



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO.7 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

EVANS ODHIAMBO OGOLLA.....ACCUSED

JUDGMENT

1. The accused Evans Odhiambo Ogolla was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that between 16th day and 20th December 2011 at Kontainer Guest in Kiambu District within Central Province murdered Esther Mukami Kamuti.

The prosecution case

2. The prosecution presented 12 witnesses. Its case is that the accused who was employed as a guard in the premises where the deceased also worked as a receptionist was on duty on the night that the deceased disappeared. He had interacted with her the same night and was later found in possession of her mobile telephone.

3. John Gitau Barua (PW1) was the owner of the business premises known as Kontaina Guest house. He had leased part of the premises operating as a Bar and Restaurant to his cousin Peter Ndungu Gitau. PW1 told the court that the deceased had called him around 6p.m. on 16th December 2011 to inform him that she had reported back on duty having taken a day off on 15th December 2011. That he however could not reach her on phone later that evening and on 17th December 2016 his cousin Peter Gitau reported to him that Mukami (the deceased) was not on duty. PW1 further stated that he had earlier bought a phone Nokia C 2-03(MFI. 1) for the deceased.

4. Mary Wambui Murigi (PW2), Grace Munyiva Kayere (PW5) and Peter Kamau Mbutia (PW7) all worked at Kontainer Bar and Restaurant as cleaner, waitress and grounds man respectively. They discovered the decomposing body of the deceased at the premises on 20th November 2011. The body was lying in room No. 11 which was used as a store room and was covered with wood and cartons. Francis Muiru Peter (PW3) and Thomas Kibara Karie(PW4) were the deceased's siblings. They identified the body at the city mortuary on 23rd December 2011. Dr. Joseph Ndungu (PW8) conducted the post-mortem on the same date. Anthony Karuma Kamwanja (PW6) a shop attendant at Self Ridges Supermarket confirmed that he had sold a Nokia C-2 Serial No. 35826604327390 and its accessories and that although he could not recollect the buyer, the records were intact in their duplicate receipt and register.

5. Lawrence Mutinda Mugo (PW9) was also an employee of Kontainer Bar and Restaurant. He doubled up as a cook in the butchery side and cleaner. He said that he was at work on 19th December 2011 until 11p.m. when he retired to bed in his house near the butchery. After about 30 minutes the guard named Evans(accused) alerted him that there were thugs who had switched off lights and were attempting to climb over the fence. PW9 responded by calling his employer (Peter Gitau) who told him to tell Evans (the guard) to call 4 GS security. 4GS security guards arrived around midnight and after conducting a search said that everything was okay and left. PW9 also said that he was present on 20th when the body of the deceased was discovered. Earlier on 17th December 2011, he had been told by the owner of the Bar (Peter Gitau) to go and check if Mukami (the deceased) was in her room. That together with the employer, they went to Mukami's room and removed a window pane to look into the room. They saw keys on the table. Peter Gitau picked the keys on the table through the window and kept the window pane. Lawrence Mugo further said that he had last seen Mukami on Friday, 16th.

6. No. 233781 Inspector John Mburu Kuria (PW1) was the scene of crimes officer. He testified that he took 15 photographs at the Kontainer Bar and Restaurant. The photographs depicted the general view of the scene, room No. 11, the body in Room 11 and the body being removed. PW10 told the court that the film got destroyed during processing. He produced a report to that effect [Exhibit No. 3]. No. 49401 Cpl. Joseph Ngari (PW11) was one of the investigators. He was directed by the D.C.I.O. Kiambu to proceed to the scene of murder at Kontainer Bar and Restaurant situated on the way to Ndumberi Trading Centre. He was in the company of Cpl. Manyasi. On arrival at the scene they were shown room No. 11 where the body lay. He observed that the body was beginning to decompose. He called the scene of crime officers who photographed the body before it was removed to city mortuary.

7. PW11 told the court that Peter Gitau (the owner of the Bar & Restaurant) and Evans Ogolla (who was the watchman) were arrested but later released for want of evidence. He later got information that the accused was seen with the mobile phone of the deceased. They traced him together with C.I. Ogutu and Police driver, Ndebo, to his rural home in Ugunja and arrested him. Back in Nairobi PW11 conducted more investigations which led him to establish that the phone in question belonged to the deceased and had been used by the accused after her death.

