



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NUMBER 106 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ELIJAH WERU MATHENGE.....ACCUSED

JUDGEMENT

Background

Elijah Weru Mathenge, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are that on the 4th day of November 2013 at Lenana Estate in Dagoretti District within Nairobi County he murdered Rosemary Njoki Nyaga. The accused pleaded not guilty to the charge necessitating this trial. The prosecution called eleven (11) witnesses in support of its case. The accused is the only witness for the defence.

The case has taken time to be determined. The reasons for this delay are captured in the court file records and include accused's medical condition which necessitated delay while awaiting a medical report. The case was initially handled by Honourable Lady Justice Florence Muchemi. She took evidence of four (4) prosecution witnesses before her transfer from Nairobi. I took over the proceedings in this trial on 12th November 2014. I took evidence from the remaining witnesses and the defence.

The Evidence

Among the witnesses who testified are five (5) police officers and two (2) doctors. The key witness is H. K (PW7), a minor aged seven (7) years at the time of testifying. He is the son of the deceased and foster son of the accused. The accused and the deceased lived together in a relationship they referred to as marriage. PW7 testified without taking oath. The court disqualified him from taking an oath after conducting a *voir dire* examination on him and finding that although he was intelligent enough to testify, he did not understand the nature of an oath. He lived with his mother the deceased in a one-roomed iron sheet-walled and roofed house in Lenana Estate, Dagoretti in Nairobi. It was house number 26B. Evidence shows that the accused used to stay away working as a caretaker in Runda. He used to visit the deceased on the weekends.

PW7 testified that he woke up in the morning and called his mother but his mother did not respond. He went to the bed and found his mother dead with straps of a cloth material bag tied round her neck. He testified that the door to their house had been locked from outside and therefore he could not exit the house.

The closest neighbour to the deceased was Doris Kalunda Wamalwa, PW1. Doris lived in house number

27B. On 4th November 2013 at about 8.30am she heard a child crying in deceased's house. The crying took some time and Doris decided to investigate. She found the door to deceased's house latched from outside. She opened it and entered the house. She found it was PW7 crying. PW7 informed Doris that his father had strangled his mother to death. PW7 showed Doris the deceased who lay on the mattress. Neighbours organized to take the deceased to hospital but she did not make it.

The matter was reported to the area Chief who visited the scene at about 10.00am. The area Chief was not a witness in this case. Meshack Mulusa, PW2, a village elder accompanied the Chief to the scene with APC Consolata, PW3, from Ngando Administration Police Camp. Meshack told the court that they found PW7 standing outside the house holding a Nakumatt paper bag and the key to the house. Inside the paper bag was the cloth material bag (Exhibit 3) whose straps were allegedly used to strangle the deceased. On her part APC Consolata confirmed visiting the scene in the company of Meshack and the Chief. She confirmed finding PW7 outside their house which had been locked. She testified that PW7 told her that his mother had been strangled to death by his father using the straps of the cloth material bag and that PW7 showed her the bag that had been placed in a plastic Nakumatt paper bag. Inside the house, APC Consolata was shown a mattress placed on the floor where the deceased was allegedly strangled to death. The officer confirmed going to the hospital where the deceased had been taken and confirming that she had died.

Investigations into the death of the deceased commenced. Police received information that the deceased has surrendered to the police at Nanyuki Police Station. On 5th November 2013, CPL Jairus Namiti, PW5, and PC Vincent Siro, PW9, travelled to Nanyuki Police Station to collect the accused. They brought him back to Dagoretti. He was charged with this offence after the investigations were completed.

PC Joseph Kigara, PW8, took eight (8) photographs of the body of the deceased at the St. Odillis Dispensary in Karen. The photographs show different views of the body and the Dispensary. The photographs were produced as Exhibits 1(a) to 1(h) and the certificate as Exhibit 2. Dr. Dorothy Njeru, PW10, examined the body of the deceased on 8th November 2013 and prepared a report produced in court as Exhibit 5. The body was identified to Dr. Njeru by Joseph Ileri, PW4 and cousin to the deceased. Dr. Kizzy Shako examined the accused on 7th November 2013 and formed the opinion that he was mentally fit to stand trial.

The accused did not give oral evidence. Instead he testified by way of a recorded statement prepared in answer to prepared questions. This was adopted as unsworn evidence of the accused in his defence. This procedure was allowed by the court for reasons that the accused had lost his power of speech after developing meningitis while in prison custody awaiting his trial. He could not therefore verbally testify in court. This court, after making enquiries which included calling for a medical report to confirm the condition, declared him a person with disability and ordered that he could testify by electing to use an intermediary or by pre-recorded statement in answer to prepared questions or by signs and gestures. The accused had initially opted to use a pre-recorded statement in answer to pre-prepared questions in examination in chief and to be cross-examined by answering questions by use of signs and gestures. He however changed his mind and opted to record his defence as unsworn evidence. The statement was accepted by this court and the defence closed its case. Parties were thereafter allowed to put in their final submissions.

