



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NUMBER 73 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

ELIKANA KAGUNDA NJOROGE.....ACCUSED

JUDGEMENT

Background

Elikana Kagunda Njoroge, hereinafter “the accused” is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the evening of 9th August 2012 at Kimende within Kiambu County he murdered Tabitha Wanjiru Miruru, hereinafter called “the deceased”. The accused was brought to court first on 17th September 2012 but the plea was not taken until 3rd October 2012 when the charges were read out to him. He denied the charge. He is represented by Mr. Nyangayo instructed by Swan Advocates. The prosecution was handled by several prosecution counsels.

Evidence

The prosecution summoned thirteen (13) witnesses to testify in support of its case. The defence called two (2) witnesses, the accused and his mother, to testify in support of the defence case. The summary of the evidence from both sides is that the accused and the deceased were in a relationship as girlfriend and boyfriend. According to the accused they met in 2010 while in college at Kitale. They had been in constant communication before her death. From the evidence of the accused, he met the deceased on 9th August 2012 at Magina at about 1.00 o'clock. They had lunch and stayed together until about 5.00pm when they parted ways and the accused left to look for accommodation. He said he was directed by the deceased to go to Topville Hotel in Kimende. Topville Hotel belonged to Peter Kuria Waruathe (PW1) who is also uncle to the deceased.

According to prosecution evidence the accused found Anne Waceke (PW2), the receptionist at Topville. Anne told the court that the accused arrived at Topville Hotel at 5.00pm. She could not identify the accused in court as the person who went to Topville looking for accommodation but it is not disputed by the defence that the accused is the person who was served by Anne and rented a room at Topville Hotel on the evening of 9th August 2012. Anne testified that the accused was allocated room number seventeen (17). He left immediately after placing his bag in the room. Anne did not know when the accused returned to the room. In his defence the accused confirmed that he checked in Topville Hotel, was allocated room seventeen (17) and left briefly to buy airtime. He said that he returned to the room after buying airtime and slept until the following morning at about 5.30am. He wanted to leave the room but he could not find Anne to hand over the room key to. He called the number showing on the receipt he had received after

paying for the room. It belonged to the proprietor of Topville Hotel Peter Kuria who was at the time in Mombasa. The accused explained his predicament to him. Peter tried to call Anne without success. He called the accused back and told him to leave the key at the reception.

The evidence from the prosecution shows that the deceased was killed on the evening of 9th August 2012 inside her mother's house. On the same evening at about 7.00pm the deceased had gone to her mother's shop where she bought three (3) eggs and left. Her mother Lillian Wangui (PW5) confirmed this. Lillian closed her shop at about 8.30pm on 9th August 2012 and went home. She found the door to her house half open. All the lights in the house were on. She saw her daughter lying on the door between the bedroom and the sitting room. She thought the deceased had fainted due to suffocation from fumes emitted by the charcoal burner. Her screaming attracted the neighbours who assisted her to take the deceased to Orthodox Hospital. The deceased was pronounced dead on arrival at the Hospital.

Investigations led police to the accused. Police tracked the accused's telephone number retrieved from the deceased's handset. Through Safaricom Mobile Provider details emerged that the accused and the deceased had communicated that day. According to CIP David Kiprono Rop (PW7), who wrote to Safaricom Mobile Provider for the call data from accused's and the deceased's telephone numbers, the accused and the deceased communicated through text messages on 9th August 2012 three times and the last communication was at 7.00pm.

The evidence of Dr. Peter Muriuki Ndegwa (PW11) is that the deceased had ligature impression at the front and back of the neck, subcutaneous bruises in deep neck muscles, fractured bone of the neck, bleeding on the surface of the lungs due to lack of oxygen and bruised intestines. The doctor told the court that the deceased died due to ligature strangulation with a possibility of sexual assault. He explained that for the bruises to manifest on the intestines the deceased must have been hit on the stomach and that a blunt force must have been used.

The accused denied killing the deceased. He admitted meeting her on 9th August 2012 but said they parted ways after spending the afternoon together. He said that the deceased was scared that her strict mother should not know that she had a boyfriend and because of this they decided to leave in separate ways using different means of transport. The accused said he went to the hotel and the deceased went home. He said he was to travel back to Kitale very early the following day and this is the reason he woke up at 5.30am. He said he was informed about the death of the deceased and that he travelled to attend the burial of the deceased at Nakuru on 16th August 2012.