8. No. 68073 Cpl. Boniface Munyasi (PW12) gave the same testimony as PW11 with respect to how they visited the scene on the directions of the D.C.I.O. and the later recovery of the deceased's mobile phone from the accused. I shall return to the two testimonies later on in this judgment.

The defence case

9. The accused was put on his defence and he gave a sworn statement. He stated that he was employed by security and deployed to Kontainer Club. He had worked at Kontainer for 1 month and 23 days. He was on duty at the material time and he saw the deceased on 16th November 2011 when he signed in at about 6.30p.m. The deceased used to keep the reporting register. The accused stated that on the night of 16th December 2011, his employer, proprietor of the Bar and Restaurant business one Peter Gitau came to him and asked to see Mukami (the deceased). The accused referred to the said Peter Gitau as P.G. He said that he (P.G.) gave him a piece of cloth and went to Mukami's room. He (P.G.) soon emerged with a drink in a glass which looked like soda and gave it to him. That when he took the drink he blacked out until about 3.00a.m. when a client hooted at the gate. That subsequently just before 6a.m., P.G. came out of Mukami's room and gave him the register book and told him to leave the same outside the corridor between room 5 and 6. That subsequently P.G. gave him a mobile phone, its box, manual, and charger and told him it was a gift. He later learnt that the phone belonged to the deceased. The accused told the court that he had initially been arrested and set free and that he left for his Ugunja home only to be re-arrested there. He denied that he had anything to do with the death of the deceased.

10. This being a murder case the prosecution is required to prove the following three critical elements:-

1. The death of the deceased and the cause of such death.

2. That the accused committed the unlawful act which caused the death of the deceased; and,
3. That in committing such an unlawful act the accused acted with malice aforethought.

Death of the deceased

11. The death of the deceased is not disputable. There was ample evidence that she was found missing from her place of work at the Kontainer Guest house on 17th December 2011 and that her decomposing body was found in Room 11 of the guest house by other employees of the Kontainer Bar and Restaurant on 20th December 2011. Her body was identified at the city mortuary by her brothers Francis Muiru (PW3) and Thomas Kibara Karie (PW4) on 23rd December 2011. Dr. Joseph Ndungu (PW8) conducted the post-mortem on the same date. He produced the post-mortem report (Exhibit No. 1) in court. Thus the court found the fact of death proven.

Cause of death

12. Dr. Ndungu found a partially decomposed body when he did the post-mortem. He observed bruising on the interior part of the neck on the left side; deep subcutaneous bruises on the side of the chest between 9th & 10th ribs; bleeding below the scalp on the back of the head to the side of the skull. He found the brain completely decomposed. Dr. Ndungu formed the opinion that the cause of death was suffocation due to manual strangulation. He removed the liver, kidney, stomach specimens and vagina swab for further examination.

13. I accepted the pathologist's expert opinion on the cause of death. Indeed the same was not challenged by the defence.

Who caused the unlawful death of the deceased?

14. For the charge of murder to succeed against the accused, it must be proved beyond reasonable doubt that he caused the death and intended to cause such unlawful death. Both the *actus reus* and the *mens rea* must be proved.

15. Much of the evidence presented by the prosecution dwell on the fact of the deceased's death. As earlier stated, John Gitau Barua (PW1) testified that he spoke to her on phone on 16th December 2011 around 6p.m. when she reported that she was back on duty after a day off. He could not reach her at 9p.m. the same night. On Saturday 17th, his cousin Peter Gitau (PG) who was the proprietor of the Bar and Restaurant side of the business called him to ask the whereabouts of Mukami telling him that she was not on duty. Mary Wambui Murigi (PW2), Grace Munyiva Kavere (PW5), Peter Kamau Mbuthia (PW7) all workers at Kontainer Bar & restaurant testified regarding the discovery of the body on 20th December 2011. None of these witnesses testified that they saw the accused kill the deceased. The pathologist (PW8) told the court there was evidence of the deceased having been strangled. However, none of the witnesses stated that they saw the accused strangle her.

16. The collective testimony of the prosecution witnesses barely sheds any light on the events of the period 16th December 2011 when the deceased was last seen at her work place to 20th December 2011 when her body was found in room 11 of the Guest House. It is the accused who said in his defence that he saw her when he signed in at 6.30p.m. She had the sign in register at the door to her room No. 8. They conversed and she told him to expect a guest who had booked a room and left to return later around 3.00a.m. The accused also said that he saw Peter Gitau (PG) go to Mukami's room at about midnight the same night i.e. 16th December 2011 and she opened the door for him. He said that on the morning of 17th December 2011 at around 5.30a.m. Peter Gitau came out of Mukami's room and approached him with the sign in registers and told him to leave them near room No. 5 after signing out. The accused said that he did not see Mukami when signing out. When he reported in the evening of 17th he did not see Mukami but found the register at the car wash. On the morning of 18th as he checked out, the register was with

Lawrence (PW9) whom he referred to as the butcher man. In the evening, the register was with the car wash people when he signed in. The accused further said that that evening around 8p.m, Peter Gitau gave him a mobile phone as a present.

