



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 64 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

MARGARET KARISA ALIAS SALAMA.....ACCUSED

RULING.

1. The accused, MARGARET KARISA ALIAS SALAMA was first arraigned in court on 19th December, 2013 facing a charge of MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.

The particulars of the charge are that:

“On the 19th and 20th day of October, 2013 at Kichwa cha Nyahi village Mrima wa Ndege location in Ganza sub-county within Kilifi County murdered IBRAHIM POMBE KIDATA.”

2. The accused entered a plea of “NOT GUILTY” to the charge and her trial commenced before court on 29th May, 2014.

3. The prosecution led by the learned state counsel called a total of Eight (8) witnesses in support of their case. M/s Munyale acted for the accused person. Each prosecution witness gave an account of what transpired.

4. P.W.1, KAHASO KIDATA POMBE, the deceased’s wife testified that on 19th October, 2013, her husband KIDATA POMBE proceeded to Ngecha in Malindi to check on his cattle. And at 4:00pm, their son SAMWEL called him on phone but did not find him. That the following day, the accused person’s son gave her the accused person’s phone number. She said that the accused told her that she had seen a motorbike in the forest but had not seen the owner. They then went to Chengu with members of public and found the deceased’s body. She said that she saw he had been hit on the head and was dead. The police were called to the scene and they took the body to Kilifi Hospital Mortuary.

5. In cross examination, PW1 testified that the accused is a sister-in-law and a good person. She said that when her husband left home on 19th October, 2012 at 7:00am he was going to check on his goats and did not tell her that he was going to see the accused. He also never told her he was going to sell goats to other people, although he used to buy and sell goats. PW1 testified that the accused had said that she had not seen the deceased but his body was found in the bushes not far from her home. She further said that she found the accused at the scene of recovery and she was weeping. She did not know whether he had quarreled with her or any other person.

6. P.W.2, LUCAS NAURIMI RANDU, a teacher at Nawangotini Primary School told court that he was also a pastor at Nawangale church. He recalled that on 19th October, 2013, he had agreed with the deceased that he would show him goats for buying. They travelled to Bofu by motorbike and went to three homes. They found 17 goats at Mzee Kahindi Kifaru’s home, three (3) goats at the said home and at Mzee wa Kaya, they met his daughter and told her that they would return. They went to have tea and then went to the third home where they found the goats were in pastures. PW2 said he went home as the deceased, one Elvin and another took another route.

7. He said that later his wife was called by KAHASO (PW1 herein) to find out if he had arrived home. They then started looking for the deceased until they received information that his motorbike had been found at Nailore area. They proceeded there and found the body of the deceased. They said he had been killed and had cut wounds on the head.

8. He called the Assistant Chief who he informed what had happened. The police also came to the scene later and took the body away. He told court that the accused was his cousin’s wife and did not know if there was a grudge between the accused and deceased.

9. When cross-examined, PW2 said that the deceased was also a pastor. He said that the accused was not attending their church since she stayed elsewhere. He denied that he had a grudge against the accused. He admitted that the deceased had been involved in an accident a week before his murder and had sustained injuries on his legs which he had received treatment for. He denied that the deceased sustained injuries on his head though he admitted not having seen his medical cards. He also said that he did not see the accused with the deceased on 19th October, 2013. He then said that it was after a week that they received information that the accused had sent a young man to kill the deceased.

10. In re-examination, PW2 said that he told the police in his statement that he did not know who killed the deceased but they got information from John Ndunda that they should not bother investigating as the accused was the murderer and she had told him so.

11. P.W.3, ELVIS KASALA KARISA KUNDE, testified that on 19th October, 2013, he was at his home when KAZUNGU RANDU went there and told him that the deceased had called to tell him that he had goats for sale. They went and met the deceased with LUCAS, the owner of the goats. They then proceeded to Bofu where they found the goats had been taken to the pastures. They then decided to have the goats transported later. They then went to Naurichafu and then Nailore where they left the deceased, who was riding a bicycle and said he was going to Kichaka Nyani. They went to Vitengeni and then home.

12. PW3 said that the following day, he received a call from KIDATU, a son of the deceased who told him that his father had not arrived home. Later, he told him that his father's motorbike had been recovered.

