The evidence of PW2, 3 and 7 create a nexus between the accused and the deceased phone. On the other hand, the accused has not contested the evidence that he had the deceased phone and that his brother Josephat was the one who had it when PW3 saw it.

22. The accused contradicted PW3's evidence that he, accused, sold the deceased phone to PW3. He did not deny carrying it from the deceased on 23rd July 2017 after the quarrel and fight. The accused admits giving the phone to his brother Josephat. Consequently I find sufficient evidence to establish that the accused and deceased met on the material day.

23. I must mention one more matter. The prosecution failed to avail one witness by name Josephat, a brother of the accused and who led the police to the accused. However since the accused did not deny the fact that Josephat introduced him to PW3 and also led to his arrest, I find that failure to avail Josephat as a witness is not adverse to the prosecution case.

24. Additionally PW7 explained at length how the investigative team used some mobile phone data to track and recover the deceased phone. However PW7 did not supply this data as an exhibit before court. Consequently I have placed no reliance on the evidence of the phone data.

25. As to whether the prosecution established that it is the accused action which led to the deceased death, there is no eye witness account of what happened. We therefore must rely on accused account of the events. The accused defence was that he quarreled with the deceased after which he was so furious due to the remarks she made to him that he set upon her and beat her before hitting her on the head and leaving her unconscious. The accused admitted having caused the deceased death. However, he denied she died as a result of strangulation as the pathologist found.

26. The evidence on record as to the cause of death was asphyxia due to ligature strangulation. The ligature used was found around the neck of the deceased. It was described by PW4, the Crime Scene officer who also produced photographs he took of the body at the scene of murder. The photos were P.Exh.9. They show the ligatures around the neck of the deceased comprising shoe laces, torn cloth from the blouse and the strap of the bra she wore on that day.

27. Even though the accused admitted causing the death of the deceased but denies strangling her, I find ample evidence to establish beyond any doubt that the deceased died of asphyxia due to ligature strangulation. Death was not caused from a blow to the head as accused stated.

28. The deceased had multiple deep bruises on the upper and lower limbs and a frontal head bruise with haematous according to the pathologist, PW6. These injuries were classified as defence injuries, meaning the deceased was trying to defend herself from all attacks. They did not however cause death.

29. I noted that the doctor who examined the accused as to injuries in his body and his mental status found defence injuries comprising a cut on the forehead and anterior neck soft tissue injury above the hip, lacerated wound around the right elbow caused both by sharp and blunt objects. Accused was of normal mental status. The Report is P.Exht.1. According to the doctor, PW1, the injuries were 4 weeks old as of 22nd August, 2017, which coincides with the time deceased was murdered. There is nothing to connect the injuries to the incident in which the deceased was murdered and therefore I leave it at that.

30. I find that there is no dispute that the deceased met the accused on the material day. I find that following that meeting the deceased was not seen alive again. I find that the cause of death was asphyxia caused by ligature strangulation.

31. From the facts established in this case, the accused has a statutory burden to discharge a rebuttable presumption that he was the one who strangled the deceased or knew who strangled her. The accused duty is to explain how he parted ways with the deceased or how she met her death.

32. This presumption is created under **sections 111(1) and 119 of the Evidence Act**. These sections stipulate as follows:

111.(1) 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 prosecuting, 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 defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

Section 119 provides:

“119. 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.”

33. The accused admits beating the deceased and hitting her on the head following which she lost consciousness. He however denies strangling the deceased. Considering the doctor's finding as to the cause of death was ligature strangulation and considering that the doctor's finding were uncontroverted and therefore final. I find that there is no other plausible explanation of how the deceased death was caused except in the manner opined by the pathologist PW6.

34. The ligatures were seen by PW5 the first officer to visit the scene of murder. They were documented by PW4, the Crime Scene Officer. PW2 also saw the ligature still around the neck when PW7 took him to City Mortuary to identify the body a week or so after her death. I find that there is no escape from the conclusion that it is the accused who used the deceased blouse, bra and shoe laces to strangle the deceased to death. The accused defence that he did not strangle the deceased cannot be true and is rejected.

