



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 58 OF 2011

REPUBLIC.....PROSECUTOR

=VERSUS=

K K.....1ST ACCUSED

BENSON MULEI WAMBUA.....2ND ACCUSED

JUDGEMENT

1. The two accused persons herein **K K and BENSON MULEI WAMBUA** were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the night of 25th and 26th day of August, 2011 at [particulars withheld] village, Athi river District within Machakos County, jointly murdered **J M K alias D K**. Both accused denied the charges levelled against them thereby warranting a trial.

2. The prosecution called a total of nine (9) witnesses in support of its case. Joel Kyalo Mula (PW.1) the Chief of Athi River location received a report by members of public that a certain lady had been found murdered near his office and that the body had already been taken by the police. He rushed to the scene and found the 1st accused herein among the crowd and on learning that he was a brother to the deceased he escorted him to Athi River police station. He also handed over to the police the 2nd accused herein whom he had known before as police claimed that he was a suspect. The chief went on to state that he had known both the deceased and 2nd accused as the duo had been to his officer over some disagreement a few weeks prior to the incident. **K M (Pw.2)** was the father of the deceased and 1st accused herein. He stated that the 1st accused herein left Athi River and went to Kitui and informed him that robbers had attacked him and the deceased while they were asleep and that the deceased had been killed in the process. He proceeded to the scene and saw the body and organized for the same to be taken to a mortuary.

Martin Kimathi Mugambi (PW.3) stated that he had met the deceased who ran a business at Athi River market and they got to know each other and even exchanged mobile phone handsets. He further stated that he stumbled upon the deceased at the office of the area chief where the 2nd accused herein who warned him to keep off from the deceased as she was his (2nd accused) wife. The deceased later informed him that she had had a disagreement with the 2nd accused over the issue of the exchange of mobile phone handsets. It was then that he and the deceased agreed to swap back their mobile phones to avoid problems from the 2nd accused herein. He later learnt that the deceased had been killed.

Daniel Mulandi Kikunze (PW.4) stated that he was the assistant chief of Athi river sub location and confirmed having received a report from the deceased to the effect that the 2nd accused herein who had been her live in husband and with whom she had separated had broken into her house and stolen a TV set and Kshs.6,000/=. He further testified that the 2nd accused furnished purchase receipt for the TV set and claimed that his personal items namely ID card, NHIF card, Driving licence and KRA Pin still remained at the house of the deceased. The witness stated that he advised the deceased to proceed and lodge a report with the police. He later learnt of the death of the deceased.

Clementine Nthenya (PW.5) stated that she used to do business together with the deceased at Athi River and that she knew both the accused persons quite well. She identified the body of the deceased during the post mortem examination.

Corporal Urbanus Musembi (PW.6) who was attached at CID Athi River stated that he visited the scene and recovered several items belonging to the 2nd accused namely a driving licence, NHIF card, KRA Pin which he produced as exhibits 1 – 3. He further conducted investigations and established that the deceased had been murdered and her body stuffed inside a carton box and tied with ropes and left inside her house and then locked from outside. He later received the two accused persons and interrogated them and thereafter charged them with the offence herein. He stated that the 1st accused who lived with the deceased never informed anybody within the area of the incident or even the police while the 2nd accused had been a lover to the deceased and had lived with her for some time before they broke up.

Corporal Jackson Kiritu (PW.7) stated that a few days prior to the death of the deceased, she had lodged a report at Athi River police

station to the effect that the 2nd accused herein with whom she had separated was threatening her. He then summoned the 2nd accused to the station and listened to both of them and learnt that the 2nd accused was unhappy at the deceased for not submitting money from a joint venture. He referred them to the area chief and was surprised later to learn that the deceased had been killed.

PC. Matheas Masibo (PW.8) stated that he visited the scene and found the house of the deceased locked from outside and he smelled a foul smell. He broke the door and stumbled upon a sack that contained a carton box wherein the body of the deceased had been put. He later called for scene of crime personnel who took photographs before the body was taken to Machakos Hospital Mortuary.

Dr. Fredrick Otieno Okinyi (PW.9) stated that he conducted a post mortem on the body of the deceased on 2/09/2011 and noted that there was a manual strangulation on the neck and throat and formed the opinion that the cause of death was traumatic asphyxia to the trachea and larynx.

3. Both accused persons were found to have a case to answer and put on their defence. They both tendered sworn testimonies.

K K (DW.1) stated that the deceased was his eldest sister with whom he lived at Athi River Town. He stated that he was with the deceased on the date of the incident when strangers stormed into the house and attacked the deceased while he was ordered to move out of the house. He stated that he opted to travel home in Kitui to report to his parents since he was only 16 years and in class seven at a [particulars withheld] Primary school and did not know anything about police. He went on to state that he later accompanied his father to Athi River Police station where they recorded statements only for the police to detain him as a suspect of murder. He stated that he used to see the 2nd accused within Athi River as he ran a motor cycle taxi business and had sometime back accompanied the deceased to their home in Kitui where he stayed for three days. He denied committing the offence.

