



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NUMBER 13 OF 2011

REPUBLIC PROSECUTION

VERSUS

NICHOLUS KIMARU KEMBOI ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. Nicholus Kimaru Kemboi is charged with *murder contrary to section 203 as read with section 204 of the Penal Code*. The particulars thereof being that on the 12th day of February, 2011 at Kapsoya village, Kipcheken Sub-location in Hamisi District within Western Province, he murdered SYLVIA MONYANI. The accused pleaded not guilty before Hon. Mr. Justice Isaac Lenaola (as he then was) on the 14th March, 2011. Kimaru J took the evidence of the first two witnesses. Chitembwe J. took the evidence of the last three prosecution witnesses while I took the evidence of the accused.

The Prosecution Case

2. The prosecution called five (5) witnesses in support of its case against the accused. Jane Khabere testified as PW1 while Henry Mulika was PW2. Dr. Masika Collins testified as PW3 while Milton Nyonyi was PW4. Benjamin Ahazeka Arthur was PW5.

3. From the five witnesses, the prosecution case is that at about 8.00pm, on 10th February, 2011 the deceased who was wife to the accused, arrived at her maternal home where she found her mother, Jane Khavaya. The deceased informed her mother (Jane) that she had been thoroughly beaten by the accused following a dispute over the use of kshs.200/-. The deceased stayed with her mother until 12th February, 2011 at about 6.00pm, when the deceased disappeared into a coffee plantation after she had been sent for by the accused. The deceased did not return to Jane's home that day. On the following day at about 11.00am, Jane visited the accused's home with a view to establishing where the deceased was. On that same day which was 13th February 2011 in the evening, Jane met with the accused and when Jane asked him where the deceased was, the accused did not answer her. Then on 25th February, 2011 the body of the deceased was recovered from the pit latrine of the accused's neighbour. The body had an injury on the head.

4. When Henry Mulika (Henry) learnt of the disappearance of the deceased, he made a report to the village elder one Serah Suswa. Henry was the deceased's father. On 22nd February, 2011, Henry took his grandchild Isaack to the parents of the accused and during that visit, the accused's mother allegedly told Henry that the accused knew where the deceased was. Henry identified the body of the deceased for post mortem examination.

5. Milton Nyonyi, PW4 (Milton) testified that on 12th February, 2011, the accused herein sent him to go and call the deceased for him (accused). Milton did what the accused sent him to do and returned with the deceased up to the rented house of the accused. Apparently, even the mother of the accused also wanted the deceased to return to her matrimonial home. Later, that same evening, Milton was sent for vegetables at Hamisi Market but on return to the accused's house, after about thirty minutes, he found the accused had locked the house. The accused also told Milton that he had finished the work his (accused's) parents wanted him to do. When the accused opened the door, Milton saw the body of the deceased inside the house. Milton did not find or see anybody else in the accused's house. Milton went and reported what he had seen to the accused's parents who in turn warned him not to tell anybody else, with a warning that if he did so, he would face death in the same way the deceased had done.

6. Milton however made a report to Sarah, the village elder. The village elder went looking for the accused who they eventually found at his (accused's) parents kitchen in Hamisi.

7. During cross examination, Milton told the court that the accused had been his friend. He testified further that when he saw the deceased, she was lying on the floor of the house. Benjamin Arthur testified that he was one of the people who demolished the toilet in which they found deceased's body.

8. Dr. Masika Collins conducted the post mortem examination on the body of the deceased who was aged about 19 years. The post mortem examination was conducted some 3 weeks after death, so the body was externally decomposed. Dr. Masika established that the skull and ribs were visible and there was congestion on the neck vertebrae. The skull had a fracture. In the doctor's opinion, the cause of death was cardiopulmonary arrest secondary to strangulation and trauma. The post mortem report was produced as Pexhibit 1.

The Defence Case

9. When the accused was put on his defence, he gave sworn evidence. He did not call any witnesses. While admitting that the deceased was his wife the accused denied killing her. He testified that on 7th February 2011, the deceased left for her maternal home at Kapsoya so that she could assist her parents with some work. On 8th February 2011, the accused telephoned the deceased who promised to return home the following day. On 13th February, Jane telephoned the accused and sought to know where the deceased was. Jane also informed him that the baby, whom the deceased had left with Jane, was crying. On 14th February 2011, Jane sent the village elder Sarah to take the baby back to the accused and the village elder informed accused that efforts to trace the deceased were still in progress. The village elder went back with the baby and on 16th February 2011, the village elder went back to the accused's home, accompanied by vigilantes and Milton. The accused was taken to Hamisi AP Camp where both himself and Milton were interrogated before being released. He was arrested together with Milton on 19th February, 2011. He denied sending Milton to call the deceased for him. He also denied killing the deceased, but stated that after his arrest, he was informed of the deceased's death.

10. When the accused was cross examined he told the court that despite reports that the accused was missing he did not make any report of her disappearance to the police. He also told the court that the body of the deceased was found in his neighbour's toilet but he could not say how or when the body was dumped there or the date on which the body was found. The accused also denied a suggestion by the prosecution that there was a quarrel between him and the deceased over kshs.3,000/- being money from chang'aa sales. The accused also told the court that what Milton told the court was a pack of lies.