In his recorded statement of defence, the accused admitted having lived with the deceased as husband and wife and PW7 as his foster son. He admitted that they lived in Lenana Estate in an iron sheet house. He described the deceased as bothersome and always raising petty issues with neighbours. He stated that one Charles a neighbour had threatened to beat the deceased complaining that the deceased made noise at night making it impossible for neighbours to sleep peacefully. He stated that he spent the weekend of 2nd November 2013 peacefully with his wife and left on Monday the 4th of November 2013 to go to Nanyuki to visit his mother. He stated that he left home at about 5.00am and told the deceased to lock the door. He said that he met the Charles outside and assumed that he was going to the toilet. He said that he left his wife alive and well.

The accused stated further that he learned of the death of the deceased through a telephone call from PW1 who blamed him for the death and that PW1 told him that police were looking for him. He testified that he decided to go to Nanyuki Police Station to report but he was placed in custody after the police made enquiries in respect of his report.

Submissions

The defence submitted that the prosecution has failed to prove the case against the accused beyond reasonable doubt and urged the court to acquit him. The defence has raised the following issues in their submissions:

- i. That the evidence of PW7, who is a minor and testified without taking an oath, required corroboration;
- ii. That the medical evidence of the pathologist did not support the theory of strangulation as the cause of death;
- iii. That there are contradictions in prosecution evidence as to the cause of death of the deceased;
- iv. That crucial witnesses were not summoned to testify;
- v. That the prosecution is relying on circumstantial evidence and that this evidence does not meet the applicable test; and
- vi. That the prosecution evidence only raises suspicion and that suspicion however strong cannot provide a basis for inferring guilt on the part of the accused.

The defence has cited various authorities in support of their submissions including **Republic v. Leonard Korir Kimutai & Another [2015] eKLR**; **Johnson Muiruri v. Republic [1983] KLR 445**; **Bukenya v. Uganda [1972] EA 549**; and **Abanga alias Onyango v. Republic Criminal Appeal No. 32 of 1990**.

The prosecution has submitted it has proved the case against the accused beyond reasonable doubt and urged the court to convict him for murder. It was submitted that the evidence adduced by prosecution witnesses places the accused at the scene of the murder; that PW7 demonstrated to Meshack and Consolata how his mother was strangled proving that he witnessed the murder; that the deceased's intention to go to Nanyuki was not to visit his mother but to escape from the scene because he knew what he had done; that the hammer recovered from under the bed and the straps of the cloth material bag were used to murder the deceased; that the accused and the deceased fought and the accused hit the deceased with the hammer and that neighbours heard the deceased scream at night and items were found scattered in the house.

I wish to point out that there is no evidence on record to point to any neighbour hearing the deceased scream during that night as submitted by the prosecution counsel. Submissions on this point are therefore misleading.

Determination

The case for the prosecution is based partly on circumstantial evidence and partly on unsworn evidence of a minor. The defence in their submissions has raised the issue of contradictions in the evidence of PW7 in court and in his statement to the police. This witness was not cross-examined on his statement to the police nor was that statement produced in evidence. This court therefore has the unsworn evidence of PW7 as the only record on which to make reference. A careful reading on the evidence of PW7 shows that he did not mention the presence of the accused before he went to sleep. He told the court as follows:

“I had gone to sleep. I woke up in the morning and I went to call mother. She did not answer. I went and checked the bed. I found her tied with handbag on the neck. It was white

handbag..... Father had left and locked the house. I just woke up and found mother tied with handbag. She was dead. I called neighbours to open for me..... They called police who started looking for photograph of accused. I did not see accused again.”

The prosecutor led PW7 in evidence to elicit this evidence. This evidence does not state categorically whether PW7 had seen the accused in the evening before he went to sleep. By stating that **“father had left and locked the door from outside”** PW7 was implying that the accused had been home that night. The only other evidence on this issue is that of Doris the next door neighbour who told the court in examination in chief that **“Mama Hoston had a husband who used to visit her during the weekend”** and in cross-examination that **“The accused used to come to his wife’s house during some weekends. That particular weekend I had heard him talk in the house the previous evening.”** This is evidence by recognition of the voice. Doris was not led in evidence to state for how long she had heard the accused speak and confirm whether she was in a position to recognize his voice. Doris did not mention seeing the accused. She only mention of hearing his voice. What made her convinced that it was the voice of the accused? What was she doing when she heard the accused speak, when was that? This evidence is weak and it required further interrogation to confirm that Doris could not have been mistaken about the voice of the accused. Because of the weaknesses in this evidence, it is my considered view that it is not capable of corroborating the unsworn evidence of PW who is a minor and who testified without taking oath.

