



IN THE HIGH COURT OF KENYA AT KISII

CORAM: R.E OUGO

CRIMINAL CASE NO.17 OF 2015

REPUBLIC.....PROSECUTION

-VERSUS-

KENNEDY OMBONGI MOTARIACCUSED

JUDGMENT

1. By an information dated the 20th April 2015 the accused, **Kennedy Ombongi Motari**, is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence are, that the accused murdered **Grace Kemunto Nyamunga** on the night of 2nd and 3rd January 2014 at Bomamba location within Kisii South Sub-County within Kisii County. The prosecution called 5 witnesses in support of its case whereas the accused gave a sworn statement in his defence.

2. I took over the matter from W.A Okwany J. who heard the testimony of PW 1. After explaining to him his rights under section 200 of the Criminal Procedure Code, the accused elected to have the matter proceed from where it had reached.

3. The first witness I heard was **George Oteki Simeon** (PW2). He testified that the accused and the deceased were married and that he had been their neighbour for a long time. He recalled that on 3rd January 2014 the deceased's child whom he knew as M. or T, went to his place at about 7:00 a.m. She told him that the deceased was bleeding and was lying on a chair. He asked her where her father was and she told him that he was not home. PW 2 went to the deceased's home in the company of another neighbour. When they entered inside the house, they found the deceased's body lying on a chair. The deceased had been cut on the head with a panga. He admitted that he did not see any weapon near her body. The deceased's child told him that when they woke up they did not find their father at home but found their mother lying there. He called PW3 who in turn called the assistant chief. The assistant chief informed the police about the incident and they arrived at the scene and took away the body.

4. **Samuel Chacha Manyancha** (PW 3) confirmed that he had received a call from PW 2 on the material day at about 8:00 a.m. informing him that the deceased had been killed. When he got to the accused person's house, he found people had already entered the scene. He testified that he saw the body of the deceased lying on a sofa set with a cut on the head. He went out and called the assistant chief and informed her about the incident. The chief arrived at the scene and later police officers came, took photos of the body and took it away.

5. Sgt. Emmanuel Rono (PW4) testified that he and his colleague PC Mwaniki were sent by the OCS to the scene following the report made by the assistant chief. They went inside the deceased's house and found her body lying on a sofa set. She had been cut on the head with a panga and there was blood on the seat. PW 5 testified that he found a blood stained panga at the scene which he produced as P. exhibit No. 1. They took the body to Bosongo Hospital Mortuary and on 12th January 2014 he went with the scenes of crime officer, PC. Lyerice Liguka Mikutsi (PW1) to the mortuary where the post-mortem was conducted by PW 5. PW 1 took photos of the body of the deceased which he produced as exhibits, P ext No.1 a to (d) and the certificate as P ext No.2.

6. PW 4 went on to testify that he took the statement of M.K. who was only 4 years old at the time. She told him how her father and mother had disagreed while she was in the bedroom. She heard her father cut her mother with a panga and leave the house. The next morning, they found the deceased had died and went to call an elder. He testified that the accused was arrested by Community Policing members on 17th April 2015 whereupon he was charged with murder.

7. Doctor Nyabera Omari (PW5) testified that he conducted the post mortem on the body of the deceased on 12th January 2014 at Bosongo Hospital Mortuary. He observed a deep cut wound on the left side of the head with a fractured skull with brain tissue oozing out of the cut wound. The cut wound measured 15cms by 4 cms. There was another deep cut wound measuring 13cms by 5 cms across the left jaw with a fractured maxilifacial bone and the tongue was exposed. He also noted massive bleeding from the head and neck. Nothing stood out from his examination of the respiratory and cardiovascular systems and the spinal code. The internal examination of the body confirmed that the skull was fractured on the left side where there was a cut. The left maxilifacial bone was also fractured with broken missing teeth. There was massive brain tissue damage on the left side of the brain with brain tissue oozing out of the air pane and bone. PW 5 formed the opinion that the cause of death was cardio respiratory arrest secondary to brain tissue damage and external haemorrhage due to deep cut wounds to the

head.

8. When placed on his defence, the accused testified that on 2nd January 2014, he was asleep at his younger wife's house. He woke up at 3:00 a.m. and went to the shamba as was his custom and decided to go to the deceased's place to inquire about a wedding that was to take place. He testified that he entered the toilet first and from there he could see torches going round his wife's house. He told the court that it was not the first time they had been attacked by villagers as they were suspected of practicing witchcraft. He recalled hearing voices say, "*He must be at the younger wife's house let's go and see if he is there.*" He saw some of the torch bearers heading towards his younger wife's place and did not realize that some had remained at the deceased's house. When he left the toilet, they shone their torch on him and said, "*ndio huyu*" ("here he is") and began chasing him. The accused testified that he ran away and by good luck the villagers did not reach him. In the process, the phone he had in his pocket fell down.

9. The accused testified that he boarded a vehicle and went to a friend's place in Nairobi. Since he had lost his phone, he could not communicate with anybody. He later on chanced upon someone from home who assisted him communicate with people from home. He was informed that his wife, the deceased, had been attacked and killed. He went back home and found her family going on with burial arrangements. He buried the deceased and decided to investigate who had killed her. He testified that he found work in Nairobi and returned during the holidays in December 2014. He stayed with his family until April 2015 when he went to a neighbour who also sold *changaa* (illicit brew) to buy a cigarette. While there, Community Policing members arrested him under the guise that he was in possession of a jerrican of *changaa*. He testified that when they brought him to court, he thought he was being charged for the *changaa* but found out that he was being charged with the murder of his deceased wife.