13. PW3 and Kazungu went to the deceased's home and then to a place where the body was found. He said the deceased was bleeding from the mouth but did not see any injury on him. The police came and took the body to Kilifi mortuary.

14. PW3 told court that one Kanya Kachacha said that he had been sent by a woman to tell them that they should not go on with investigations since she was the murderer. In cross-examination, PW3 denied that he was sent by the accused to Lucas and said that she was the murderer. He said that he did not know the accused and the first time he saw her was at Mariakani Police Station.

15. P.W.4, TAABU KARISA CHAI, told court that he was the Chief of Mrima wa Ndege location, having worked as such for a period of 16 years. His evidence was that on 20th October, 2013 he was at the D.O's office when he received a call from the Assistant Chief, Richard Ngarame informing him that the body of Ibrahim Kidata had been found at Kichaka Nyani within his location. He sent an elder to go to the scene and then called the police from Bamba Police Station and they too proceeded to the scene.

16. PW4 visited the scene the following day at 11:00pm in the company of OCPD, the OCS and they observed it. He went on to state that Margaret Salama, a relative to the deceased called him and he went to her home at about midday. That she told him that she had met the deceased who had taken her in the bushes where he seduced her but before they could have sex, he got epileptic fits and died. He said she also told him that she had sent one Kazungu Kichacha to explain to the family and that she would also explain the same at the funeral.

17. In cross-examination, PW4 said that Margaret, the accused person had told him that the deceased had educated her son and wanted back favours. He also said that the accused did not tell him that she killed the deceased but only said that he got epileptic fits and fell on her. PW4 knew that the deceased would visit the accused person's home.

18. PW5, KAINGU KACHACHA told court that on 19th October, 2013, the accused person called and told him to pass by her home the following day, 20th October, 2013, which he did. That she asked him whether he knew the deceased and went on to explain to him that he had called her to the bushes. PW5 said that the accused is his grandmother. He also said that he had seen the deceased's body the previous day and it was bleeding from the nose. When cross-examined, he said that the accused person did not tell him that she had killed the deceased.

19. PW6, DR. HASHIM SULEIMAN, a medical officer at Kilifi County Hospital told court that he conducted a post mortem examination on the body of Ibrahim Pombe Kidata on 24th October, 2013 at the said hospital and observed that:

- it had multiple depressed skull fractures all over the head.
- a fractured cervical spine with the head hanging freely without support from the cervical spine.

He noted that the fractures involved the frontal region of the head, the occipital region, the temporal and parietal region of the head. He concluded that the cause of deceased's death was severe head injury. He filled and signed the post mortem report which he produced as exhibit P1. When cross-examined, PW6 said that the fractures could have been caused by a fall, accident or assault.

20. P.W.7, NO. 61451, SERGEANT FRANCIS RONO of Bamba Police Station stated that he was among the police officers who went to Mlima wa Ndege on 20th October, 2013 where it had been reported that someone had been killed. They secured the scene where one Reverend Ibrahim Kidata had been found lying dead and he drew a rough sketch plan of the scene. They also took photograph of the scene and identified a motorcycle alleged to belonging to the deceased and had been abandoned about 50 metres from where the deceased's body was lying. He said that the deceased was oozing blood from the nose but they did not find any weapon at the scene which appeared not to have been disturbed. They thought he would have been killed elsewhere.

21. According to PW7, bystanders told them that the deceased was a pastor of the East African Pentecostal Church at Milore and that on 19th October, 2013 he had gone to broker for his son in law to buy sheep and goats and was last seen at 3:30pm. He said that there were three men by the names Sherrif Kazungu, Inzana Ngala and Katrin Tefa, who were from a neighbouring village and the mob nearly beat them. They interrogated the three and found that they had not been involved in the murder of the deceased. They took the deceased's body to Kilifi County hospital where a post mortem examination was conducted. They handed over the file to the CID for further investigation. He

produced the sketch map as Exhibit P2. In cross-examination, PW7 said that on arrival at the scene, he found so many people who included Margaret, the accused person.