Benson Mulei Wambua (DW.2) stated that he met the deceased in Athi River in 2010 for the first time and took her as his girl friend and started paying rent for her. He stated that he accompanied her to her parent's home in Kitui in 2011. He went on to state that their relationship hit the rock bottom in June, 2011 and they started living separately but when he demanded to take back some of his personal documents and household items, the deceased refused and he was forced to report her to the area chief. He stated that he only managed to pick a T.V set and DVD but the driving licence, ID card, NHIF card and KRA pin remained with the deceased. He also stated that he had a spare key to the deceased's house as he was the one still paying the rent and that is why he had managed to collect the TV set and DVD but that the deceased lodged a complaint at Athi river police station. He stated that he went to the Police station but later went away without informing the police that his personal items were still in possession of the deceased. He went on to state that, that was the last time he saw the deceased at the police station only to be informed on the 30/11/2011 that she had been killed and he presented himself to the area chief who handed him over to the police where he was charged. He further stated that he had bought a mobile phone for the deceased and was later disappointed with her when he found her with another man and they parted ways. He denied killing the deceased even though he confirmed that he had the deceased's spare keys and could enter the house anytime he wished. He also confirmed that his relationship with the deceased was strained.

4. Learned counsels filed written submissions.

Defence submissions

Mr. Mwangangi for the accused persons first submitted that the case had not been proved against the 1st accused as he was new in the area having just visited the deceased a few days from the village and being a minor could not be faulted for not acting like a reasonable adult for failing to report the incident to the police. It was also submitted for the 1st accused that upon alerting his parents, he accompanied them to Athi River police station and briefed the police on what had happened and therefore his evidence should be treated as the truthful and honest account about the incident.

It was submitted for the 2nd accused that all his dealings with the deceased were already known by the local administration and the police prior to the death of the deceased namely that the items recovered from the house of the deceased and produced as exhibits were already a matter of fact in possession of the deceased before her death and therefore it is erroneous for the prosecution to use the same to allude to any guilt on the part of the second accused for the murder.

Prosecutions submissions

Mr. Machogu for the state submitted the prosecution's evidence showed that the attack on the deceased was carefully planned, pre-meditated and well executed in that the external force exerted on the neck of the deceased could only have been intended to cause the death of or do grievous harm to the deceased. Learned counsel submitted that there was malice aforethought within the meaning of Section 206(a) of the Penal Code on the part of the accused persons who should be convicted.

Determination

5. I have considered the evidence of the prosecution and defence. It is not in dispute that the deceased died as a result of traumatic asphyxia on the trachea and larynx as it seems she was strangled. It is also not in dispute that during the killing of the deceased the 1st accused was present and witnessed it. It is also not in dispute that the 2nd accused and the deceased had been lovers although they had not formalized their marriage by payment of dowry to the deceased's parents. It is also not in dispute that the deceased and the 2nd accused prior to the death had been living separately due to some disagreements. It is also not in dispute that following the separation, the deceased became acquainted with one Marin Kimanthi Mugambi (PW.3) with whom they had exchanged mobile phone handsets and which had angered the 2nd accused to the point that he had issued threats to the said Martin Kimanthi Mugambi (PW.3) to stay away from his wife (deceased). It is also not in dispute that the 2nd accused and the deceased had earlier presented their disagreements before the area Chief and Athi River Police Station. It is also not in dispute that the second accused's personal documents namely driving licence, NHIF Card, KRA Pin certificate were

recovered from the house of the deceased and which were produced as exhibits herein. It is also not in dispute that the 2nd accused had a spare key to the house of the deceased. It is also not in dispute that none of the prosecution witnesses saw any of the accused persons killing the deceased herein and therefore any evidence that will link them shall have to be circumstantial in nature. The issue for determination is whether the prosecution proved its case against the accused persons beyond reasonable doubt.

6. As noted above that the case rests entirely on circumstantial evidence, the decision of the court of Appeal in the case of **SAWE =VS= REPUBLIC [2003] KLR 344** will be a guide in the determination of this matter. The court in the above had this to say on circumstantial evidence:-

(1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocent of the accused and incapable of explanation upon any other reasonable hypothesis 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 the circumstances relied on.

(3) The burden of proving facts which justify the drawing of this inference from the facts is 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.....

