



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL CASE NO. 13 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PAUL MWANGI MACHARIA.....ACCUSED

JUDGMENT

1. Rose Njerina Tema (deceased) hereinafter referred to as Rose was murdered at a young age of 22 years. The post-mortem revealed that Rose was stabbed five times in her neck. She died of excessive bleeding. She lay dead on her bed for three days, before her front door was broken by the police, who had received information that there was a foul smell coming out of her room. The police who retrieved her body found a knife, with blood stains, and a cell phone. The government chemist analyst, Lawrence Kinyua Muthuri, found that the blood stains on that knife matched the DNA profile generated from Rose's blood sample.

2. Paul Mwangi Macharia (the accused) is charged with the murder of Rose. The particulars of the charge are that he, Paul Mwangi Macharia, on the night of 9th and 10th April 2013 at Nanyuki Township in Laikipia County murdered Rose Njerina Tema.

3. The prosecution's evidence, which was confirmed by the accused, was that the accused was a boyfriend of Rose. Evidence of the prosecution also revealed that Rose had intimate relationships with two other men. One of them James Makarios who testified in this case as PW 4. The other man did not testify, and he was the boss of Rose. He was called Mureithi. The fact that Rose had intimate relationships with those men becomes relevant in determining whether the prosecution proved, on the required criminal standard, that the accused murdered Rose.

4. James Makarios stated in evidence that he and Rose were in the same school together, from primary to secondary school. After completing their education they lived together for six months. Their love affair did not last because he did not approve of Rose's late night arrival at their residence. They parted their ways in early April 2013.

5. James Makarios in evidence stated that a week after his separation with Rose he went to the restaurant where Rose worked. He had gone there to have lunch. Rose then introduced him to the accused who Rose said was her husband.

6. The accused and Rose worked at the same restaurant called New Kungu Maitu in Nanyuki town. The accused in his defence stated that he and Rose were lovers and that they had no disagreement with each other at the time of her death.

7. Sakita Nyoroka (PW 7) a cousin of Rose also worked at the New Kungu Maitu restaurant. She was aware of the love relationship between the accused and Rose. She stated that in February 2013 when their boss, Mureithi, discovered that love relationship he transferred the accused to a branch restaurant called Kungu Maitu, in Nyeri.

8. Felista Brigita Garmushe a first cousin of Rose testified and while being cross examined stated that Rose had also an intimate relation with her boss Mureithi. This is how she put it:-

“They (Rose and Mureithi) were friends over and above being employer, employee.”

9. In my consideration of the evidence adduced, more particularly by the prosecution's witnesses, I formed the clear opinion that the police failed to carry out their duties properly by not thoroughly investigating this case.

10. It is clear that Rose at the time of her death was intimately relating with other men other than the accused. James Makarios broke off his relationship with Rose because he suspected she was having an affair with someone else. That came out very clearly when he was cross examined. He stated while being cross examined that he separated with Rose in early part of April 2013. That period of their parting is

important when one considers that Rose was murdered on the 9th or 10th April 2013.

11. James Makario's also stated in evidence that Rose introduced him to the accused and in so doing Rose described the accused as her husband.

12. On the whole I did not find James Makarios to be a truthful witness. I had the opportunity to observe him as he testified and I formed the opinion he was not telling the truth and even when he was questioned about his relationship with Rose; Whether they lived together as husband and wife, I noted that he was looking uncomfortable.

13. But perhaps what was to me the most untruthful statement was when he stated while being examined in chief, that he was in the same school with Rose from primary to secondary, but when he was later asked while being cross examined, to read his statement to police he stated:-

"I cannot read or write."

It is in that statement he told police that he separated with Rose because he suspected she was being unfaithful to him.

14. It seems that Rose may have been intimately relating with the accused, even as she lived with James Makarios. This is because the accused stated that he had relationship with Rose for nine months before she died.

15. When James Makarios was questioned of how he felt of Rose relating with the accused he gave what I thought was less than candid answer. He said he felt good.

