



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 47 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

SIMON YELE SAMOYO.....ACCUSED

JUDGMENT

The accused **SIMON YELE SAMOYO** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the 25th day of April, 2015 at Njoro Township in Njoro Sub-county murdered ESTHER WACHERA KAMANGU”

The accused entered plea of ‘**Not Guilty**’ to the charge. The prosecution called a total of five (5) witnesses in support of their case.

PW1 JANE AKIRU KAMANGU is the mother of the deceased. She told the court that on 25/4/2015 the accused who is her daughter’s husband phoned her and informed her that he had found his wife standing at the marked place with a strange man. For this reason the accused told **PW1** that he had beaten his wife. He informed **PW1** that the deceased was sleeping. The next day a cousin of accused phoned **PW1** and told her to rush to the couple’s home in Sobeya. **PW1** went there only to be met with murmurs of ‘**pole**’. She was informed that her daughter was dead. **PW1** then went to the mortuary to view the body of her daughter. The body had multiple injuries all over. The matter was reported to police after which the accused was arrested and charged with murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused elected to make a sworn defence. He denied having fatally assaulted the deceased. The accused stated that on the material day he went to work as usual. He returned home after work to find his wife lying dead in the house with several injuries all over her body.

This court must now analyse the evidence on record to determine whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal Code defines the offence of murder as follows.

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

In this case the fact of the death of the deceased is not in any doubt. **PW1** the mother of the deceased told the court that she went to the mortuary and identified the body of her daughter. **PW1** gave the name of the deceased as '**Esther Wacera**'. The accused however produced the deceased Identity Card which gave her name as '**Esther Waithera**'. This could have been no more than a misspelling of the deceased name at the time of framing the charge. In any event the accused readily conceded that he was married to the daughter of **PW1** who is now deceased.

The cause of death was proved by the evidence of **PW3 DR TITUS NGULUNGU** the Government Pathologist who conducted the autopsy on the body of the deceased. **PW3** noted multiple bruises and injuries on the body of the deceased. Upon conclusion of his examination **PW3** opined that the cause of death was "**head injury attended by brain contusion and pulmonary fat embolii due to multiple trauma to the body in keeping with fatal assault**"

PW3 filled and signed the post-mortem report which he produced as an exhibit **P.exh 1. I**

It is therefore clear that the deceased met her death due to a brutal thrashing assault on her person.

The critical question which requires an answer is whether it was the accused who administered this brutal beating which led to the death of the deceased.

There was no eye witness to the event which led to the death of the deceased. No witness who saw what happened ever came before this court to testify as to the events of that day.

PW1 the deceased's mother told the court that on 25/4/2015 the accused phoned her and told her that he had beaten his wife because he found her at the market place with some unknown man. **PW1** did not herself witness the incident. This is not admissible evidence of a confession by the accused. The rules regulating the admissibility of a confession are clearly set out in section 25A of the Evidence Act, Cap 80, Laws of Kenya. Given that **PW1** herself did not see anything this purported admission by the accused cannot be used to implicate him.

PW1 told the court that the accused later phoned her husband "**Samuel Kamangu**" and informed him that he had beaten the deceased. The said '**Samuel Kamangu**' did not testify in court to confirm if he ever received such a call from the accused. In any event this purported admission by the accused would still fall foul of the provision of Section 25A of the Evidence Act.

PW4 SYVESTER THEURI was a brother to the deceased. He told the court that some of the deceased's neighbours informed him that the couple had been engaged in a fight during the night. No doubt these neighbours were crucial witnesses who may have seen what befell the deceased and who assaulted her. However none of these neighbours was called as a witness in this case. It was stated that they were reluctant to record statement with the police. It would appear that if such eye witnesses existed the police did not aggressively seek to obtain their statements. This remains hearsay evidence which is not admissible as proof of the guilt of the accused.

Suspicion certainly falls upon the accused as he was the spouse to the deceased. However it is well settled that suspicion on its own, no matter how strong cannot form the basis for a conviction (see **SAWE Vs REPUBLIC [2001]KLR**)

It was alleged that the accused absconded from the matrimonial home after the incident. **PW5 SENIOR SERGEANT JUSTUS KASUSIA** the court that police were searching for the accused in respect of other unrelated offences. **PW5** states that he searched for the accused and eventually traced him to Ponda Mali Estate from where the accused was arrested on 5/7/2015. The deceased met her death on 25/4/2015. The accused was not arrested until 5/7/2015 almost three (3) months later. In his defence accused denies that he absconded from his home. I do not buy this defence at all. If accused remained at his usual residence, the police would not have needed to search for him. The fact that police were searching for the accused means that he could not be traced at his usual residence. It is clear that after the death of his wife the accused went underground and that is why he was not arrested until three months later. The fact that

accused abandoned his home after the incident is certainly indicative of a guilty mind and suggests that he could have had a hand in the death of the deceased.

However the prosecution have failed to adduce tangible evidence to link the accused to the fatal assault upon the deceased. All the court has been subjected to is conjecture and hearsay. The charge has not been proved beyond reasonable doubt. I therefore enter a verdict of '**Not Guilty**' and I acquit the accused of the charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 24th day of April 2017.

Mr Maragua holding brief for M/s Kerubo

Mr Motende for DPP

Maureen A. Odero

Judge