17. The accused also narrated an incident that he claimed occurred on the night of 19th. He said that robbers jumped over the fence to the lodging area. He went to awake Lawrence Mugo, the butcher man (PW9) who raised an alarm. That G4s Security guards responded in about 10 minutes. They checked around but found nothing. That Administration Police officers also responded about 30 minutes later and did not find anything unusual. He checked out at 6.00a.m. He was arrested when he reported back on duty at about 7.30p.m. on 20th December, 2011.

18. The alleged incident on the night of 19th December 2011 was also described by Lawrence Mugo (PW9). He testified that he closed the butchery business at around 11p.m. and retired to his residence nearby. He was woken up by the guard named Evans (the accused) who alerted him of the presence of thugs. He called his boss who told him to tell the guard to put on the alarm. G4s security guards responded shortly. The police also arrived and after looking around told them that everything was okay and he went to sleep. PW9 also narrated an incident that alleged happened on 17th December 2011. He said that the owner of the Bar P.G. asked him to go and look for Mukami in her room and that together they went to the said room. They removed a window pane and looked through the window. They saw keys on the table and P.G. picked the keys through the window. P.G. also kept the window pane.

19. The alleged attempted break in or robbery by unknown persons which first was introduced in the evidence of PW9 and in the defence of the accused was neither proved nor disproved and its significance in the trial remained unclear. It is not clear if the incident was linked in any way to the incident surrounding the death of the deceased. If the deceased was killed in her room No. 8 on the night of 16th or morning of 17th, might this be the time that her body was dumped in room No. 11 and covered with cartons and wood planks or might there have been an attempt to remove her body? These remain mute questions as there was no attempt made by the prosecution to link the two incidences.

20. The only evidence that seems to connect the accused to the death of the deceased is the recovery of the deceased's phone from the accused after her death. The two police officers who investigated the case testified extensively on this issue. They were No. 49401 Cpl. Ngare (PW11) and No. 68073 Cpl. Boniface Munyasia (PW12) then of D.C.I.O. Kiambu. PW11 testified that he got information that the accused was seen with a phone resembling that of the deceased. He proceeded to Kontainer Bar to look for him but found that he had travelled to his rural home in Ugunja. He travelled to Ugunja with C.I. Ogutu and police driver Ndebo. They found the accused and recovered a Nokia mobile phone from him. They arrested him and took him to Kiambu from where PW1 identified the phone as the one he had bought for the deceased. The accused led them to his house in Kirigiti trading centre where upon conducting a search, they recovered a package of the phone, charger and user's manual. The package showed that the phone was bought from Kamindi Self Ridges Supermarket in Kiambu town. Cpl. Ngare produced the phone, the charger, package and manual as Exhibits Nos. 1A, 1B, 1C & 1D respectively.

21. Cpl. Ngare proceeded to Kamindi Supermarket where he found a duplicate receipt book and register which indicated that the phone had been sold on 12th September, 2011. He produced the original register (Exhibit No. 4) and a copy of the sale receipt serial No. 358288047710511 (Exhibit No. 5). The witness further testified that he obtained data from Safaricom mobile service provider which showed that the accused had inserted his sim card No. 254700905797 into the deceased's phone and withdrawn money on 23rd December 2011. He produced the data as Exhibit No. 6. He also produced the mental status report in respect of the accused prepared and signed by police Surgeon one Dr. Kamau (Exhibit No. 7) The defence did not object to the production of the two exhibits by the witness on the basis that they were neither contesting their authenticity nor disputing the contents.

