



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CRIMINAL CASE NO.1 OF 2015

REPUBLIC PROSECUTOR

VERSUS

KASSIM SHEIKH HASSAN.....ACCUSED

JUDGMENT

KASSIM SHEIKH HASSAN, is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence were that between the 29th and 30th day of November 2012 at Moyale township, Moyale District of Marsabit County, murdered **ASTER MANGACHA**.

Prior to the death of the deceased herein, the prosecution contended that the accused was having a love affair with some two ladies who were known to each other. At the place where he was running a business he held out the deceased as his wife. When the body of the deceased was retrieved from a well, the accused was linked to her death.

In his defence the accused contended that the deceased was his wife. She went to purchase some items from Ethiopia but never returned. This was at a time when there was fighting in the Ethiopian side. He mounted a search for her in vain. When her body was found in a well, he was arrested and charged for her death.

The issues for determination are:

1. Whether the deceased was killed by the warring people in Ethiopia and her body dumped in a well.
2. Whether the accused was involved in her killing; and
3. If he was, whether the killing amounted to murder.

At about 2 p.m on the 6th December 2012 **Abdul Wario** (P.W 2) was at the no man's land along Kenya Moyale border. While talking with a friend he detected some foul smell and at the same time an alarm was raised. This was at a well where some boys said they were seeing something like a human body. Police officers from Ethiopia and Kenya went to the scene. A suit case was removed from the well and which contained a human female body. This was the body that was identified as that of **ASTER MANGACHA**. **Wario** (P.W 2) testified that he identified the body as that of the deceased. This was a person known to him prior to her demise. According to this witness the face was tied with a cloth. The

bag had two big stones tied to it.

The evidence of **corporal Lang'at** (P.W 6) is that when he was called to the scene he assisted in pulling out the suit case containing the body of the deceased. He further described how the body was before it was placed in the suit case. The neck was tied with a piece of cloth, hands tied with some sisal rope and the body put inside some two sacks.

From the description of these two witnesses, it would appear that the deceased was a victim of a cleverly planned killing and which was executed almost faultlessly but for the discovery. The evidence does not support the contention that she could have been a victim of warring parties. This is what the accused alluded to. He testified that on 5th December 2012 at 9.30 a.m she left for Ethiopia to purchase shop goods but did not return. Since there was fighting in Ethiopia, he informed his neighbours. There are usually no attempts to conceal deaths arising out of a war situation. I therefore dismiss this contention.

There is no direct evidence that link the accused to the offence. All we have against him is circumstantial evidence. What is circumstantial evidence? In the case of **MOHAMED & 3 OTHERS vs. REPUBLIC [2005] 1 KLR 722** – Osiemo Judge explained what circumstantial evidence is as follows:

“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved”.

Elizabeth Jaldo Jara (P.W 1) testified that in October 2012 she met the accused while she was working at Taye hotel in Ethiopia. They became friends and soon thereafter started living together. The accused promised to marry her. She introduced the deceased to the accused and the friendship of the accused and the deceased grew deeper. At one juncture, the accused took her to his sister's home at a place called Bolle. This was after he had informed her that his uncle had passed away. The accused subsequently called on phone and asked her to return. When she returned, her neighbours informed her that the accused had carried all their household goods and came into Kenya in company of a girl. When she finally succeeded in getting him on phone, he returned her clothes and they started living in a lodging.

After about nine days of their living in the lodging, the accused informed her that he had received a report that his shop on the Kenyan side had been broken into. He crossed into Kenya. He returned the following day and told her what had been stolen. He asked her to accompany him to Kenya, which she did. He took her to a shop that had a rear room. In the morning he left to go and report the loss.

While she was sweeping, she saw some clothes in a bag under the bed. at that time the accused called from the police station and asked her to take to him some clothes and shoes. When she took the items she was not allowed to speak to him but he handed over the items to the police. From a distance the accused asked her to return home in Ethiopia. Apparently she complied for she testified that in the night the accused went for her in Ethiopia. She however accompanied him to Kenya on the third time. Back in Kenya she found the bag which was under the bed missing but the clothes were in some two paper bags. When she opened one of the paper bags, she found that is contained **Aster's** clothes. When she asked the accused what the clothes were doing there, the accused asked why she kept enquiring about **Aster** and yet they had killed her with Tariku. She became afraid and did not interrogate him further. She informed him she wanted to go back to Ethiopia. When they were returning to Ethiopia, the accused was called on phone and he informed her that the girl he was with had been killed. He asked her to return to Ethiopia for the issue was going to pursue him. She was arrested while in the process of going back to Ethiopia.

It is not in doubt that the accused was staying with the deceased in Kenya and held her out as his wife. This came from the evidence of **Fatuma Noor Mumin** (P.W 3) who was their landlady. She testified that when they were looking for a business premises they introduced themselves to her as husband and wife though previously she had employed **Aster** where she worked for her for about one year. The accused confirmed the relationship in his evidence.

The body of the deceased was pulled out of the well on 6th December 2012 at about 2 p.m. The foul smell emanating from the well is what attracted members of the public to the well. They eventually called the police. The stench was a sign of decomposition of the body. The post mortem report was produced by consent without calling the doctor who performed the post mortem. Doctor Sirong made the following relevant observations:

- (1) He noted decomposition of the body with foul smell
- (2) skin loss
- (3) Deep wound on the head
- (4) Blunt injuries on the frontal chest wall
- (5) Swollen orbital region with haematoma and a deep cut wound

He formed an opinion that the cause of death was cardiopulmonary arrest following the stab wound to the face and blunt injuries to the head with loss of blood.

The contention of the accused that the deceased left for Ethiopia on 5th December 2012 cannot therefore be true. If the killing of the deceased could have been on 5th December or early on the 6th December 2012, then the decomposition of her body would not have set in when the body was retrieved from the well at about 2 p.m on 6th December 2012.

The other issue that displaces the defence of the accused is the suit case in which the body was found. Evidence on record indicate that this suit case was previously in his house before the body of the deceased was found in it. Without an explanation from the accused how it left his house without his knowledge, then the logical inference to make is that it must have left the house with his knowledge.

The conduct of the accused before the discovery of the body of the deceased makes him a suspect. We get most of it from the evidence of **Elizabeth Jaldo Jara** (P.W 1). This witness testified that he asked her to take her clothes and return to Ethiopia and claimed that the issue of the dead girl was going to pursue him. If there were any doubts in the utterances attributed to him by (P.W 1), then his conduct erased them. I have no doubt in my mind that the accused participated in the killing of the deceased.

Did the killing of the deceased amount to murder? Murder is defined **in section 203 of the Penal Code** as follows:

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

In the case of **REPUBLIC vs. ANDREW MUECHE OMWENGA [2009] eKLR** Maraga J (as he then was), referring to the above Penal Code definition went on to say:

It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.

In the instant case as I had earlier observed, the killing of the deceased was skillfully planned and executed. This amounts to murder. All the ingredients of the offence have been proved beyond reasonable doubts. I therefore find that the accused herein was the key schemer of the offence. I find him guilty and accordingly convict him.

DATED at MARSABIT this 19th Day of April 2017

KIARIE WAWERU KIARIE

JUDGE