22. PW8, NO. 70816, PC DICKSON MISATI OGALLO, gave evidence that on 10th November, 2013, he was instructed by the DCIO, Kaloleni to take over investigations of a case which had been reported at Bamba police station from Sergeant Rono. He found witnesses had recorded their statements. He accompanied his boss and other police officers to the scene at Mlima wa Ndege where they met the chief and interrogated the witnesses.

23. He learnt that the accused person had been seen with the deceased at Chaurungu forest and were engaged in a sexual relationship in the course of which the deceased fainted and died. He traced the accused person and interrogated her but she denied.

24. He then escorted her to the OCS, CIP Samuel Bii who recorded her statement under inquiry in which she admitted having been with the deceased and had sexual intercourse, a result of which he fainted and died. He also said that the post mortem examination indicated that the deceased had died as a result of being hit by a blunt object. He charged the accused person with the offence of murder. The prosecution closed its case and the accused person was placed on defence whereby she opted to give sworn evidence in defence called one witness.

25. The accused, MARGARET KARISA, testified as D.W.1. She denied the offence or ever admitting to the police that she had been with the deceased in a forest where they were making love before he died. She said that she was arrested together with her husband and taken to the police station where they stayed for 7 days.

26. The accused told court that the deceased was a brother to her husband and both of them were pastors in Malanga and Milole respectively. She explained that the deceased had educated their son Micheal Tuva upto form 4 and their relationship was cordial.

27. She explained that on 19th October, 2013, which was a Saturday, she spent the day with her children at a kiosk near their home until 5:00pm when they returned home. She said that on 20th October, 2013 she had come from fetching water at a stream with other village mates when she learnt that the deceased had died and his body found at Charungu. She also joined the members of the family, church and neighbours to the place and saw the deceased lying dead. She went on to say that the deceased was buried after 2 weeks and she attended his burial at Malanga. She was arrested after a month. She denied ever calling anyone at her home and telling them she had been with the deceased before he died.

28. D.W.2, SIMON TUVA, is the son to the accused person. He told court that the deceased, Ibrahim Pombe was his uncle and overseer. He said the relationship between the deceased and their family was good as he had also taken care of his brother Micheal Tuva who he had educated to High School. He denied that his mother murdered the deceased and explained how on 19th October, 2013 he and the other siblings were with their mother at the hotel near their home where they stayed until 5:00pm when they went back home. He also said he learnt of the deceased's death on 20th October, 2013 from the neighbours and he went to the scene where he saw the body lying.

29. The defence closed their case and M/s Munyalle, counsel for the accused person submitted that the prosecution failed to satisfy the threshold in respect of a murder case for a conviction to lie against the accused person.

30. For this court, the issue for determination is whether the prosecution, as required of it by law, has proved the charge of murder against the accused person to the required standard of proof. The offence of murder is defined under Section 203 of the Penal Code as:

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

31. The offence of murder has three ingredients that the prosecution must prove beyond reasonable doubt in order to achieve a conviction. They are:

(a) the death of the deceased and cause of it.

(b) that the accused person committed the unlawful act or omission that caused the death of the deceased.

(c) that the accused person in committing the unlawful act or omission, had malice aforethought.

32. What constitutes malice aforethought is provided for under Section 203 of the Penal Code. That malice aforethought shall be deemed to be established by evidence proving anyone or none 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.

33. For the death of the deceased and the cause of it, the deceased is alleged to have died between 19th and 20th day of October, 2013. According to PW1, PW2 and PW3, the deceased had gone to look for goats to buy with PW2 and PW3. They parted and the following day, the deceased was found dead in a bush at Nailore area.

34. PW6, DR. HASHIM SULEIMAN, a medical officer who conducted the post mortem examination on the body of the deceased on 24th October, 2013 confirmed that the deceased died and he died as a result of severe head injury.

35. PW1, said that she saw the deceased had been hit on the head. PW2 said that he saw the deceased had cut wounds on the head. PW3 said he only saw the deceased bleeding from the mouth while PW5 said he was bleeding from the nose. PW7 also said the deceased was oozing blood from the nose. The evidence of the deceased's death and cause of it was as evidenced by the Doctor, PW6. It was not challenged, hence the same has been proved beyond reasonable doubt.

