

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 65 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

STOURAS MIHESO SABATIA.....ACCUSED

RULING

Stouras Miheso Sabatia, referred to in this judgment as the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The charge reads that on the night of 20th/21st August, 2016 at Kibera Lindi in Nairobi within Nairobi County he murdered Rose Nekesa Mudachi. When the charge was read to the accused he denied committing this offence.

After presenting evidence of eight (8) prosecution witnesses, the prosecution closed its case against the accused. The facts of this case are that Rose Nekesa Mudachi, the deceased, was found lying on the ground near the door to her house in Lindi Kibera on the night of 20th/21st August 2016. TS (PW6) a minor aged 10 years at the time and a neighbor found the deceased and informed his parents John Akuno Sibembe (PW2) and Susan Akeyo (PW4). The deceased was taken to a nearby clinic but was referred to Kenyatta National Hospital. She was however taken to Mbagathi Hospital where she was pronounced dead on arrival. The accused is the husband of the deceased. He was arrested and charged with causing her death.

There are different versions on what happened on the evening of 20th/21st August 2016. Joseph Okunga Maumo (PW3) told the court that at about 1.00am on 21st August 2016 he found his neighbours John Akuno Sibembe and Susan Akeyo fighting. Stouras, the accused and Rose, the deceased were present and were trying to separate Sibembe and Susan. Joseph joined them to try to separate the two. A woman by the name of Mama Belinda also joined them. They managed to separate them. Joseph in company of Belinda escorted Sibembe and Susan inside their house and continued talking to the two in a bid to reconcile them. Joseph said he heard the deceased telling her husband the accused to go into their house. Shortly, Joseph heard a child calling him to go outside. He said it was a girl related to Mama Belinda who was calling him. The girl told him that Rose had fallen down. Joseph went out and found the deceased lying on the ground at her door and the accused standing near her. Joseph called the deceased but she did not respond. The accused according to Joseph was in shock and did not respond at first when asked what he had done to the deceased. He responded shortly thereafter that he had not done anything to the deceased. Joseph said that he did not see any object where the deceased was lying and that the accused and the deceased lived a normal married life with normal domestic issues.

On cross-examination, Joseph told the court that the girl who called him was related to Mama Belinda a neighbour and had come to visit Mama Belinda. He said that she called him about 2 minutes after he entered Sibembe's house. He said that he found the accused standing next to the deceased calling her and looking confused. He said that he did not see any hammer or piece of stick near where the deceased and the accused were. He said that the surface where the deceased fell had stones.

Sibembe did not mention a fight between him and his wife Susan. Sibembe testified that he met Susan his wife going to the funeral in the neighbourhood when he was returning home from work. He testified that they went home with Susan and he was served food. He testified that Joseph (PW3) his neighbour joined him and they started talking. He stated that his son, referring to PW6 went outside to the toilet but returned to the house and told him that he had seen something outside but after two minutes he heard someone knocking at the door. He said he went outside and saw the deceased lying near her door. He said that the deceased was unable to talk. He said that the accused was also present and was asking the deceased what was wrong. On cross-examination, Sibembe told the court that he did not hear a commotion or quarrel between the deceased and the accused. He said that the accused looked shocked about deceased's condition.

Susan on the other hand tells a totally different story. She too did not mention a fight between her and the deceased. Her evidence is that she met her husband as she was going to the funeral meeting and returned home to serve him food. She said she heard the voice of the accused and that the accused was drunk. She said the accused asked her for the key to his house because the deceased had locked the door and taken the keys with her. Susan said that she heard the sound of a door being broken open shortly thereafter. She said that the deceased returned home and she heard her asking the accused why he had broken the door instead of going for the key. She said the accused responded that he had been hungry and wanted to get into the house and eat. She said she heard the accused asking the deceased whether she had come from the funeral or from another place. Susan said that her son (PW6) went outside to the toilet but returned and told his father (Sibembe) that he had seen someone lying on the ground outside. She said that they went out and found Joseph (PW3), the accused and other neighbours gathered outside. She said she saw the deceased lying on the ground near her door breathing with difficulty. Susan said that the deceased used to complain of chest pains and difficulty in breathing. On cross examination Susan said that she saw the accused and the deceased going into their house laughing together and did not hear any commotion or quarrel between them. She said that the accused was holding the head of the deceased on his lap.

