



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 8 OF 2011

REPUBLICPROSECUTION

VERSUS

WILSON MISIKO MUNGASIA ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGEMENT

Introduction

1. On 2nd March 2011, the accused herein, Wilson Misiko Mungasia appeared before Lenaola J, (as he then was) and pleaded not guilty to a charge of murder *contrary to section 203 as read with section 204 of the Penal Code*, the particulars of which are that on the 10th day of February 2011 at Mituri Village, Lukusi Sub-location Ivihiga Location in East Kakamega District within Western Province, he murdered SELINA IKAMBI ANASI.

2. Following the plea of not guilty, the prosecution called 4 witnesses, in support of the charge against the accused person.

The Prosecution Case

3. The prosecution called 4 witnesses. From the testimonies of these witnesses, namely Dr. Dickson Mchana who testified as PW1, Japheth Khalisia, a son of the deceased as PW2, Julieta Queen Musee, a daughter-in-law of the deceased who testified as PW3 and Dorine Khalisia who testified as PW4. However the testimony of PW4 was not complete because she was not cross examined on the same. Just before her cross examination, the prosecution and the defence informed the court that they intended to enter into a plea agreement. When the case next came up for further hearing of the prosecution case, the prosecution suddenly closed its case.

4. Briefly, the facts of the case are that on 10th February, 2011, the deceased who lived in the same compound with the accused who is her grandson was found missing from her home. There is evidence on record to show that the deceased who was 79 years of age at the time hardly left her home and it was surprising that she was absent from home and that even the accused who used to assist the deceased with home chores could not say where the deceased was. On the evening of 9th February 2011, the accused had been seen around the deceased's house carrying some utensils and was also seen going into the deceased's house.

5. When the deceased could not be seen for the better part of 10th February 2011, a report was made to the sub-chief and to the area chief as well as to her son Japheth, PW2. A search was mounted for the deceased and eventually her body was discovered in the family sugarcane plantation just around the home on 11th February 2011 at around 8.00am. The body was covered in a blanket while her mouth was filled with pieces of mattress sponge. Initially the accused was reluctant to be part of the team searching for the deceased, but eventually he joined the other family members in the search though he went to a different direction from the one taken by the rest of the family members.

6. A report was also made to the police who later visited the scene and took the deceased's body to Kakamega County General Hospital on 11th February 2011. Dr. Mchana performed the post mortem examination on the body of the deceased at the Kakamega PGH on 14th December 2011 after the deceased's body was identified to him by Japheth Khalisia and Julieta Queen Musee, who are son and daughter of the deceased respectively.

7. From the examination, Dr. Mchana observed that the deceased had an irregular deep cut wound on the forehead measuring 11cm x 1.5cm while there was a male condom in the genital tract with spermatozoa. Internally the deceased's lungs had features of prolonged smoke exposure. The deceased's heart was mildly enlarged. There was no fracture of the skull bone though there was haematoma on the right side of the back of the head. Dr. Mchana was of the opinion that the cause of death was closed head injury with evidence of sexual assault. The

post mortem report was produced as Pexh.1

8. The court was also informed that after discovery of the deceased's body on 11th February 2011, the accused who had been living in the same homestead with the deceased and who was the one assisting the deceased with home chores, disappeared from home and only re-appeared on 16th February 2011 during the deceased's funeral.

Defence Case

9. By a ruling dated 27th February 2017 the accused was found to have a case to answer and accordingly put on his defence. On the 28th June 2017, the court was informed by defence counsel that the accused had elected to remain silent. Miss W. Mukwana defence counsel then asked for a judgment date.

Submissions

10. The state, through prosecution Counsel, Paul O. Juma filed detailed written submissions in which he submitted that though the accused may not have been seen or found in the act of killing the deceased, the available circumstantial evidence was sufficient to connect the accused to the commission of the offence. Counsel also submitted that when accused person opts to remain silent as a defence, the court may infer that the accused is guilty. Prosecution counsel supported his submissions with a number of authorities which I have had the privilege to read through and I commend counsel for the same.

Burden of proof

11. The burden of proof in criminal cases always rests on the shoulders and at the feet of the prosecution and never shifts to the accused person unless the prosecution raises certain presumptions which the accused then has a duty to rebut. The prosecution may prove its case either through direct or indirect evidence. The latter can also be rightly referred to as circumstantial evidence. The present case rests entirely on circumstantial evidence because none of the witnesses saw the accused rape the deceased or knock her forehead or the back of her head with some object. It is therefore necessary that before I get into the analysis of the available circumstantial evidence, I delve into the whole question of circumstantial evidence and the circumstances under which such evidence may be used as a basis to convict an accused person.