35. As to whether prosecution has established that the accused had malice aforethought, it is trite law that malice can be inferred from the facts and circumstances of the case. In this case, PW2 told the court that deceased was going to meet Richard for the first time. They were total strangers. The accused contradicted that claiming he had met the deceased way before the incident and that they were friends. Whether they had met before or were total strangers is the word of PW2 against that of the deceased.

36. However the prosecution which had the burden of proof on this issue was unable to establish that there could have been a long term cause for malice. No evidence was adduced to allude to any malice having existed prior to the meeting between the deceased and the accused on the date in question.

37. From the evidence of the Pathologist it can be inferred that the accused chose to use shoe laces, pieces of cloth torn from the deceased's blouse and the strap of her bra to strangle her. This action is proof that the accused had clearly formed an intention to cause the deceased death. He left the deceased in the bush with the pieces of cloth, the strap and shoe laces still tied around her neck and the other end tied to a shrub. That clearly proves that accused's actions were actuated by malice.

38. As to the motive for this attack, **Section 9(3)** of the **Penal Code** provides:

“(3) Unless otherwise expressly declared, 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.”

39. It is clear that motive need not be proved in a case. In **Choge Vs. Republic 1980 KLR** the court held:

“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1stappellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”

40. The law is clear that in a case depending on circumstantial evidence, presence of motive would provide added corroboration to the prosecution case. In this case the prosecution did not even attempt to prove motive. The accused on the other hand accused the deceased of infuriating him because of having another relationship besides his and for answering him with words to the effect he was not the only man she could give her body to.

41. I fail to understand how having other friends and also saying she was free to give her body to whoever she willed could be an excuse for the accused to commit murder. The two were not married to each other. The words spoken or the alleged conduct of the deceased could not have given the accused any reason to cause the deceased death. The words spoken and the deceased conduct could not have induced a motive for the accused to cause the deceased death. The deceased alleged words and conduct took place almost simultaneously with the accused action which caused the deceased death. The bottom line is that no motive was established for this murder.

42. Regarding whether the accused is entitled to any defence, this issue flows from the last one considered of motive. The accused in his defence stated that the deceased infuriated him because of having another man friend which she tried to hide from him and also for telling him off that he was not the only man she could give her body to.

43. Provocation is set out under **Section 207** of the **Penal Code** which provides that:

“When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool he is guilty of manslaughter.”

44. **Section 208 (1)** of the **Penal Code** defines the term provocation as follows:

“The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant,

to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

45. In THITHIO VS. REPUBLIC [1988] KLR 796, it was held thus:

“It is not every provocation that will reduce murder to manslaughter. To have that effect, the provocation must be such as temporarily to deprive the person provoked of the power of self-control, as the result of which he commits the act which causes death. An unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did.”

46. Could the deceased words and conduct to the effect that she could give her body to any other man other than the accused, have resulted in provocation and having the effect temporary loss of control on the accused part? As stated elsewhere in this judgment, the disagreement the accused and deceased had over another man could not warrant the taking of life. The two were not married neither were they living together.

47. I find that the alleged words and conduct by the deceased towards the accused were not of such a nature as to cause loss of control or deprive him of the power of self-control as to induce him to strangle the deceased to death. I find that those words and that conduct if done to an ordinary person would not have led to the accused action. I find that under the circumstances, provocation as a defence is not available to the accused person.

48. Having come to the conclusions I have of this case, I find that the prosecution have proved the charge of Murder contrary to Section 203 of the Penal Code as against the accused person beyond any reasonable doubt. Consequently, I find the accused guilty of Murder as charged and accordingly convict him under Section 322 of the Criminal Procedure Code.

DATED AT NAIROBI THIS 29TH DAY OF OCTOBER, 2019

LESIT, J

JUDGE