22. The testimony of No. 68073 Cpl. Boniface Munyasi (PW12) was similar in all material aspects to that of PW11. He reiterated that when the accused was arrested in Ugunja he had the phone Nokia C2 03 with IMEI Nos. 35826043274908 and 358226043273916 and that he (the accused) had inserted his sim card

No. 0700805797 into the mobile phone of the deceased. PW12 said that the accused did not volunteer an explanation about the deceased's phone until he was arrested the 2nd time after mobile data was availed by Safaricom. He stated that they recovered the deceased's phone from the accused and that the Safaricom data showed that he had used the phone after the death of the deceased. He further stated that the accused did not give an explanation of how he came into possession of the phone when he first made his statement to the police on 21st December 2011 and that the accused's further statement on the phone was merely an afterthought.

23. It is clear from the testimony of PW11 and PW12 that the main reason that the accused was charged was because he was found with the deceased's mobile phone. In law, the doctrine of recent possession operates under very clear principles. The Court of Appeal in **Isaac Nanga Kahinga alias Peter Ng'ang'a Kahinga Vs. Rep. Criminal Appeal No. 272 of 2005** (unreported) restated them in the following terms:-

"...it is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in criminal case the possession must be positively proved. In other words, there must be positive proof, first the property was found with the suspect and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of suspect and recovery alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses....."

24. In this case however, the accused did not deny being in possession of the phone he only disputed that he had any knowledge that it belonged to the deceased. In his defence, he stated that he was given the phone and its accessories by Peter Gitau or P.G. as a present. He admitted that he inserted his sim card into the said phone hence admitting the evidence captured in the Safaricom data.

25. The prosecution proved that the phone did belong to the deceased. PW1 confirmed having bought it for her to run his guest house business. Positive proof of purchase was provided by PW11 as aforesaid. The accused's explanation however was that he was given the phone by P.G. PW11 and PW12 while admitting that the accused told them in his 2nd statement that P.G. gave him the phone, merely dismissed that assertion as an afterthought. It would in the view of the court however have made investigative sense to interrogate the accused further on his statement and to interrogate the said P.G. on the alleged gift. From the witness statements availed to the court in the bundle, there was no statement recorded from the said P.G. despite being implicated by the accused. Even in court, the accused's testimony that he was given the phone by P.G. was not displaced by any evidence to the contrary. This creates sufficient doubt as to whether the accused killed the deceased and took her phone or whether P.G. took the phone from the deceased before or after her death and gave it to the accused as he alleges.

26. There is no doubt in the mind of the court that the accused knew more about the death of the deceased than he revealed in his defence. He did not appear truthful in his testimony and was evasive in explaining the events of the material period. He talked about an interaction between himself and deceased on the night of 16th December 2011. He also talked of an interaction between himself and P.G. and further stated that he saw P.G. visit the deceased the same night in her room. His testimony that P.G. later gave him a present that turned out to be the deceased's phone provides a critical albeit unclear link between himself, P.G. and the death of the deceased. That said however, it was the duty of the prosecution to prove the case against the accused. The accused bore no burden to prove his innocence.

27. From my overall appreciation of the evidence, I find this case to be one which was neither diligently investigated nor prosecuted. While the pathologist testified that he removed samples including vaginal swab, kidney, liver and stomach for further analysis by the government chemist, no evidence or report was presented in the trial. No statement was taken from the person alleged to have been seen last with the deceased. In general, the investigation left more questions than answers. According to the testimony of various prosecution witnesses aforesaid one Peter Gitau or P.G. seemed to have been at the centre of the happenings at the Kontainer guest house. He is the one who alerted PW1 that the deceased was missing.

He is alleged by PW9 to have removed a window pane and keys from the deceased's room. More significantly he is alleged (by the accused) to have visited the deceased on the night of 16th and after to have given the deceased's phone to the accused. All these allegations seem either not to have been investigated or not deemed useful to the prosecution case. While PW11 told the court that the said P.G. was initially arrested and set free as there was no evidence against him, it emerged from the trial that he may have played a much more significant role and his evidence might have been of assistance in sealing some of the gaps in the prosecution case.

28. In view of all the material gaps observed and allegations made by various witnesses in the course of the trial, and in the interest of justice, this court recommends to the Director of Public Prosecutions that the death of the deceased be subjected to a fresh investigation. In this regard, the Deputy Registrar of the Court is directed to expeditiously forward this judgment to the Director of Public Prosecutions.

29. In the final analysis however, I find the charge of murder against the accused not proved beyond reasonable doubt. The totality of the evidence only raises a strong suspicion against him. He is acquitted of the charge and set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and delivered at Nairobi this **30th** day of **January**, 2017

R. LAGAT-KORIR

JUDGE

In presence of:

.....: Court clerk

.....: Accused

.....: For accused

.....: For State