



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 21 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

NAOMI MUTHONI MWAURA.....ACCUSED

RULING

Naomi Muthoni Mwaura, the accused, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The charge is framed as follows:

NAOMI MUTHONI MWAURA: Between the 1st November 2014 and 3rd January 2015 at Umoja Tena Estate within Nairobi in Nairobi County murdered DAVID GIKARU GACHIHI.

David Gikaru Gachihi, the deceased, lived in room 10 on the fourth floor of a building situated in Umoja Tena Estate. The building belonged to his father Lawrence Gachihi Mwangi (PW1). In the same building on the third floor lived Victor Onyango Oele (PW2). According to Victor, the building had two sets of staircases. Victor and the deceased used the same staircase situated on a different side of the building. They were the only people using that staircase to access their houses. Other than the deceased, Victor and a woman referred in the evidence as Beatrice and said to be sister to Lawrence and aunt to the deceased, this court was not told whether there were other tenants and if so how many lived in that building. Mary Wangechi Gachihi (PW4) told the court that she used to live in the same building at Umoja Tena Estate before moving out to Kileleshwa. She however said that she retained her house at Umoja Tena Estate. She did not specify how often she went to that house.

According to Lawrence, he talked to the deceased last during the first week of November 2014. The deceased was not reachable when the family called him to find out if he was travelling to join them for Christmas in 2014. His whereabouts were unknown until 3rd January 2015. On this day Albert Vwawwa (PW3) the caretaker of the building where the deceased and Victor lived detected a foul smell from deceased's house. He told Victor about it. Victor had detected the same smell from 24th December 2014 onwards but did not associate it with decomposing body of the deceased. He thought the smell was from the rubbish or from a dead animal like a cat or rat.

Both Albert and Victor confirmed that the stench was coming from the house of the deceased and noticed that the door to that house was locked. Albert informed Beatrice who called her brother Lawrence and informed him. Lawrence went to Umoja and confirmed the report. He called his son Robert (not a witness) who came with workmen. They broke open the house and entered. They saw the decomposing body of the deceased lying in the sitting room. The matter was reported to the police at Buruburu Police Station. Police visited the scene and retrieved the body after the scenes of crime personnel took

photographs. The body was moved to Lee Funeral Home where the post mortem examination was carried out by Doctor Oduor Johansen (PW11) on 4th January 2015.

The prosecution closed its case after calling eleven (11) witnesses. The law under **Section 306 of the Criminal Procedure Code** requires that after the prosecution has closed its case, the court must analyze and consider all the evidence by the prosecution to determine whether a prima facie case had been made out against the accused person. If the court finds in the positive then the accused is placed on his defense in accordance with **Section 306(2) of the Criminal Procedure Code**. If the court finds that the evidence does not establish a prima facie case against the accused, then the court must record a finding of not guilty and acquit the accused as provided for under **Section 306 (1) of the Criminal Procedure Code**.

At the close of the case for the prosecution, Mr. Kamande, counsel for the accused person and Ms Ikol the Prosecution counsel made their respective submissions. Mr. Kamande submitted that the case for the prosecution is based purely on circumstantial evidence and that the evidence by the prosecution witnesses does not meet the legal standard on circumstantial evidence. He submitted that the prosecution has not established all the ingredients of murder; that the prosecution has withheld crucial evidence from the court that would have exonerated the accused person and that the evidence is materially contradictory, weak and cannot form the basis for conviction. Mr. Kamande cited the case of **Musili Tulo v Republic [2014] eKLR** on the requirements that the prosecution must meet when relying on circumstantial evidence.

Mr. Kamande took issue with the evidence of the Investigating Officer CPL Moses Ouma (PW10) who he submitted wanted the court to believe that the accused was the last person seen with the deceased in December 2014 and who attributed this evidence to Victor. Mr. Kamande submitted that Victor was categorical that he never saw the accused in the company of the deceased in December 2014. He submitted that Mary Wangechi Gachihi (PW4) and Caroline Wangechi Mwangi (PW7) identified the accused at the identification parade as the person whose photo was in the deceased's Facebook and who had been introduced to them as deceased's friend and not as the person who had killed the deceased. He submitted that Mary and Caroline identified the accused from the photograph during the identification parade since they already had her photograph with them before the identification parade. He submitted that the data from Safaricom would have been relevant to determine whether the deceased and the accused communicated and ascertain whether the two were in the same locality and that the cybercrime evidence would have been relevant to ascertain the nature of the communication between the accused and the deceased, if any.

Mr. Kamande submitted that while the fact of death of the deceased is not denied, it has to be proved that it was the accused who did the unlawful act with malice aforethought that caused the death of the deceased; that there is no evidence to support that the accused caused the death of the deceased; that there is only speculation which cannot be a basis of convicting the accused if she were to remain silent. Mr. Kamande urged that this court finds that the prosecution has failed to establish a prima facie case against the accused person and acquit her.

Ms Ikol for the prosecution submitted that the prosecution has proved that the accused was deceased's girlfriend and had been introduced to the family of the deceased; that the accused had been seen on several occasions in the company of the deceased; that Victor saw her leaving the house of the deceased and recognized her because he had seen her before; that the accused was the last person to be seen with the deceased on 19th December 2014 and that she was seen leaving the house of the deceased carrying a suitcase and in a hurry; that she was properly identified through photographs shown to the witnesses and that PW4 was able to recognize the accused as the person she had seen. Ms Ikol submitted that the prosecution has established a prima facie case against the accused and urged the court to place her on her defense.

I have analyzed and considered all the evidence and the rival submissions. In brief, out of all the witnesses who testified for the prosecution, it is only Victor who lived in the same building with the deceased. Lawrence Gachihi received information about foul smell from the house of the deceased from Beatrice his sister. Beatrice was not a witness. Beatrice on her part was informed by Albert (PW3) the

caretaker. Albert became aware of the foul smell after he went to the building to clean it on 3rd January 2015. Mary Wangechi (PW4), sister to deceased and Caroline Wangechi (PW7), cousin to deceased all received information about his death after the fact. PC Joseph Kipsang (PW5) took photographs of the scene; Dr. Jackline Ochieng (PW6) examined the accused and certified her fit to stand trial; CIP Donata Agutu (PW8) conducted identification parade; PC Simon Mokaya (PW9) escorted the body of the deceased to Lee Funeral Home and attended the post mortem on 4th January 2015; CPL Moses Ouma (PW10) investigated the case and Dr. Oduor Johansen examined the body of the deceased.

Lawrence assisted by his workers and son Robert (not a witness) broke open the door to the deceased's house and found the body of the deceased. From his description of the scene and that of Victor and the testimony of PC Kipsang as well as the photographs of the scene, the body of the deceased had been lying inside his house for several days and most probably for more than six (6) days. Dr. Oduor told the court that any time after approximately six days the body starts to decompose although this depends on the environment.

Mary told the court that her brother the deceased had introduced the accused to her as a friend but she was not given the name of the accused. She said that she has seen the accused three times prior to the death of the deceased. She told the court that after the burial of her brother she saw the photograph of the accused in the deceased's Facebook page. She is the one who sent the accused's photograph to Victor who confirmed that the photograph belongs to the woman who used to visit the deceased. Caroline too told the court that she had been introduced to the accused as a friend of the deceased in April 2014 when she met them on Kimathi Street Nairobi and she had never met her again. CPL Ouma, the Investigating Officer used photographs downloaded from the Facebook of the deceased to track the accused to Kangema Sub-District Hospital from where she was arrested.

When Mary and Caroline attended the identification parade, they were going to identify the woman who they had seen with the deceased and who they had been introduced to as deceased's friend. Victor too went to the identification parade but the officer who carried out the identification parade for Victor did not testify. I have examined with care the evidence of Caroline and Mary. Nowhere do these two witnesses state that they identified the accused as the woman who killed the deceased or that they saw the accused with the deceased on the day he died. Indeed by the time these two witnesses and Victor went to the identification parade, they had seen photographs of the deceased downloaded from the Facebook page of the deceased.

Turning to the evidence of Victor, this is what he told the court:

“On 19/11/2014 I was expecting the woman who cleans my clothes and house. I was at the balcony when heard someone going downstairs. I saw it was a lady. She was coming from upstairs. Only two houses were occupied on that side of the building, mine and deceased's. I could not tell which floor she came from. I saw a woman carrying a suitcase. She went to the gate and opened it. I saw her open the gate and go out. I was not very clear that day to know whether I had seen her before or not. I had seen a lady in October 2014 with the deceased. They had been in his house then went to the kiosk to buy vegetables. On 19th November 2014 the lady was in a hurry. I did not see the face and I assumed it was the same lady who normally visited deceased. The lady who used to visit deceased is the accused in the dock. Before 19/11/2014 I had not seen the deceased. On 18/11/2014 I had seen some lights in deceased's house when I was standing at the balcony. I knew deceased was in. After 19/11/2014 I started smelling something bad. It smelt like something dead.”

On cross examination, Victor told the court that he started “smelling something” bad on 24th December 2014 and that he did not remember “smelling anything bad” between 19th November and 24th December 2014.

This evidence is clear that Victor did not identify the woman who came down the stairs and who was carrying a suitcase. This woman according to Victor was in a hurry and it was not clear to him from

which floor the woman had come. It is also clear from Victor's evidence that he did not know that the deceased was in his house. He assumed the deceased was inside his house on 18th November 2014 because he saw lights in deceased's house. There is no evidence from Victor or any other witness on the whereabouts of the deceased from 18th November 2014 when Victor assumed the deceased was inside his house because he had seen lights on in deceased's house to 3rd January 2015 when the body was discovered. Victor said in cross examination that he used to go out to his business and come in and that most of the time he was away from his house and therefore he could not tell if deceased came and went. He could not tell if anyone visited the deceased between 19th November 2014 and 3rd January 2015.