Circumstantial Evidence

12. According to **Black's Law Dictionary, eighth edition**, circumstantial evidence is defined as:-

1. Evidence based on inference and not on personal knowledge or observation – Also termed indirect evidence; oblique evidence, as contrasted with direct evidence.

2. All evidence that is not given by eye witness testimony. It is further stated in the dictionary that circumstantial evidence is

“Evidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence, is termed circumstantial evidence” William P. Richardson, The Law of Evidence para 111 at p68 (3rd Edition 1928).

13. In this jurisdiction as it is in other common wealth jurisdiction, for a court to rely on circumstantial evidence as a basis for a conviction, the inculpatory facts in the evidence must be such that they are incompatible with the innocence of the accused. For this proposition, see ***Rex versus Kipkering Arap Koskei & another [1949] 16 EACA 135.***

14. What the court was saying in the ***Kipkering case*** (above) is that the circumstantial evidence must at all turns and bends point to the accused person as the perpetrator of the offence. For example, in ***Abanga alias Onyango versus Republic – Criminal Appeal number 32 of 1990***, the Court expressed itself thus on the issue:-

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

a. the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;

b. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

c. 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.”

15. When I come to the analysis segment of this judgment, I shall cast my eyes back to the above cited authorities with a view to determining whether the circumstantial evidence in this case places the accused person herein at the centre of the death of the deceased. I now move to consider other peripheral but pertinent issues.

The Right of an Accused Person to Remain Silent

16. I have indicated hereinabove that when the accused person was put on his defence, he chose to remain silent. And it was his constitutional right to do so; although in certain circumstances, the court may draw an inference that the accused person committed the offence. The right of an accused person to remain silent is embedded in **Article 50(2)(i) of the Constitution 2010** where it is provided that **“Every accused person has the right to a fair trial, which includes the right to –**

a.

b.

c.

d.

e.

f.

g.

h.

i. remain silent, and not to testify during the proceedings.”

17. The above notwithstanding, the law under **Sections 111(1) and 119 of the Evidence Act, Cap 80 Laws of Kenya** requires that where the evidence places upon an accused person the statutory burden to discharge any rebuttable presumption as provided thereunder, then the accused person assumes the burden of proving any such fact particularly when it is clear that such a fact is within his knowledge.

18. In **Republic versus Nicholas Ngugi Bangwa [2015] eKLR, Lenaola J** (as he then was) dissected the impact of sections 111(1) and 119 of the Evidence Act in the following words:-

“Having been placed at the scene of deceased house as the last person to be with the deceased before she died, the accused had a duty to give an explanation of how either the deceased died or of how they parted company. The accused in his statement in defence put forward an alibi as his defence. That does not meet the statutory requirement of sections 111(1) and 119 of the Evidence Act. Therefore the rebuttable presumption created by these two sections that having been the last person seen with the deceased before she died the accused knew how she died and that it is his interest to give an explanation.

“.....where an accused person either attempts no explanation of facts which he may reasonably be expected to be able and interested to explain or gives a false incredible or contradictory explanation, that may augment circumstantial evidence adduced against him.....”

19. It will be important therefore, when I come to analyze the issues in hand, in light of the evidence on record, to make a finding as to whether the accused person’s silence augmented the circumstantial evidence adduced against him.

20. There is one more pertinent issue to be addressed before I move further in this judgment and that is the prosecution’s failure to call police witnesses. In my considered view, police officers especially investigating officers are material witnesses in any criminal trial. In **Nganga versus Republic [1981] KLR 483**, the court held that,

“The prosecution may elect not to call a material witness but they do so at the risk of their own case. The courts accept as a matter of practice that it is not possible for informers to be called to the stand. In Abdalla Bin Wendo versus Rex [1953]20EACA 166, the court held, inter alia, that, “subject to certain exceptions a fact may be proved by the testimony of a single witness” but if that witness is a single identifying witness, then “...this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances, other evidence, circumstantial or direct pointing to guilt is needed.”

21. In the well-known case of **Cheya – versus – Republic [1973] EA** the court held that even where a doctor’s evidence in a murder case is not adduced, the death of a deceased can still be proved if there is other sufficient evidence to confirm that indeed the deceased died. Even in more recent times, it has been held that where the body of the deceased has been burnt beyond recognition, medical evidence would serve no useful purpose. Other evidence can be used to prove the death.

Issues for Determination

22. Under **section 203 of the Penal Code**, the ingredients of the offence of murder are:

a. The death of the deceased and the cause of that death

b. Proof that the death occurred as a result of the unlawful act or omission on the part of the accused;

c. That the act or omission was accompanied by malice aforethought as defined under section 206 of the Penal code.

