



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL CASE NO. 24 OF 2017**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**DANIEL EKURU KITELA.....ACCUSED**

**JUDGEMENT**

1. The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code [Cap.63] Laws of Kenya in respect of the deceased Lispah Mokeira Ndubi. The accused pleaded not guilty.
  2. The prosecution called five (5) witnesses in support of the charge.
  3. The accused made an unsworn statement and called no witnesses in his defence.
  4. The prosecution called Moses Odhiambo Owuor (PW2) who is a resident of Lenana Estate in Narok town. Pw.2 is a caretaker in the employment of Abdul Azim, the landlord of the accused. PW2 is also a member of “Nyumba Kumi”.
  5. As a caretaker PW2 rented out houses of his employer to prospective tenants. In doing so, PW2 required an incoming tenant to provide a copy of his identity card and cell phone number.
  6. On 20/11/2016 PW2 left his place of work and went to Naivas Supermarket. Thereafter he returned and found the accused who was a tenant in a one roomed house number 14A, which was opposite to that of PW2. They were separated by a corridor. The accused was with a lady visitor.
  7. On 21/11/2016 PW2 went to do manual work at a building site in town near the university and returned to his residence at about 4.00pm. PW2 then found the body of the deceased dumped in the building that was incomplete. PW2 was able to identify the deceased as the lady visitor who had come with the accused the previous day on a Sunday. The deceased lay face downwards with her arms spread out.
  8. Furthermore, PW2 testified that the deceased had an injury on the temple part of her head. He then made a report to Narok Police Station. At about 8.00pm the police came and took the body of the deceased to the mortuary. At about 10.00pm the police arrested the accused.
  9. It was also the evidence of PW2 that the accused became a tenant in that one roomed house in 2012 in room number 14A. He then produced a copy of the accused’s identity card as exhibit 1 and a list of tenants in that plot was put in evidence as exhibit 2. PW2 finally testified that on 20/11/2016 the deceased and accused entered house number 14A at 1.30pm.
- Alloys Joseph Lengesia (PW1) is the chairman of Nyumba Kumi at Lenana estate. He got a report of the death of the deceased which he reported to the police.
10. The prosecution also called Kamburu Saul Matagaro (PW3) who with the father of the deceased identified the body of the deceased, to the doctor, who carried out a postmortem examination on the body of the deceased. PW3 testified that the deceased was dressed in a black skirt and a skin tight pair of shorts and a sweater.
  11. PW3 further testified that the deceased, who was his niece left home on 20/11/2016 and went to have her hair plaited. She never returned. He then searched for her whereabouts until 25/11/2016, when he got information that her body was in the mortuary, which he later confirmed.

In addition to the foregoing witnesses, the prosecution called number.4623 Cpl. Paul Kiilu (PW4) of scenes of crime. He took photographs of the deceased which were put in evidence as exhibit 5 (a), 5 (b) and 4 (a) and 4(b) respectively.

12. PW4 also took the body of the deceased from the scene to the mortuary. Additionally PW4 also took the blood stained shirt of the accused from his house for DNA profiling which was put in evidence as exhibit 7.

13. Finally, the prosecution called number 80369 PC. Dan Onyango (PW5), who was attached to CID Narok. He was the investigating officer. It was his evidence that deceased was with the accused on 20/11/2016. It was also his evidence that the deceased and accused disagreed on the amount of money payable to the former for her sexual services to the latter.

14. PW5 further testified that the two had agreed that the deceased was to be paid Shs.400, but the accused only had Shs.350. There was a blood stained t-shirt that was recovered from the one roomed house of the accused. PW5 produced it as exhibit 7.

15. Furthermore, PW5 produced in evidence the postmortem report of Dr.Mutai Kiplangat Titus, as exhibit 3. Exhibit 3 was produced by consent. According to exhibit 3, the deceased was aged 29 years old and was 5 feet and 7 inches tall. The doctor found multiple bruises on all limbs, buttocks, abdominal wall, face and neck. The neck, face and mouth were swollen. There was a huge dark abrasion on the forehead. There was a head injury with multiple bruises caused by a blunt object. The cause of death was due to cardio-respiratory arrest secondary to very severe head injury and sexual assault following possible assault with a blunt object.

16. The prosecution was granted an adjournment to call the Government Analyst on 19/7/2017. Thereafter they were granted five more adjournments between 19/9/2017 and 6/3/2018 to enable them call the government analyst. On 6/3/2018 the last prosecution adjournment application was refused. As a result they closed their case.

17. Upon being put on his defence, the accused made an unsworn statement. He stated that he was a building construction fundi. On 20/11/2016, he went to look for casual labour, which he did not get. As a result he went to drink alcohol at Tushauriane bar, where he met the deceased. They then drank together. The deceased told him that she was a prostitute. Thereafter, the two went to the house of the accused at 1.30pm and made love till 4.00pm. He then paid her Ksh.450 and she then left.

