



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO 25 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

MUSA MUTISO NZUKI.....ACCUSED

JUDGEMENT

1. The accused herein **MUSA MUTISO NZUKI** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the night of 15th and 16th March, 2008 at Kangundo Township, Kangundo Division in Kangundo District within the Eastern Province murdered **ANDERSON KILONZO GEORGE**.

2. The brief circumstances of this case are that on the material night one **Janet Kimuli** who was a tenant of some rental premises within Kangundo Township was outside her house fetching rain water when she spotted a stranger sauntering into the premises and appeared to be staggering and heading towards the common toilets whereupon the accused herein who also resided within the plot accosted him and dragged him towards the end of the said plot. The following morning she found the stranger lying face down in an unoccupied room with a belt around his neck. She then alerted the caretaker of the premises and police later visited the scene and picked up the body of the deceased. A post mortem was later conducted by Dr. Eshiroso who established the cause of death as asphyxia due to strangulation. Several suspects were later arrested and who included the accused herein but the police later singled him out as the suspect.

3. After a full trial in which five witnesses testified, the accused was placed on his defence. He tendered a sworn testimony and denied the charge. He stated that he reported from work on the evening of 15/03/2008 at 7p.m. and retired to bed at 8 p.m. The following morning he went back to his place of work only to be informed that a certain person had died within the plot where he also resided and he rushed home and saw the body of the deceased. He stated that the lady named Janet Anna had been his wife with whom they had separated due to issues of infidelity and were not on good terms though they lived within the same plot.

4. This case had proceeded before three other judges and that both the Prosecution and defence had closed their respective cases before I took over. I now proceed to analyze the evidence tendered so as to establish whether or not the Prosecution has proved its case against the accused beyond the required standard of proof.

PW.1 – Musembi George was an older brother to the deceased and who was alerted of the incident by another of his brothers namely Samson Kala (PW.2). The two visited the scene and saw the body had a belt around his neck and they organized for the body to be taken to Kangundo Hospital mortuary where a post mortem was conducted. PW.3 was Peter Kyalo Matheka and who stated that he was a caretaker at a certain plot within Kangundo Township and that on the 16/03/2008 one Janet Wayua who was one of the tenants alerted him of the presence of a dead man within the plot. He proceeded to the scene and saw the body of the deceased which had a belt tied around his neck. The said witness confirmed that the reportee named Janet Wayua informed him that she had heard noises in the previous night but did not tell him of what exactly transpired. The said witness confirmed that the said Janet Wayua informed him that she did not see what had happened to the deceased on the material night. On re-examination he maintained that what he stated to the court was as he had received from the said lady tenant Janet Wayua. PW.4 was **Janet Kimuli** and who stated that she was the caretaker of the plot and that at the time it was raining and it was dark. She stated that after fetching water outside she went to her room and while there she saw the deceased staggering towards the toilets and that she saw the accused pulling the deceased towards the toilets. She maintained that there was moonlight. She stated that the following morning she stumbled upon the body of the deceased lying face down in one of the unoccupied rooms. She confirmed on cross-examination that the plot had no electricity and tenants used lanterns and it was then raining.

PW.5 was PC. Weldon Towett was the investigating officer. He testified that on receiving the report of the incident from the caretaker, Peter Kyalo Matheka he proceeded to the scene and saw the body of the deceased which had a belt tied around his neck. He organized for the removal of the body to Kangundo Sub-District Hospital where a post mortem was conducted by Dr. Eshiroso. He also recovered the belt as well as a white vest and a jungle jacket and arrested the accused whom he subsequently charged with this offence. He also produced the recovered exhibits as well as the post mortem report. He admitted on cross examination that other suspects were arrested but released and that scenes of crimes personnel were not involved and also no fingerprints were dusted on the recovered belt.

5. Learned counsels for the prosecution and defence filed written submissions. It was submitted by Mr. Machogu for the Prosecution that the

Prosecution has proved its case against the accused beyond reasonable doubt in that the accused had intention of inflicting injuries or grievous harm on the deceased which led to his death and therefore there was malice aforethought within the meaning of Section 206 (a) of the Penal Code. It was further submitted that the evidence of the key witness PW.4 placed the accused at the scene of crime as she properly recognized him. It was finally submitted for the prosecution that the accused's defence consisted of mere denials which did not raise any doubt in the Prosecution's case.

It was submitted by Mr. Kamanda for the accused that the evidence of PW.4 was one manufactured at the dock and should be rejected as she deliberately failed to inform PW.3 of what she had seen on the night in question. It was further submitted that there was insufficient light for PW.4 to positively identify the accused on the night in question considering the fact that it was actually raining at the time and could not have been possible for her to peep through the window at 10 p.m. at night while raining and manage to identify a person who was ten meters away.

6. I have considered the evidence adduced by prosecution and defence as well as the submissions. The offence the accused has been charged with is that of murder which is defined by Section 203 of the Penal Code as follows:-

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

Therefore in order to establish and secure a conviction for the offence of murder the prosecution must prove beyond reasonable doubt the following ingredients:-

(a) Evidence of the fact and cause of death of the deceased.

(b) Evidence that the deceased met his death as a result of an unlawful act or omission on the part of the accused.

(c) Evidence that the said unlawful act or omission was committed with malice aforethought.

It is to be noted that malice aforethought is established under Section 206 of the Penal Code. When there is evidence of any of the following:-

(i) 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.