10. In cross examination, the accused answered that M. was his and the deceased's child. He stated that M. was with his older daughter but he had been unable to trace them after she moved. He also stated that he had been unable to report to the police that his life was in danger and affirmed that he was arrested on 4th April, 2015.

11. Learned counsel for the accused person, Mr. Nyangacha closed the defence case after the accused person's testimony. He and the State Counsel, Mr. Otieno elected to rely on the evidence and made no written submissions.

12. The offence of murder is defined under **section 203** of the **Penal Code** thus; "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" From this definition, the prosecution is expected to prove the following ingredients beyond reasonable doubt:

- a. The death of the deceased and cause of that death;
- b. That the accused committed an unlawful act or omission that led to the death; and
- c. That the accused committed the unlawful act with malice aforethought.

13. On the fact of death, all the prosecution witnesses including the accused confirmed the deceased's death. PW 2, PW 3 and PW 4 testified that they had seen the body of the deceased at the scene of the crime on the morning of 3rd January 2014. PW 1 took photos of the body before the post-mortem was conducted by PW 5 who opined that the cause of death was cardio respiratory arrest secondary to brain tissue damage and external haemorrhage due to deep cut wounds to the head.

14. Having proved the fact as well as the cause of the death of the deceased, it was binding upon the prosecution to prove that the accused unlawfully inflicted the fatal injuries on the deceased. No eye witness was called to testify on the events that led to the death of the deceased. The prosecution relied on circumstantial evidence. The factors to be considered when considering whether circumstantial evidence is sufficient to convict an accused were set out as follows in the case of **Rep v. Kipkering Arap Koskei & Another 16 EACA 135**, the court stated

"In order to justify 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 than that of his guilt".

15. This was further expounded by the Court of Appeal in the case of **SAWE -v- REP [2003] KLR 364** thus:

1. *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 hypotheses than that of his guilt.*
2. *Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*
3. *The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. " (Emphasis mine)*

16. The prosecution's case is that the deceased and the accused were a married couple and were engaged in a tussle before the accused attacked her and cut her with a panga on the night she died. This information was allegedly given to the investigating officer, PW 4, by the deceased's daughter M. The girl also informed PW 2 about the condition of her mother the morning after the incident. PW 2 and PW 3 who were neighbours of the deceased and the accused did not testify to any disagreement between the couple. In fact, PW 2, who had been their neighbour for a long time told the court that he did not know anything about their relationship. The evidence of the accused and deceased's daughter was therefore crucial to the prosecution's case.

17. PW 4 testified that he took the evidence of the deceased's daughter but by the time the prosecution closed its case, she had not been called to testify. In the absence of the evidence of the deceased's daughter, the testimony of PW 4 of what transpired on the material night was inadequate and amounted to mere hearsay. (See **Kinyatti v Republic Criminal Appeal No 60 of 1983 [1984] eKLR**)

18. As none of the witnesses saw the accused at the *locus in quo* on the material night, the only other piece of evidence offered by the prosecution was a panga which was believed to be the murder weapon. PW 4 had testified that he found a blood stained panga at the scene of the crime when he went there the morning the deceased was found dead. He however admitted that no forensic analysis had been conducted on the weapon thus no link to the accused was proved, even with the weapon which was recovered at the scene.

19. It remains the duty of the prosecution to establish its case beyond reasonable doubt. Where the accused advances a defence, he does not assume the responsibility of proving it. That was the finding of the Court of Appeal in the case of **Mwamusi & another v Republic 226 of 2002 [2003] eKLR** where it held;

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable **Kiarie –vs- Republic (1984) KLR 739** at page 745 paragraph 25.

20. In **Victor Mwendwa Mulinge vs. R Criminal Appeal No. 357 of 2012 [2014] eKLR** the Court of Appeal rendered itself thus on the issue of alibi:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs. R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

21. In this case, the accused raised a plausible defence. He testified that on the material night he had slept at his younger house and went to the deceased's place to make an inquiry concerning a wedding. Before he got to her house, the accused claimed that he saw villagers who had previously attacked him and the deceased for alleged witchcraft, encircle the deceased's house. He testified that when they saw him they ran after him and he barely managed to escape. He stated that he lost his phone as he ran away from the assailants and was unable to communicate with anyone to find out what had happened. To explain the time it had taken to arrest him, the accused testified that he stayed away from the area after the attack and only went back to bury the deceased when he learnt about her death.

22. Weighing the prosecution's case against the defence of the accused, I find that the accused person's defence raised questions as to his culpability which were not sufficiently answered by the prosecution. It is trite law that suspicion however strong and compelling cannot be the basis for a conviction in a criminal trial.

23. In as much as the prosecution was not obliged to call a superfluity of witnesses, it was required to establish the charge of murder which is a very serious charge beyond reasonable doubt. (See **Keter V Republic [2007] 1 EA 135** and **Bukenya & Others V Uganda [1972] EA 549**.) Having failed to call the deceased's daughter who was said to have witnessed the attack, the inculpatory facts presented by the prosecution against the accused person were insufficient to prove the charge against the accused beyond any reasonable doubts.

24. Consequently, I acquit the accused **Kennedy Ombongi Motari** and order that he be set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at Kisii this 24th day of October 2019.

R.E. OUGO

JUDGE

In the presence of;

Accused In Person

Counsel for the Accused Absent

Mr. Otieno Senior State Counsel Office of the DPP

Rael Court clerk