Submissions

It was submitted by the defence counsel, and correctly so, that the case for the prosecution is based on circumstantial evidence. Counsel relied on the case of **Musili Tulo v Republic [2014] eKLR** to emphasize on the requirements that ought to be satisfied by the prosecution when relying on circumstantial evidence. He submitted that proof of motive is crucial where the evidence to be relied on is purely circumstantial and cited the case of **Libambula v Republic [2003] KLR 683**. Counsel urged that the prosecution has not demonstrated that the accused had motive to cause the death of the deceased. It was further submitted that the accused gave a defence of alibi which defence was not controverted by the prosecution. Counsel relied on **Solomon Kirimi M'rukaria v Republic [2014] eKLR** where the court cited with approval the case of **Uganda v Sebyala & Others [1969] EA 204** on the defence of alibi.

The defence counsel submitted that the prosecution failed to call crucial witnesses, the neighbours and workers who were said to have been constructing chicken coop in the compound at the scene of the murder. Counsel urged the court to acquit the accused for lack of evidence linking him to the death of the deceased.

On the other hand, the prosecution submitted that it has tendered sufficient evidence to prove the case against the accused beyond reasonable doubt; that the evidence places the accused at the scene of murder and that evidence shows that the accused is the last person to be seen with the deceased and the last

person to communicate to her. The prosecution submitted further that it has proved all the ingredients of murder and urged the court to find the accused guilty and convict him for the death of the deceased.

Analysis and determination

The offence of murder is created by Section 203 of the Penal Code which provides that:

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

The penalty for murder is provided for under Section 204 of the Penal Code. The burden of proof lies with the prosecution. The prosecution bears both the evidentiary burden and legal burden of proof. It is the prosecution to adduce evidence to prove that the death of the deceased occurred as a result of an unlawful act or omission perpetrated by the accused person before the court and that in so acting or omitting to act the accused person possessed malice aforethought. Section 206 of the Penal Code defines malice aforethought to include (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not; (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused. The standard of proof is proof beyond reasonable doubt.

My careful reading and analysis of the evidence from the prosecution and the defence reveals that certain facts are not disputed. It is not disputed that the accused and the deceased knew each other, were in a relationship and were together on 9th August 2012. It is not disputed that they communicated on 9th August 2012 using their cell phone numbers 0722968299 belonging to the accused and 0725644627 belonging to the deceased. Evidence by the prosecution, which is not denied by the defence, shows that the accused and the deceased used to communicate using the numbers shown above even before the date in question. It will therefore serve no purpose to discuss in detail the evidence by the police concerning the call data obtained from Safaricom. This evidence shows that the two telephone numbers were located near Safaricom mast Serial Number 05432 which is placed near Lari Educational Office as testified by CIP Shamalla (PW12). The evidence of CIP David Kiprono Rop (PW7) shows that the accused and the deceased communicated last using their respective numbers at 7.00pm. CIP Rop told the court that the accused and the deceased had communicated three times on 9th August 2012 and that he singled out the accused's number from the other numbers that had communicated with the deceased because it was the number that communicated with the deceased last on that day at 7.00pm.

The case for the prosecution is based on circumstantial evidence. There is absolutely no direct evidence linking the accused to the death of the deceased. The only evidence that brings the accused closer to this matter is his own admission that he was with the deceased earlier that day (9th August 2012) and the call data locating the two telephone numbers at the same area. I have examined the text messages before the date in issue and I find nothing in them to indicate that their relationship was anything but that of a young girl and boy in love. I wish to discount the prosecution evidence that the accused was the last person to see the deceased on 9th August 2012. There is no evidence to support this and to state so amounts to mere speculation.

The rules on circumstantial evidence are clear. As submitted by the defence and relying on the cited case of **Musili Tulo** (supra) and other authorities (see **GMI v Republic [2013] eKLR, R. v. Kipkering Arap Koske & Another, 16 EACA 135** and **Musoke v. R [1958] EA 715**), to prove a case basing it on circumstantial evidence, 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.

What are the circumstances in this case? They are that the accused and the deceased communicated on 8th August 2012 and 9th August 2012; that they met and spent time together on 9th August 2012; that the accused booked a room at Topville Hotel on the 9th August 2012 at about 5.00pm spent the night in that hotel and left the following morning at about 5.30am. After booking the room, the accused went out. There is no evidence to show the time he returned to the hotel. Evidence shows that the accused was alone at the time. The deceased, on the other hand, went to her mother's shop on 9th August 2012 at about 7.00pm and bought eggs and left. She was alone at the time. It is therefore not farfetched for me to conclude that at one time the accused and the deceased parted ways, with the accused going to look for accommodation and the deceased perhaps going home and later to her mother's shop to buy eggs. Her mother saw her at the shop around 7.00pm. Her mother went home at about 8.30pm and found her daughter murdered. It will be highly speculative for me to assume that the accused left his room in Topville Hotel, went to deceased's home, murdered her and returned to the hotel. I have nothing to point me towards that direction of reasoning.