Even assuming that the accused was at home and that he killed the deceased, this court does not have direct evidence and will have to resort to circumstantial evidence. Circumstantial evidence is evidence that tends to prove a fact indirectly by proving other events or circumstances which lay the basis for the court to make reasonable inference of the occurrence of the fact at issue. The test to be applied in relying on circumstantial evidence has been enunciated in various decisions including the ones cited by the defence. The prosecution must prove that:

- i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;***
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;***
- iii. 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.***
- iv. 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.***

See also **Musili Tulo v Republic [2014] eKLR; GMI v Republic [2013] eKLR; R. v. Kipkering Arap Koske & Another, 16 EACA 135 and Musoke v. R [1958] EA 715).**

The circumstances of this case are that in the morning of 4th November 2012 Doris heard PW7 crying inside their house. She went to investigate and found the door secured with a latch from outside. She opened it and found PW7 crying and deceased lying on a mattress. She called other neighbours and on examining the deceased, someone thought she was not dead. She was taken to hospital where she was pronounced dead. PW7 told Doris that his father had strangled his mother. Doris said the walls of the houses they lived in were made of iron sheets and that one could hear from the neighbour’s house. Doris did not hear any commotion nor did PW7 hear anything. Evidence by Consolata and Meshack seem to suggest that items were scattered in the house of the deceased, indicative that there was a struggle. If there was a struggle no one heard anything. There is no evidence to show when the deceased was attacked, how she was attacked, by whom and by what weapon. According to Doris, she was still alive when they found her. This is why they decided to take her to hospital.

In my considered view, the evidence by the prosecution on what happened to lead to the death of the

deceased does not meet the test of circumstantial evidence in the above cases. Even assuming that the accused killed the deceased, the circumstances from which the inference of guilt is sought to be drawn are not cogently and firmly established; these circumstances are not of definite tendency unerringly pointing towards the guilt of the accused; the circumstances taken cumulatively do not 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 and there are other co-existing circumstances which would weaken or destroy the inference. For instance the time of the attack on the deceased is not established and there exists doubts as to whether the accused had left the house when the deceased was attacked or not.

The second issue is the cause of death of the deceased. The prosecution has advanced the theory that the deceased was strangled to death. Dr. Njeru did not find this to be the case. In her evidence in-chief Dr. Njeru told the court that the cause of death was head injury due to blunt force trauma. On cross-examination she told the court that the blunt trauma was extensive on the scalp and the blood has spilled beneath the skin of the scalp and that she found no strangulation marks on the neck. She said that the weapon used was blunt and did not have a cutting edge and that if a hammer had been used it depended on the impact and the part of the hammer used.

The police did not investigate the weapon that caused the death. They believed the theory that the deceased was strangled to death. Consolata and Meshack demonstrated to the court during cross-examination how the deceased was strangled as shown to them by PW7. This demonstration obviously did not agree and contradicted each other. PW7 was asleep and there is no way he could have witnessed the murder. Had this been the case he would have screamed to attract the neighbours. This theory of strangulation was discounted by Dr. Njeru. I have considered this evidence and I am not satisfied that the prosecution has tendered evidence to show what happened to the deceased and who inflicted the fatal injuries.

The post mortem was conducted on 8th November 2013. This is the same day the hammer was recovered by the police. Consolata told the court that she had to go back to the scene to recover it. This evidence was discredited by the defence that the prosecution went looking for evidence in order to align it with the findings of the doctor that the cause of death was due to blunt force trauma to the head. I agree with the defence that the recovery of the hammer on 8th November 2013 is suspect. This court is not able to believe that the hammer was found in the house of the deceased without proof of the same given that it was not found on the day the deceased was found injured.

I agree with the defence that crucial witnesses were not called to testify. There is the caretaker, the Chief, a neighbour called Mama Lucy who is said to have taken deceased to hospital, the hospital staff who attended to the deceased and other neighbours of the deceased. Perhaps these may have heard or seen something that may be of some relevance to this case. This court was not told why they were not summoned to testify.

I have considered the defence of the accused. He reported to the police at Nanyuki police station on 5th November 2013. This is the following morning after the murder assuming the accused was assaulted on 4th. The law does not place the onus of proving a murder trial on the accused. He had however explained what he did on arriving in Nanyuki. He had the chance to go into hiding but he did not.

Having considered the evidence in totality, I find that there is strong suspicion that the accused could be culpable. I have examined the evidence against him and I have found it wanting. It proves death of the deceased beyond reasonable doubt. It did not however agree with the theory of the prosecution that the deceased was strangled to death. Evidence does not prove beyond reasonable doubt that the accused is the one who assaulted the deceased on the head causing fatal injuries to her. It does not prove intention to cause death or grievous harm. It does not prove motive which though not relevant to prove murder is relevant where prosecution evidence is circumstantial. The law from decided cases is that suspicion alone, however strong, can never form a basis for conviction. Given what was tabled before me, I find that the prosecution has failed to reach the threshold of proving the case beyond reasonable doubt. The benefit of doubt must go to the accused. Consequently, I find the accused not guilty of the murder of the deceased and acquit him forthwith. He is at liberty to enjoy his freedom unless for any other lawful cause he is held

in custody. Orders shall issue accordingly.

Dated, signed and delivered this 27th April 2017.

S. N. Mutuku

Judge