Colleta Dindi (PW1) sister to the deceased told the court that after receiving information about the death of her sister she went to her house. She said she saw clothes, a h and a piece of timber near the door of the house belonging to the accused and the deceased. The other three witnesses, Joseph, Sibembe and Susan did not mention any of these items. Colleta testified that she saw bruises on the hands and face of the accused that looked like nail scratch marks. She told the court further that the deceased and the accused had troubled relationship and that at one time the deceased had left the accused and gone to live with her mother. Colleta was cross-examined on her statement to the police. Her

statement did not contain anything about the broken door, the hammer, marital problems between the accused and the deceased or the injuries she said she had noted on the deceased. She admitted that she had never witnessed the accused beating the deceased.

The police officers who testified, CPL Abdullahi Hussein (PW5) and SGT Peter Kosgei (PW8) took part in investigating this case. Their evidence is based on the evidence given to them by the witnesses.

I have considered this evidence. That Rose Nekesa Mudachi died is not in dispute. Dr. Charles Muturi examined her body at Chiromo Mortary on 23rd August 2016. He found an extensive abrasion on the left arm; bruises on mid back, left elbow and forearm; lacerations on the right big toe and dislocation of the cervical vertebrae. The opinion of the doctor is that the deceased died as a result of cervical spine injury due to blunt force trauma. In lay man terms, the deceased died as a result of injuries associated with a broken neck.

I have examined and considered all the evidence to determine whether the prosecution has made out a prima facie case against the accused. I have mentioned in this ruling the different versions of evidence given by the three witnesses who were present at the scene. The only evidence of the three witnesses that is in agreement is that Joseph was inside the house of Sivembe and Susan and that none of them heard any commotion or quarrel between the accused and the deceased. I am inclined to believe the evidence of Joseph. He struck me as an honest and truthful witness. His demeanour as he testified was impressive. He remained calm and composed. Susan and her husband seem to be hiding something from this court. They were not truthful that they had been fighting that day and that they had been separated and later counseled by Joseph. Susan seems to indicate that the accused was not happy after finding the house locked by the deceased, yet Sibembe and Joseph, who were also present, did not hear or witness the conversation between the accused and the deceased. I find the evidence by Susan that the accused and the deceased disagreed on the issue of the locked house incredible. I also find the evidence of Colleta that she saw a hammer and a piece of stick near the door where the deceased lay incredible since no other witness testified to seeing these items. Colleta seemed to insinuate that the accused and the deceased fought hence the alleged bruises on the accused. I do not believe this evidence by the two witnesses.

In my considered view the evidence against the accused in respect to whether he is the one who assaulted the deceased causing the injuries leading to her death is purely circumstantial. There is no eye witness to what happened. All the evidence shows that the accused was with the deceased before the deceased was found lying on the ground with injuries. Circumstantial evidence can only be relied on to convict an accused person if it irresistibly points to the accused person to the exclusion of all others as the one who may have killed the deceased. In this case the pathologist told the court on cross-examination that:

“The cervical spine injury could have been due to a fall or a direct blow to the neck. If it was a direct blow to the neck it is expected that there would be a mark. If the force is not direct like someone falling and bending the neck it can be dislocated. A road traffic accident can also cause this type of injury. There were bruises and she may have fallen and twisted the neck.”

This evidence by the pathologist is not conclusive that the fatal injury was caused by the accused. It leaves the court with two possibilities. The deceased may have fallen and twisted her neck or the accused may have assaulted her. The accused was described by all the witnesses as standing near the deceased looking shocked and confused. He was also calling her name. There is also evidence that the surface where the deceased fell was not smooth and had stones. In my view, all this evidence taken together leads me to a conclusion that the prosecution has not presented a case on which a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence (see Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335 and Wibiro alias Musa v. R [1960] E.A at 186). It is my conclusion, therefore, that I do not find the evidence by the prosecution witnesses sufficient to persuade me to place the accused on his defence. I find that he has no case to answer. Consequently, in compliance with Section 306 (1) of the Criminal Procedure Code I hereby acquit the accused person forthwith. He is at liberty to go home unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Delivered, dated and signed this 19th day of December 2018.

S. N. Mutuku

Judge