36. The next issue of determination is whether the deceased's death was caused by an unlawful act or omission of the accused person. The accused person was arrested and charged with causing the death of the deceased.

37. For the evidence of PW1, PW2 and PW3, the deceased together with PW2 and PW3 went to check a goats for sale on 19th October, 2013 at Bofu area. They found the goats had gone to the pastures to graze. They then agreed to have the goats transported. PW3 and another by the name Lucas together with the deceased went to Nauriachafu and then Nailore where they left the deceased. The deceased did not return to his home on that night and the following day his motorbike was found in a bush at Kichaka cha Nyani and his body lying dead about 50 metres from the said motorcycle.

38. According to PW1, and PW2, the deceased had an injury on the head. PW3 said that the deceased was bleeding from the mouth while PW4, the Chief said he was bleeding from the mouth and nose. PW4, the Chief of Mrima wa Ndege called Bamba police station and the OCS, CIP David Wafula, PC Maingi (Driver) and PC Kirui proceeded to the scene where they found the deceased's body and motorcycle.

39. It was PW4's evidence that the accused person had told him that she had met the deceased and they had gone to the bush where he had seduced her but before they could have sex, he got an epileptic attack and died. He also said that the accused person told him that she had sent Kaingu Kachaka to explain this to the family. PW5 said that the accused person called and explained to him that the deceased had called her to the bushes.

It is worth noting that both PW3 and PW5 in cross-examination said that the accused person did not tell them that she killed the accused.

40. he accused person was arrested and charged with the offence of having caused the death of the deceased but clearly, from the evidence of all the witnesses, she was neither seen doing it nor found at the place where the deceased's body was found lying dead and motorcycle standing about 50 metres from it.

41. PW4, the Chief is the one who gave evidence which I believe led to the arrest of the accused person. He said that the accused person told him that she had been seduced by the deceased and they had gone into the forest, where before they would have sex, he suffered an epileptic attack and died. PW2 and PW5 also gave evidence that the accused person told PW5 that she had been with the deceased. I find none of their evidence holds any water as against the accused person.

42. Furthermore, the issue of epilepsy has not featured in the evidence of any of witnesses such as the wife who would give such history of the doctor who conducted the post mortem examination to establish the cause of death.

43. And more importantly, there is no evidence that the accused person gave any confession statement because what is alleged by PW4 does not amount to confession because it does not qualify as such under the provision of Section 124 of the Evidence Act. Further on the evidence of PW7, the Investigating Officer, that appeared to suggest that the deceased could have been murdered elsewhere and his body brought where it was found since the scene was not disturbed, doubt arise as to where the deceased was murdered and how culpable is the accused person in relation to where she resides.

44. In her defence, the accused person (DW1) and DW2, her son, Tuva, the accused told court she was at her kiosk where she carries out her business together with her children on 19th October, 2013. They said she spent the night at her home with her husband and children and she denied telling anyone that she was with the deceased and that they had gone to the forest to have sex when he collapsed and died.

45. Clearly from her defence, the accused person has raised an alibi which I find requires no explanation from her since the prosecution's evidence against her is insufficient.

In the case of **REPUBLIC –VERSUS- SOLOMON KIRIMI M'RUKARIA, MERU HIGH COURT CRIMINAL APPEAL NO. 46 OF 2011**, the court stated as follows:-

“The accused person does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin, an alibi which is not particularly strong may well raise doubts.”

46. In view of the foregoing, the prosecution has failed to prove beyond reasonable doubt that the accused person caused the death of the deceased. The accused person having been found not to have caused the deceased's death, I find that the issue of malice aforethought does not arise.

47. The prosecution having failed to satisfy the threshold required for the offence of murder, I find the same not proved beyond reasonable doubt, the accused not guilty and acquit her accordingly.

DELIVERED, DATED and SIGNED at MOMBASA this 15th day of March, 2018.

D. CHEPKWONY

JUDGE.

IN THE PRESENCE OF:

M/S Ocholla, counsel for the state

Mr. Nalela, counsel holding brief for M/S Munyalle for the accused person

Accused; Present

Court Assistant; Beja