(4) Suspicion, however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

The issue of circumstantial evidence was also dealt with by the court of Appeal in the case of **MUSILI TULO =VS= R [2014] eKLR** where it was held:-

"In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must consider a further principle set out in the case of MUSOKE =VS= REPUBLIC [1958] EA 715 citing with approval Teper =Vs= Republic [1952] AL 480 thus:-

It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

7. Starting with the first accused, I find that he was in the company of the deceased who was his elder sister when the deceased was attacked. After the incident he briefed his parents about it and then accompanied his father to Athi River police station from where he led them to the deceased's house. It appears the police found his failure to raise alarm and alert the neighbours or even report to the police over the incident suspicious. Indeed any right thinking person in such a situation would have been expected to act better than the first accused herein hence the suspicion towards his guilt. However the 1st accused has stated in his defence testimony that he was only 16 years old and a standard seven pupil at a primary school in Kitui and had only come to visit the deceased who was his elder sister for the August holidays. Indeed the fact that he slept with the deceased in a single room left no doubt that he must have been a minor. It is also possible the attack terrified and horrified him to the point that the only thing on his mind then was to proceed to his parents and inform them of what had happened. I find the suspicion however strong in the circumstances cannot provide the basis for inferring guilt on him. In any event the deceased had been his provider and an elder sister and could not have teamed up with her killers. He was also new in the area and he had arrived in Athi River a few days from Kitui. Hence I find the prosecution did not prove the element of malice aforethought attributed to the 1st accused beyond any reasonable doubt. The 1st accused readily agreed to accompany his father to Athi River police station and recounted about the incident and volunteered to lead them to the house of the deceased. The 1st accused ought therefore be given the benefit of doubt.

8. Turning to the second accused, I note that he has disassociated himself with the incident in which the deceased was killed. He stated in his testimony that he last saw the deceased when they were at Athi River Police Station over a complaint that had been lodged against him by the deceased and was only informed about the death on the 30/08/2011. The police officer who had received the complaint from the deceased was corporal Jackson Kiritu (PW.7) and who told the court that the deceased had lodged a report to the effect that the second accused had threatened her. It is instructive that at the time the 2nd accused was at the Athi River police station, he did not inform the police about the issue of his personal items still in possession of the deceased. Indeed the 2nd accused in his testimony stated that he did not inform the police about the issue of his items. He also admitted on cross-examination that he had disagreed with the deceased over a mobile phone and also the fact that the deceased had started a relationship with another man and that his relationship with the deceased was strained and soured. The new man in the love triangle was Martin Kimanthi Mugambi (PW.3) and who stated in his testimony stated that the 2nd accused confronted him and told him to stay away from the deceased who was his (2nd accused) wife. It is therefore clear that the 2nd accused was not happy with the deceased over three issues namely: the detention of his personal documents by the deceased; the failure by deceased to account for some money received from a joint venture and the deceased's liaison with a third man Martin Kimanthi Mugambi bringing in a love triangle. I find these three issues brewed bitterness in the heart of the 2nd accused and which therefore formed the malice aforethought in the murder of the deceased. Malice aforethought is defined in Section 206 of the penal code as follows:-

(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.

The deceased was violently strangled and her underpant lowered briefly and then the body stuffed into a carton tied with a rope and then placed inside a sack. The killers then locked the door from outside. The 2nd accused in his evidence in chief and cross – examination admitted that he had spare keys to the deceased’s house and could enter the house anytime he wished since the deceased was his lover and he used to pay the rent. It is also noted that nothing was stolen from the house of the deceased and therefore it was not a robbery but murder most foul.

The circumstantial evidence presented by the prosecution and defence places the 2nd accused at the centre of the murder of the deceased. He had a strained relationship with the deceased who had refused to surrender his personal documents and also did not render an account of monies from a joint business and further the coming into the picture of another lover in the name of Martin Kimanthi Mugambi (PW.3) further worsened matters between the 2nd accused and the deceased. I find the inculpatory facts presented appear to be incompatible with the innocence of the 2nd accused and only point towards his guilt. There are no co-existing circumstances weakening the chain of circumstances relied on herein. Even though none for the witnesses saw the 2nd accused killing the accused, the circumstantial evidence in existence prior to the death of the deceased point towards him as the killer. He had a motive to kill the deceased due to the strained relationship with her and was thus the prime suspect. His defence evidence did not dislodge that of the prosecution which is overwhelming against him. Hence I find the prosecution has proved its case against the 2nd accused beyond any reasonable doubt.

9. In view of the foregoing, it is the finding of this court that the prosecution has not proved its case against the **1st accused K K** beyond any reasonable doubt and he is ordered acquitted of the charge and to be set at liberty forthwith unless otherwise lawfully held. It is also the finding of this court that the prosecution has proved its case against the **2nd accused Benson Mulei Wambua** beyond reasonable doubt and he is found guilty of the charge of murder and convicted accordingly.

Orders accordingly.

Dated and delivered at Machakos this 23rd day of July 2018.

D. K. KEMEI

JUDGE

In the presence of:

Mwangangi for both accused persons

Machogu for the State

Josephine - court Assistant