16. When Rose was relating with the accused, Rose's first cousin, Felista Brigita Garmushe stated in evidence in respect to Makarios:-

"Makarios was [a] secret admirer of Rose but Rose did not like him."

17. There was therefore, in respect to Makario, a motive to kill Rose. He admired her but she preferred to relate with the accused.

18. Similarly there was a motive on the part of the accused to kill Rose. It is clear that the accused was suspicious, which suspicion was well founded, that Rose was intimately relating with their boss Mureithi. There was evidence, that the accused once reacted angrily to a phone call that came from Mureithi to Rose's phone, while they were together. The accused broke Rose's phone. Prosecution's evidence was also to the effect that the accused threatened to kill Rose, through text messages.

19. Mureithi was not called to give evidence in this case and yet it is clear that his evidence may have assisted this court.

20. But more importantly even though the police recovered Rose's phone, when her body was retrieved, the same was not subjected to examination to confirm whether indeed the accused sent rose text messages threatening her.

21. In my view the police did no investigations but simply arrested the accused because the larger family of Rose suspected him to be the murderer. This suspicion is clearly shown in the evidence of Tema Saaya Karmushu, half brother of Rose. This witness narrated how Rose's body was retrieved by police then stated:-

"Later I met a lady neighbour. She was living on the plot. It was her Rose Nyoroko (PW 7) and Brigita (PW 8). They came – we began to discuss on who could have killed deceased. One of them said she had a boyfriend called Paul Mwangi (the accused)."

22. From that evidence, it is clear that the accused was arrested because family members of Rose, suspected him, and they suspected him only because he was Rose's boyfriend.

23. The prosecution relied on what is termed as circumstantial evidence. Circumstantial evidence was stated in the case **REPUBLIC –V- GEOFFREY CHERUIYOT** alias **ERIK KIPROTICH KIRUI [2015] eKLR** as follows:-

"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."

24. In this case there are no chains which this court can attempt to link. There is simply no evidence, circumstantial or otherwise, which can lead this court to determine that the accused is guilty of the charge of murder.

25. The evidence of the supposed threats by the accused to kill Rose was given by close family members, who as stated before determined that the accused, who was Rose's boyfriend, must have been the one who committed the murder. The police failed to bring before court evidence of the alleged text messages sent by accused which threatened Rose.

26. I totally discount the evidence of alleged confession of the accused which evidence was given by Rose's half brother Saaya Tema (PW 6).

PW 6 stated that the accused on seeing him on 14th April 2013 at Kungu Maitu, Nyeri, he ran way but was apprehended by police. That on being apprehended the accused confessed that he killed Rose because she was having an affair with Mureithi.

27. That evidence of confession is wholly contrary to the evidence of the arresting officer P.C. David Sambu Musyioki who said that on accused being identified as he arrived at his place of work, he was arrested then he stated thus:-

“There was no incident at the scene of arrest.”

The officer stated that on arresting the accused he was taken to Nanyuki Police Station.

28. Bearing that evidence in mind it become clear that PW 6, Rose’s half brother, was not telling the truth when he said the accused confessed of having killed Rose.

29. Accused was arrested and charged with the murder of Rose on suspicion. Suspicion cannot infer guilty. This was stated in the Court of Appeal case **JOAN CHEBICHII SAWE –v- REPUBLIC Criminal Appeal No. 2 of 2002**, as follows:-

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (criminal appeal No. 17 of 1998) (unreported) suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

30. There is no evidence which can lead to the conviction of the accused on a charge of murder. There is, in this court’s view, the very likelihood that another person could have murdered Rose. That doubt that I entertain shall be to the benefit of the accused. I therefore enter a verdict of not guilty and hereby acquit Paul Mwangi Macharia of the charge of murder.

DATED AND DELIVERED AT NANYUKI THIS 18TH DAY OF APRIL 2018.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Accused: Paul Mwangi Macharia

For Accused

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE