



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE (MURDER) NO. 30 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MARGARET WANJIKU OCHIENG.....1ST ACCUSED

ROSELINE ADHIAMBO MIRERI alias Nyar Oyugis.....2ND ACCUSED

JUDGMENT

1. Accused herein are jointly charged with 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 2nd May, 2015 at Kakola/Ahero sub-location, Nyando Sub-County within Kisumu County, jointly with another not before the court murdered **SALINE AKINYI OCHIENG**. The accused persons denied the charges.

PROSECUTION CASE

2. The prosecution called six witnesses. Deceased and accused 1 are respectively the 1st and 2nd wives of one Victor Ochieng alias Japolo. Japolo is alleged to be a pastor whose home people usually visited for alleged miraculous prayers. Accused 2 was one of the miracle seekers who visited and stayed for prolonged periods at Japolo's home.

3. PW1 George Otieno Adika, Ahero community policing chairperson recalled that on 8.5.15, while he was at Ahero Township; he heard bodaboda riders saying that Japolo had killed his wife. That on the same day at 9.00 pm, the area assistant chief informed him about the murder of Japolo's wife. That he went to Ahero Police Station on 9.5.16 and found that the murder had not been reported and while at the police station, Japolo called him and told him that his wife had been killed and he requested him to go and talk to the 1st accused who was his 2nd wife. That accused 1 informed him that deceased had left home at 3.00 am for Kibuye market where she used to sell clothes and had been found lying alongside Kisumu-Ahero road at about 4.00 am from where accused 1 and 2 took her to hospital where she subsequently died.

4. PW2 Albert Odhiambo Ojuang, a taxi driver recalled that at 3.00 am on the morning of 3.5.15, accused 1 who was his customer asked him to go to her home and assist her take a sick person to hospital. That she went to Japolo's home where she found accused 1; accused 2; one Otieno; the sick lady and another man. That accused 1; accused 2; Otieno and the other man carried the sick lady who was covered with a blood stained lesa to the taxi and he took her to Kisumu Hospital in company of the 2 accused persons and another lady. That he left them at the hospital and went his way.

5. PW3, Joseph Otieno, recalled that on 2.5.15 at about 7 pm, he as usual went to his uncle's home (Japolo's home) to collect food for his grandmother. That he after delivering food to his grandmother, returned to the house of Japolo where several people were served with food prepared by accused 2 and then he went to sleep in one of the houses in Japolo's compound. That in the middle of the night, he heard Saline, the first wife of Japolo whom she had known since he was a small boy crying from her house asking to be taken to hospital. That he also heard the voices of accused 1 and 2 in Saline's house but did not hear what they were saying. That Japolo called him to wake up and when he awoke and went to Saline's house, he found accused persons but did not see Japolo. That he assisted accused persons to carry Saline, who looked weak and sickly and could not walk, to a vehicle that was parked outside the house and she was taken to hospital. That he later learnt that Saline had died and accused persons were thereafter arrested. PW4 Christopher Otieno Juma was the owner of the vehicle that PW2 had used to take the deceased to hospital on the night of 2.5.15.

6. Dr. Corazone Deya a medical officer at Jaramogi Oginga Odinga Teaching and Referral Hospital produced deceased's postmortem report PEXH. 1 filled by her colleague Dr. Omondi Mboya. The report showed that deceased had the following injuries:

- swollen face with swelling around the eyes

- bruises around the eyes

- 3 cm cut sutured wound on front of face
- Abrasions and 10 cm and 14 cm contusion on right and left forearms respectively
- Swollen left forearm
- Contusion on right thigh
- Cuts on right foot
- Contusions on lumbar region
- Hematoma and scalp edema
- Contusion brain injury
- Bilateral subdural and sub cranial hematoma

The doctor formed an opinion that deceased died of severe head injury due to blunt force trauma, associated with circulatory collapse secondary to multiple soft tissue injuries.

7. PW6 IP John Mutai stated that in the course of investigating this case, accused persons told him that they had found deceased at Rabuor area about 10 km from their home on the early morning of 3.5.15 after they were informed about her condition by a bodaboda and that they had taken her to Hospital where she died. That PW2 and PW3 upon being interrogated stated that deceased was collected from the house of accused persons and was taken to hospital in a taxi. That he formed an opinion that accused persons had lied and charged them with the offence of murder.

DEFENCE CASE

8. When the accused persons were placed on their defence, the 1st accused made a sworn statement to the effect that he was called by a bodaboda about 5.00 am on the morning of 3.5.15 who took her and accused 2 at Rabuor where they found the deceased who was injured and they took her to hospital where she was pronounced dead.