Do these circumstances meet the criteria set out in the authorities cited above? Are these circumstances cogently and firmly established? Are they of a definite tendency unerringly pointing towards the guilt of the accused? Taken cumulatively, do these circumstances 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 finally, are there other co-existing circumstances which would weaken or destroy the inference?

As stated above there is no evidence from the prosecution to show what the accused did when he left his room after booking at 5.30pm. Did he go back to the deceased and murder her? If he did it, this must have been after 7.00pm when deceased's mother Lillian saw her daughter at the shop. There is no evidence to show the court when the accused returned to the hotel. He testified that he went out of his room after booking briefly to buy air-time. Should this court doubt him and assume that he left the hotel with the intention of killing the deceased, committed the act and returned? In my view to assume this would be a miscarriage of justice because this court would have no basis for doing so, and his word that he went to buy credit and returned to the room offers reasonable explanation in the absence of evidence to the contrary, in my view. PW5, deceased's mother, told the court that she had not met the accused. The accused told the court that the deceased feared her mother and did not want her to know she had a boyfriend and this is the reason they left their rendezvous separately. If this is true, and I have no reason to believe otherwise without evidence, then the accused could not have dared venture into the home of the deceased lest he meet the mother!

To answer all the questions I have posed above in regard to circumstantial evidence, it is my considered view that the circumstantial evidence adduced by the prosecution does not meet the criteria set in the authorities cited above. There are other co-existing circumstances that would weaken or destroy the inference. For starters, there is insufficient evidence to show what accused did on 9th August 2012 save for call data showing he communicated with the deceased. The gaps in prosecution evidence have been filled by the evidence of the accused who told the court what he did that day, from meeting the deceased, having lunch with her, spending time with her and parting ways to look for accommodation. Secondly, there is his behaviour after parting with the deceased. Topville Hotel is not far from deceased's home. It belonged to PW1 Peter Kuria who is uncle to the deceased. He called Peter on 10th August 2012 at 5.30am to ask him where to leave the key after failing to get Anne (PW2) the receptionist. In my considered view this is not normal behaviour of a man who has just committed murder. The survival instinct would have kicked in and he would have gone as far as possible and distanced himself from the scene of the murder.

The evidence from PW5 the mother of deceased and police who visited the scene show that the scene of crime is a house in a compound of other 20-30 houses. It was a congested area. There were many neighbours around. There were also other people constructing a chicken coop. None of these people were called to testify to inform the court whether they had heard or seen anything at the scene.

The accused gave an alibi defence and as submitted and following decided cases including *Uganda v. Sebyala & Others (1969) EA 204* cited in *Solomon Kirimi M'rukaria [2014] eKLR*, I have analyzed the entire evidence from both sides and in testing the alibi defence, I find that the evidence by the accused creates doubt in my mind as regards the credibility of the prosecution case that he is the one who murdered the deceased.

I have analysed the evidence in totality with a view to determining what motive the accused would have had to kill the deceased. They were in a relationship and from the text messages from the mobile call data the relationship had no difficulties as at the time of this incident. Though motive may not be relevant in a murder case, it becomes relevant in determining circumstantial evidence as stated by the Court of Appeal in *Libambula v Republic [2003] KLR 683* that “.....*Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence.....*”

In conclusion therefore it is my finding that the deceased died as a result of ligature strangulation as testified by Dr. Peter Muriuki Ndegwa (PW11). This proves beyond reasonable doubt that the fact of unlawful death of the deceased. This proves only one element of murder. Available circumstantial evidence as analyzed above does not prove that the accused caused that death. It does not prove malice aforethought on the part of the accused either. The conclusion I arrive at therefore is that the prosecution has failed to prove the case against the accused person beyond reasonable doubt. In compliance with Section 215 of the Criminal Procedure Code which commands this court to acquit the accused person where there is no evidence supporting his conviction, I hereby find the accused, Elikana Kagunda Njoroge, not guilty of the offence of murder as charged. This court sets him at liberty. He is free to enjoy his constitutional right of freedom unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 20th day of April 2017.

S. N. Mutuku

Judge