Albert the caretaker told the court that he used to clean the building twice a week but he did not clean it the whole of December 2014. He said that in November 2014 he did not detect any foul smell. Deceased's father, Lawrence, told the court that he talked to his son last during the 1st week of November 2014 and after this he used to call the deceased without success. This means that from the 1st week of November 2014 and probably from 18th November 2014 when Victor assumed that the deceased was inside his house, no one can tell when deceased was killed. Given that Albert or Victor did not detect any foul smell in November 2014, it is probable that the deceased was killed in December 2014 on an unknown date. Given the evidence of the doctor that a body starts to decompose about 6 or more days given the environment, it is not far-fetched without evidence to the contrary to assume that the deceased was killed the latter part of December 2014.

I must admit that the evidence of Victor is confusing especially on the dates. He kept on referring to 18th and 19th November 2014 in his evidence in chief and in cross examination. He specifically told the court that he heard a woman going down the stairs on 19th November 2014 and later saw her going out of the gate carrying a suitcase. He repeated this in cross examination. But in re-examination he stated that the date when he saw this woman was 19th December 2014. His statement to the police was not produced as evidence so this court will take his evidence in court. This evidence does not change the fact that no one knows when the deceased was killed or who killed him. If it was in December, it must have been long before 3rd January 2015 when the body was discovered decomposing inside the house.

As submitted by Mr. Kamande, the case for the prosecution revolves around circumstantial evidence. The prosecution bears the burden of proving the ingredients of murder against the accused. In this case the evidence against the accused is purely circumstantial and as such it must meet certain legal criteria for this court to convict. The legal requirements that circumstantial evidence must meet were set out in **GMI v. Republic (2013) eKLR**. (See also **R. v. Kipkering Arap Koske & another, 16 EACA 135**; **Musili Tulo v. Republic [2014] eKLR** and **Musoke v. R [1958] EA 715** citing with approval **Teper v. R. [1952] AC 480**). The threshold to be met is as follows:

- 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 the 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 one else.***
- iv. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.***

With these principles in mind and given the evidence on record, it is my view that the prosecution has failed to establish a prima facie case to warrant the accused person being placed on her defense. The evidence so far adduced does not identify the accused person as the person who did an unlawful act or

omission as a consequence of which the death of the deceased occurred.

There is no dispute that the deceased died. The date of his death is in issue because there is no evidence to show when he died. There is no evidence to show that the accused was the last person to see the deceased alive. All the evidence on record shows that the accused was a friend of the deceased person. It does not show that she killed him and in so doing she had malice aforethought.

My careful analysis and consideration of all the evidence leads me to the conclusion that the evidence against the accused is weak. The Investigating Officer did not tell the truth or if he told the truth then he failed to bring a witness to confirm his evidence since Victor did not testify to giving the Investigating Officer the information he referred to in court. The Investigating Officer testified that the accused was seen by Victor on 18th December 2014 entering the deceased's house with a strange man. He further testified that Victor saw the accused on 19th December 2014 leaving the deceased's house carrying a black brief case. On cross-examination he told the court that Victor Onyango had indicated that on 18th December 2014 he had seen the accused entering the deceased's house with another man. Victor did not testify to this and therefore it is not clear where the Investigating Officer got this information from.

The identity of the person who caused the death of the deceased and whether that person had intended that death have not been proved. Having closed its case, there is no further evidence expected from the prosecution and therefore the evidence presented in court by the prosecution cannot be relied on by this court to convict if the accused opted to remain silent. The burden of proof remains with the prosecution and having failed to present cogent and firm evidence this court cannot conclude that it is the accused to the exclusion of all others who caused the death of the deceased. It is obvious to this court that the accused was targeted because she was friends with the deceased if this court were to believe the evidence that they were friends. She was not arrested because evidence shows that she killed the deceased. If such evidence exists, this court did not have the benefit of it.

I conclude by stating that the evidence by the prosecution does not meet the requirements set out in the various authorities cited above including **Musili Tulo case** cited by the defense. Any person could have had the opportunity to kill the deceased and it cannot be said with certainty that it was the accused to the exclusion of all others. It would be, in my opinion, a miscarriage of justice if this court were to proceed to place the accused on her defense with this type of evidence, especially after the prosecution has closed its case with no likelihood of tendering further evidence against the accused. I will comply with the dictates of the law under **Section 306 (1) of the Criminal Procedure Code** and find that the accused has no case to answer. Consequently, I hereby record a finding of not guilty and acquit Naomi Muthoni Mwaura, the accused person. She is free to enjoy her liberty unless for any other lawful cause she is held in custody. It is so ordered.

Delivered, dated and signed this 18th day of January 2018.

S. N. Mutuku

Judge