9. Her witness, Michael Omondi, a bodaboda rider stated that on 3.5.15 at about 4.50 am or 5.00 am, he found deceased lying on a road being beaten by 3 men he identified and he reported the matter to accused 1 and accused 2 who went to the scene and took deceased to hospital. He said he went to report the matter to police but found the 3 suspects talking to a police officer and the officer chased him away from the police station.

10. 2nd accused in her sworn defence stated she had gone to the home of Japolo who was husband to deceased and accused 1 for prayers. It was her evidence that she and other prayer seekers were staying in the guest houses in Japolo's compound. She recalled that on the material night at about 4.00 am, accused 1 called her and 3 other guests and told them that deceased had been attacked by thieves. That accused 1 called for a taxi. That PW2 arrived in a taxi and she, accused 1, PW3 and 2 other women carried deceased to the taxi which took her to hospital where she was pronounced dead. In cross-examination by Ms. Wafula for the state, she maintained that she found deceased in her house, injured. She denied going to Rabuor with accused 1 or finding deceased at Rabuor area. She denied that deceased named any 3 men as the ones that had injured her. In cross-examination by Mr. Amondi for accused 1, she maintained her evidence that she found deceased injured in her house and not at Rabuor. She denied that she was implicating accused 1 to save herself.

11. I have considered the evidence on record and submissions filed on behalf of both accused persons.

ANALYSIS AND FINDINGS

12. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. Those ingredients are as follows:-

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence

(a) Proof of the fact and cause of death of the deceased

13. The death of the deceased has been evidenced by prosecution witnesses and accused persons and by the postmortem form which confirms the cause of death. The Court therefore finds as a fact that indeed the deceased herein died.

b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused person

14. From the evidence on record, none of the prosecution witnesses saw accused persons murder the deceased.

15. PW2 stated that he was called by Japolo to the house where the deceased was lying injured and that he found both accused persons in that house. The presence of the two accused persons at the house where the offence was committed is not in dispute. Equally, that the two accused with the help of PW2 and 3 took the injured deceased person to PW2's taxi and later to hospital is not in dispute. That the deceased later succumbed to her injuries is also not in dispute.

16. Accused persons' role with regard to the admitted assault of the deceased is disputed. The court must determine whether the two accused and another not before court, with malice aforethought inflicted the injuries that resulted in the death of the deceased. Admittedly, the incident in which the deceased sustained the fatal injuries occurred in the Japolo's home where accused persons and deceased lived. PW3, who is Japolo's nephew occasionally slept in one of the houses in the said home. The two accused persons were well known to PW3. PW3 said that he was called from his sleep to the scene by Japolo and that when he arrived at the scene, he found both accused persons there but did not see Japolo. It was his evidence that deceased had already been injured when he arrived at the scene.

17. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence taking into consideration the fact that the accused persons being interested parties may have lied to save themselves.

18. As we know from Republic –vs- Taylor Weaver and Donovan (1928) 21Cr. App. R. 20

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

19. In SAWE –V- REP[2003] KLR 364 the Court of Appeal held:

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.

20. In Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR), cited by accused 1, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

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 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 none else.

21. In order to establish the accused persons culpability, the prosecution suggested that the accused persons were in the same house where the deceased was on the material night and where she was injured yet lied to the investigating officer that deceased was found at Rabuur about 10 km from her home. Evidence that deceased was assaulted at her home, in Japolo's compound, is corroborated by PW2 and PW3 who confirmed that they assisted accused persons to carry deceased who was injured from her house to the taxi in which she was taken to hospital by PW3, accused persons and another lady.

22. It has been alleged that PW3 was coerced to implicate accused persons. That is however far from the truth since his evidence has been corroborated by that of PW2. It is therefore not correct to say that the investigating officer wholly relied on the evidence of PW3 who was coerced. On the other hand, PW2's evidence that he took the deceased to hospital from the compound of Japolo where deceased and accused 1 lived has been corroborated by PW3.

23. Having said that, I find that the prosecution case that deceased was injured in her house within Japolo's compound which is well corroborated has completely destroyed and weakened the evidence tendered by accused 1 and her witness that deceased was found injured at Rabuur area.

24. I have also considered the evidence of accused 2 that deceased injured in her house within Japolo's compound and it is in tandem with that of PW2 and PW3. The issue in question is whether the court should attach any weight to accused 2's.

25. It has also been stated in many authorities that:

"A confession by an accused involving his co-accused when unsupported by other testimony is evidence of the weakest kind against such co-accused. It is accomplice evidence needing corroboration. (See Anyuma s/o Omolo & Another v Republic (1953) 20 EACA 218).