Analysis and Determination

23. After intently and carefully analyzing the evidence on record as well as the law as stated above. I now proceed to consider each issue in turn with a view to determining whether or not the accused herein is guilty as charged.

24. Whether the fact and cause of death have been proved.

From the evidence on record there is no doubt in the mind of this court that the deceased herein, SELINA IKAMBI ANASI died, and according to the medical evidence produced by Dr. Mchana, PW1, the cause of the deceased's death was closed head injury with evidence of sexual assault. PW2 confirmed that the body of his mother was found in the sugar cane plantation near the house where she lived and thereafter he was one of the two people who identified the body of the deceased to Dr. Mchana. PW2 also, saw his mother's body which had injuries on the head, and other body parts.

25. Whether the prosecution has proved that it was through the act or omission of the accused person that deceased died.

As stated elsewhere in this judgment, there was no eye witness account to the events that led to the death of the deceased. The only available evidence is therefore circumstantial evidence. I am fully aware of the dangers of relying on such evidence. I am also fully aware of the principles to be applied by the court before accepting circumstantial evidence as a basis for a conviction. See *Kipkering Arap Koskei Case* (above) as well as the *Abanga Alias Onyango Case* (above).

26. In the instant case, the evidence on record is that the accused person herein who is deceased's grandson was the one assisting his grandmother with house chores, including preparing her meals. On 10th February 2011, the accused person was seen in the compound carrying the deceased's utensils. He even entered the deceased's house and when he was asked where the deceased might be, the accused spoke with a certain degree of certainty that the deceased had gone to treat some people. There is also evidence on record that at about 7.00pm on 9th February, 2011(the last day the deceased was seen alive at her home), the accused person followed the deceased into her house to prepare food in that house. According to further evidence, the only two people in the deceased's house on the evening of 9th February 2011 were the accused person and the deceased.

27. Then on 10th February 2011 in the morning, the deceased's house was found latched from outside, and the accused person was also seen taking a bath in a bathroom that was next to a toilet in the compound. The evidence further shows that after the accused person had taken his bath, he was seen coming out of the deceased's house with some plates and a sufuria and asked Dorine where the deceased was. The accused person also told Dorine, that the door leading to the deceased's bedroom was locked with a padlock. In her mind, Dorine thought that the deceased had gone out to treat some children since she was a known herbalist for children. The deceased remained missing the whole day and night on 10th February 2011.

28. At about 6.00am on 11th February 2011, Dorine decided to go into the deceased's house to help with the cleaning and when she entered, she found things in disarray. Dorine found that the padlock usually used for securing the kitchen was on the bedroom door, and the cow which was normally tied inside the house was outside. A search conducted inside the deceased's bedroom did not trace the deceased. Two hours later, the deceased's body was found in the sugarcane plantation near her house.

29. The question that arises for determination at this state is whether the circumstances surrounding the death of the deceased points a finger at the deceased. In my humble view they do. First of all, at about 7.00pm on 9th February 2011, the accused person was the last person to be seen with the deceased before the deceased's lifeless body was found in the sugar cane plantation just outside her house. Secondly, on the morning of 10th February 2011, the accused person was seen leaving the deceased's house with utensils and the evidence shows that the accused person knew that the deceased was not in the house because he is the one who asked Dorine where the deceased was. Thirdly, when the family started searching for the deceased the accused person was not only reluctant to participate in the search but he went in a completely different direction. Fourth, as soon as the deceased's body was found, the accused person disappeared from home for about five days before he resurfaced on the day of the burial of the deceased. As Lenaola J, (now Kenya Supreme Court Judge) said in the *Nicholas Ngugi Bangwa Case* (above) the accused herein, having been the last person with the deceased before she died was under a duty and on his own interest to explain how the deceased died. Having failed to do so, the only inference this court can make is that he knows how the deceased died.

30. From the above analysis and from the fact that the accused person did not alert the rest of the family about the whereabouts of the deceased instead of asking Dorine where the deceased was, the accused person acted with malice aforethought in killing the deceased and making every effort to conceal her death.

Conclusion

31. In the premises, I find and hold that the accused person herein, WILSON MISIKO MUNGASIA is guilty of the murder of his grandmother, SELINA IKAMBI ANASI on 10th February 2011 and I accordingly convict him of the same under **Section 322(1) 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 on this 26th day of October, 2018.

J. NJAGI

JUDGE

In the Presence of:

Mr. Ngetich for State

Mr. Munyendo holding brief for Mukhwana for Accused

George - Court Assistant