(ii) 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.

On the fact and cause of death

7. As regards this first ingredient, it is not in doubt that all the prosecution witnesses 1 – 5 confirmed visiting the scene and saw the body of the deceased lying face downwards with a belt tied around his neck in one of the unoccupied rooms within the rented premises. PW.1 and PW.2 confirmed the body of the deceased to be that of their younger brother Anderson Kilonzo George. It was the evidence of the investigating officer PC Weldon Towett that the body was removed and taken to Kangundo Sub – District Hospital Mortuary where a post mortem was conducted by Dr. Eshiroso who formed the opinion that the cause of death was asphyxia secondary to strangulation. The investigating officer produced the post mortem report as exhibit No.4. Hence the above ingredient was established by the Prosecution.

On the unlawful act or omission on the part of the accused:

8. From the evidence of the five prosecution witnesses none gave evidence to the effect that they saw the accused actually killing the deceased. However, the evidence of PW.4 seems to suggest that the accused had been spotted within the vicinity around 10 p.m. It was the evidence of PW.4 who stated that she peeped through her window and saw the deceased staggering towards the toilet and that the accused lifted him up. It was further the evidence of PW.4 that it was then raining and the premises had no electricity lighting but that there was some moonlight. The said PW.4 appears to be the sole eye witness since all the other occupants appear not to have seen or even heard of any commotion or altercation between strangers within the said plot on the night in question. Again it was the evidence of PW.3 that PW.4 did not inform him at all on what she had observed that night until the following day and when she turned up in court and made the allegations. It is therefore quite baffling for the said PW.4 to keep such information to herself instead of alerting PW.3 who was the plot's caretaker. The investigating officer PW.5 confirmed on cross – examination that the deceased was well known by PW.4. It is instructive that PW.4 did not alert her fellow tenants until the following morning and it was herself who proceeded to where the deceased was lying that morning and then started alerting the rest yet she seemed to have been aware of the deceased's presence in the premises the whole night and whom she had described in her evidence as a stranger. The question to be asked is ***“why did she not alert her fellow tenants of the presence of a stranger within the premises at night?”*** It is also instructive to note from the evidence of the accused in his defence that the said PW.4 had been his wife with whom they had separated over some allegations of infidelity. Indeed the accused was cross-examined by this court when he tendered his sworn evidence and he confirmed that he had married PW.4 and lived with her for three (3) years until they separated in 2007 and were not in good terms as she hated him. It is highly likely that the said PW.4 indeed had a grudge with the accused and had framed him for this offence so as to get at him over their marital problems. It is also instructive to note that several other suspects were arrested by the area chief and upon being handed over to the police, the investigating officer brushed the chief aside and concentrated on the accused only and released those others. The state of affairs at the time at the scene made it rather unfavourable for PW.4 to have clearly pinpointed out the accused in that it was then raining at about 10 pm with no electricity within the compound and it is therefore unlikely for PW.4 to have peeped through her window and identified the deceased and the accused. Indeed visual identification of an accused by a witness in difficult conditions like at night must be treated with caution. (see **Maitanyi Vs= Republic [1986] KLR 198**). Again it is noted that the investigating officer did not bother to have the scene of crime officers visit the area and dust fingerprints on such things as the recovered belt

so as to establish if the accused had had any contact with the deceased. It also transpired that the premises did not have a gate and therefore it was possible for every stranger to enter the same. Moreover there was a bar and restaurant within the vicinity thereby not ruling out an influx of several persons in the area. It is therefore unsafe to rely on the evidence of PW.4 to convict the accused in the absence of any corroborating testimonies.

On malice aforethought

9. The deceased was found with a belt around his neck. This then implies that the attacker intended to either cause the death or cause grievous harm. The accused herein stated in his evidence that he arrived from work at 7 p.m. and retired to bed at 8 p.m. He stated that he woke up the following morning and prepared himself for work and which was confirmed by PW.4. The accused only came back after he was alerted of the presence of a stranger's body in the premises and he rushed back home and joined the members of public. It also transpired from the evidence of PW.4 that the accused and other occupants had requested her to assist fetch rain water for them with the plot. PW.4 had not even alerted the caretaker of the alleged incident the previous night and it was just out of the blue that she implicated the accused the next day by claiming that she was a witness yet she had not alerted the caretaker or other occupants. As the Accused has stated that he and the said PW.4 had previously been married and had separated over some differences, it is highly likely that PW.4 was out to frame him for the offence to settle scores. Under those circumstances it is unsafe to impute any malice aforethought against the accused. The perpetrator might have been a different person other than the accused since several other persons were also arrested but released in unclear circumstances.

10. In the result I find that the prosecution's case is full of inconsistencies and contradictions. The conduct of the sole eye witness (PW.4) raised suspicious as to her sincerity and conviction as to culpability of the accused to this crime.

11. I find from the evidence adduced by the Prosecution it is unsafe to convict the accused. I find the prosecution has not proved its case beyond any reasonable doubt. The defence evidence in my view has created some doubt on the prosecution's case and the benefit of such doubt must be resolved in favour of the accused. I find the accused not guilty and that the charge of murder levelled against him not proved. He is ordered acquitted of the said charge and to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 21st day of March, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Machogu - for the State

Kamanda - for the Accused

Kituva - Court Assistant