26. It has also been held that ***"It would be difficult to conceive a case in which it would be proper to convict on the unsupported evidence afforded by the confession of a co-accused"***. (See Republic v Wadingombe bin Mkwanda & Others (1941) 8EACA 33).

27. The Court of Appeal in the case of Antony Kinyanjui Kimani v Republic (2011) KLR (Criminal Appeal 15/2007) grappled with this question and stated *inter alia*:

"What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2 EA 559, the supreme court held that "in a criminal trial a witness is said to be an accomplice if, *inter alia*, he participated as a principal or an accessory in the commission of the offence, the subject of the trial", The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:

"On the authorities, there appears to be no one accepted formal definition of "accomplice". Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davies of Director of Public Prosecutions (supra), the House of Lords said at 513:

'On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as failing within the category: (i) on any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).'

28. In one of the earliest cases on the subject, the Court of Appeal for East Africa in the case of Republic -vs- Ndara s/o Kariuki & 6 others (1945) 12 EACA 84, at Page 86 prescribed the correct approach in dealing with accomplice evidence as follows:

"A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief."

29. In reiterating the foregoing the court stated in Kinyua -vs- Republic (2002) 1 KLR 256 that:

"Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly."

30. From the foregoing, it is apparent that in evaluating evidence of an accomplice witness, the courts adopt the cautionary rule whose function and scope is to serve as a reminder to the courts that the facile acceptance of the credibility of certain witnesses may prove dangerous. The cautionary rule requires, first, that the court should consciously remind itself to be careful in considering evidence which practice has taught, should be viewed with suspicion and secondly, that the court should seek some or other safeguard reducing the risk of a wrong finding based on the suspect evidence. It has often been stressed, however that the exercise of caution should not be allowed to displace the exercise of common sense. Usually corroboration satisfies the cautionary rule but it is not the only factor, any other factor which can in the ordinary course of human experience reduce the risk of a wrong finding will suffice.

31. I have reviewed the evidence by PW2 and PW3 whom I had an opportunity to watch both in their evidence in chief and during length cross-examination and I am convinced that they are credible witnesses. Accused 2's defence by and large corroborated the evidence of PW2 and PW3 that deceased was indeed assaulted in the house where accused 1 was. Evidence that Japolo called PW3 to the scene and later disappeared also leaves no doubt in the mind of the court that Japolo was also at the scene where deceased was injured. Even after considering that accused 2 is an obvious accomplice with an obvious possible motive to tell lies to obtain immunity for herself, her evidence gave details of the crime, similar to those of PW2 and PW3 which aptly gives the court the impression that she was telling the truth. I have also considered that the risk of false incrimination is reduced by the fact that accused 2 is an acquaintance of accused 1.

32. I have considered both the prosecution and defence cases and I have not found any material discrepancy between accused 2's evidence and PW2 and PW3's testimony. I am therefore satisfied that the truth lies in the fact that accused 1 and Japolo were at the scene where deceased was injured and participated either actively or passively in the unlawful act.

33. I have also considered the provisions of **Section 20** and **Section 21** of the Penal Code. It becomes necessary to consider whether the two sections can be applied to the facts in this case. The application of the sections has been considered in several decisions. In the case of Njoroge vs. Republic, [1983] KLR 197 at p. 204, the Court of Appeal stated that: -

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

34. Their common intent may be inferred from their presence, their actions and omission of either of them to disassociate himself from the assault. (*See Republic v Tabulyenka S/o Kirya (1943) EACA 51* and *Dracaku s/o Afia -vs- Republic (1963) E.A 363.*) Accused's 1 common intent can safely be deduced from the fact that she plainly lied that deceased was found at Rabuor which is about 10 km from where she was actually injured. Accused 1's guilty mind is exhibited by her attempt to conceal that deceased was injured in her house and not at Rabuor. Accused 1 has also made every possible effort to conceal the presence of her husband, Japolo, at the scene where deceased was injured.

35. From the foregoing, I find that accused 1 and another combined for an unlawful purpose in which deceased was killed which constitutes the 'actus reus' of the offence. The extensive and life threatening injuries inflicted on the deceased leaves the court in no doubt that the injuries were inflicted with an intention to cause grievous harm or death of the deceased which constitutes the *mens rea* of the offence. I accordingly find accused 1 guilty as charged and convict her accordingly.

36. I find no incriminating evidence against accused 2 and she is found not guilty and is acquitted and set free unless otherwise lawfully held

DATED, DELIVERED AND SIGNED THIS 24th DAY OF May 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Accused 1 & 2 - Present

For Accused 1 - Mr. Ariho holding brief for Mr. Achura

For Accused 2 - Mr. Ariho

For the State - Ms. Wafula