18. The following day on 21/11/2016, the accused went to work and returned to his house at 6.00pm, where he left the shopping he had done. He then proceeded to see her mother's friend at Lenana Centre whom he did not meet. He then returned to his house at 8.00pm, cooked and ate. Furthermore, he stated that at 9.00pm police went to his house and arrested him for making noise to other tenants in the plot. He further stated that police carried out a search and recovered a shirt, which he stated was not his. He was then charged with murder on 22/11/2016.

19. Counsel for the accused, Ms. Kudate filed written submissions in which she cited *R.V. Martin Kinyua Nancy (2016) eKLR*, *Roba Galma Wario V. R (2015) eKLR* and *Nzuki V. R. (1993) KLR*. In all these cases the ingredients of an intention to cause murder were analyzed. The ingredients are as follows:

- i. The intention to cause murder.
- ii. The intention to cause grievous bodily harm.
- iii. Where the accused knows that there is a risk that death or grievous bodily harm will ensure from his acts and commits them without lawful excuse.

20. Counsel for the prosecution did not file written submissions as he is barred from doing so by virtue of section 310 as read with section 161 of the Criminal Procedure Code [Cap 75] Laws of Kenya.

21. I have considered the totality of both the prosecution and defence evidence, in the light of the applicable law.

I have also considered the submissions of counsel for accused. As a result I find the following to be the issues for determination.

- i. Whether or not the circumstantial evidence points irresistibly to the guilt of the accused.
- ii. Whether or not the accused cause the death of the deceased.
- iii. Whether or not the accused had malice aforethought.

### **Issue 1**

There is no eye witness who saw the accused cause the death of the deceased. It therefore follows that the evidence against the accused is circumstantial in nature. In order to convict the accused on circumstantial evidence, such evidence must irresistibly point only to his guilt.

22. Furthermore, the chain of circumstances that point to the guilt of the accused should not be broken. Any break in the chain of circumstances means that the accused is not guilty of the offence according to *Republic V. Phylis Grace Karimi, Criminal Case Number 29 of 2015 (Embu)*.

In the light of the foregoing pronouncement of the law, I have considered the whole evidence tendered at trial by the prosecution and the defence, as required by law according to *Oketch Okale & Others V. Republic (1965) E.A 555*. As a result I find that the deceased was last seen alive by Moses Odhiambo Owuor (PW2) with the accused in the afternoon of 20/11/2016, entering the one roomed house of the accused in Lenana estate in Narok town. The deceased was found dead the following day on 21/11/2016 behind the incompleting building, 50 metres from the one roomed house of the accused.

23. The evidence of the accused in this regard is that the deceased left his house after 4.00pm on 20/11/2016. This was after they had had a love affair. This evidence is not rebutted by the evidence that was tendered by the prosecution.

24. Furthermore, the prosecution tendered evidence through number 80369 PC. Dan Onyango (PW5) that the deceased and accused had agreed to have sex at an agreed sum of Shs.400. PW5 testified that the accused only had Ksh.350. This is what led to the disagreement between them.

25. There is further evidence of PW5 that a blood stained T-shirt was recovered from the house of the accused, which among other exhibits, was forwarded to the Government Chemist for analysis. The blood stained T-shirt was recovered from the house of the accused by Number 4623 Cpl. Kiilu (PW4).

Unfortunately, the evidence of the government analyst was not tendered in evidence due to the inability of the prosecution to secure his attendance as a witness. It is important to point out that the court granted the prosecution five adjournments between 19/7/2017 and 6/3/2018 to enable them to get the analyst to testify without success.

26. It is clear from the foregoing evidence that the prosecution are relying on the evidence that the deceased was last seen alive with the accused. I find from the totality of the evidence that the accused had sex intercourse with the deceased. I also find that the deceased was last seen alive on 20/11/2016 with the accused.

27. Furthermore, I find that the accused disagreed with the deceased as to the amount of money payable to her. PW5 testified that the deceased demanded Shs.400 while the accused only had Shs.350 in respect of the sexual intercourse. This does provide a motive for the cause of death of the deceased.

28. I therefore find that the circumstantial evidence fell short of proving that the accused caused the death of the deceased.

## **Issue 2**

I find from the severe injuries inflicted on the deceased, that she was murdered. Whoever inflicted those injuries intended to cause the death of the deceased. I therefore find that the offence of murder was proved.

29. The upshot of the foregoing is that I find that the accused is not guilty of this offence of murder in terms of Section 306 (i) of the Criminal Procedure Code [Cap.75] Laws of Kenya. He is therefore acquitted under section 322 (i) of the Criminal Procedure Code.

30. The accused is hereby set free unless he is held on other lawful warrants.

**JUDGEMENT DELIVERED in OPEN COURT this 19<sup>TH</sup> day of JUNE, 2018**

in the presence of both Ms. Torosi for the state and Ms. Kudate for the accused, but in the absence of the accused.

**J. M. BWONWONGA**

**JUDGE**

**19/6/2018**