Issues for Determination

11. The issues for determination in this case are the ones set out under sections 203 and 206 of the Penal Code, namely:

- a. That there was a death that was unlawful either through an act or omission on the part of the accused;*
- b. The establishment of the cause of the death.*
- c. That in causing the death of the deceased, the accused did so with malice aforethought.*
- d. The identification of the accused, either directly or indirectly through circumstantial evidence, as the person who caused the death of the deceased, either alone or with others.*

Submissions

12. Miss Robina Andia, Advocate filed brief written submissions in which she urged the court to find and hold that the prosecution had failed to prove its case beyond any reasonable doubt. On its part, the state relied on the testimonies of the prosecution witnesses.

Analysis and Determination

13. From the record, none of the witnesses saw the accused carry out the alleged murder. What is available therefore is circumstantial evidence. Secondly, there is only witness Milton who testified that he was sent by the accused to call the deceased, that he went with deceased to accused's rented house and left her there with the accused when the accused sent him to buy vegetables from the market at Hamisi. When Milton returned to the accused's house some thirty minutes later, he found the deceased's body lying dead in the accused's rented house. There is thus the issue of a single identifying witness.

14. The issue of circumstantial evidence has been considered by the courts in this country which have held that circumstantial evidence, if well founded is the best type of evidence. In *Ndurya versus Republic [2008]KLR 135*, the Court of Appeal held, *inter alia*, that,

“Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing an inference of guilt of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference.”

15. In the instant case, Milton stated that he was together with the accused when the accused sent him to go and call the deceased who was then at Jane's home. Milton said he did what the accused sent him to do and returned with the deceased up to the rented house where the accused was staying. Milton left the accused and the deceased together as he went to Hamisi market to buy vegetables. On returning to the accused's place about half an hour later, Milton found the accused who told him he had done what his parents wanted him to do. The accused opened the door to the house and Milton saw the body of the deceased lying inside.

16. Though the accused has denied Milton's story, and though this court is not the one which took Milton's evidence, the record which I have read casts no shadow of doubt on Milton's testimony. The allegation by the accused that Milton lied to the court is not supported by any evidence. There was no suggestion during cross examination that Milton was a liar nor was there any suggestion that there was any grudge between the accused and Milton that would have motivated Milton to concoct a lie against the accused whom he described as his friend. I am thus satisfied that since the accused was the last person to be seen with the deceased before Milton saw her dead body inside the accused's single roomed house he (accused) is the one who knows how the deceased died.

17. Milton also testified that when he arrived at the accused's house with the deceased, the deceased informed him that his (accused's) parents had also sent for her and that she was going to see them. So the accused's statement to Milton after Milton came back from buying the vegetables that he (accused) had done what his parents had asked him to do, was very telling. After seeing the deceased's body, Milton decided to go and inform the accused's parents about what he had seen, but instead of screaming like all parents would do, they told him to remain silent about what he had seen, and that the accused's mother named Janet warned Milton that if he gave the information to anyone else, he would die like the deceased had died.

18. It is my considered view that the sum total of all these circumstances point to the irresistible conclusion that the accused had a direct hand in the death of the deceased. The accused's denial in this regard has not in any way shaken the prosecution's circumstantial evidence linking the accused to the death of the deceased. I am satisfied that the principle set out in the case of **Republic versus Kipkering Arap Koske and another (1949) EACA 135** concerning the inculcating facts in the chain of circumstantial evidence has been fulfilled.

19. There is also the conduct of the accused after the deceased disappeared. Although the body of the deceased was in the house of the accused, the body was eventually found dumped in a pit latrine belonging to the accused's neighbour. The purpose of dumping the body of the deceased in the pit latrine was, in my considered view, to cover up the murder, but concerted efforts by the deceased's parents and the foul smell emanating from that toilet, led to the discovery of the partly decomposed body of the deceased. It is also instructive to note that Milton's dispatch to the market by the accused provided the perfect opportunity for him to accomplish his mission before Milton returned.

20. The evidence by Dr. Masika Collins was to the effect that the deceased suffered a fractured skull which was coupled with congestion on the neck vertebrae. The doctor concluded that the deceased died because of cardiopulmonary arrest secondary to strangulation and traum

21. The fact that the deceased was strangled and had trauma on the head and ribs meant that the accused intended either to kill or cause grievous harm to the deceased. The acts of the accused were unlawful and the extent of the injury confirmed that accused had malice aforethought in killing the deceased.

Conclusion

22. As I conclude this judgment I note that the prosecution did not call the investigating officer in this case. It was held in **Kiriungi versus Republic [2009]KLR 638** that "**it was good practice for prosecuting authorities to comply with the requirement to call an investigating officer as a witness but the mere failure to comply with it could not automatically result in an acquittal,**" and that each case has to be considered on its own merit. The court further held that it was not mandatory for the investigating officer to be called, unless there was an allegation that he would have said something adverse to the prosecution case. In the instant case, there was no indication by the defence that the evidence of the investigating officer would have been adverse to the prosecution case.

23. In light of the evidence on record, I do think that the evidence by the investigating officer would not have added to or subtracted any value from, the prosecution's case.

24. From the above analysis, I am satisfied that the prosecution has proved beyond any reasonable doubt all the ingredients of the offence of murder, namely the death and cause of death of the deceased; that it is the accused who unlawfully killed the deceased and that he did so with malice aforethought.

25. I therefore find the accused guilty of **murder contrary to section 203 as read with section 203 of the Penal Code, Cap 63 Laws of Kenya** and convict him accordingly under **section 322(2) of the Criminal Procedure Code.**

It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega this 23rd day of July 2018.

J. N. NJAGI

JUDGE

In the Presence of

Juma for the state

No appearance for the accused

Juma Court Assistant

Accused – present