



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL MURDER CASE 13 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MAINA MUTHONI..... RESPONDENT

JUDGMENT

1. The accused **John Maina Muthoni** 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 on the night of 22nd December 2012 at Memo Village Kinangop Location in Nyandarua South District within Nyandarua County, jointly with others not before court murdered **Josephine Muthoni**.

He pleaded not guilty.

At the trial, he was represented by Olonyi Advocate while the Director of Public Prosecutions was represented by Mr. Motende and Chigiti at various times.

2.The prosecution called seven witnesses.

PW1 was Peter Kariuki Githuka

His evidence was that on the 21st December 2012 he left the deceased, the accused and other people drinking at *Saba-Saba* Bar at Memo at about 9.00p.m. He testified that in the morning he learnt of the death of the deceased and when he went to find out, he was arrested together with the accused and one Kimani but after investigations, they were released but the accused was later arrested. He testified that he did not witness the killing of Josephine Muthoni, and that he did not know the relationship between the accused and the deceased but left them drinking in the bar. He stated that he did not know who killed Muthoni.

3.**PW2 Joseph Kamau** was the owner of the bar called *Saba-Saba* within Memo, and was present at the bar on the fateful night. He saw the deceased at the bar drinking at about 9.30p.m. sitting with other people, and also at about 11.00p.m., when the bar was closing.

He did not see or witness the killing nor did he know who killed Josephine Muthoni. He testified that at the bar, the deceased and the accused were not sitting at the same table.

4.**PW3 Florence Njeri Kinyanjui** is the daughter of the deceased. Her testimony was that on the 8th January 2013 she was summoned to the police station to identify a telephone set. She testified that the telephone handset belonged to her deceased mother. It was a Nokia 1280 with Serial No.

3597260/43215588, but had no evidence to confirm ownership of the said telephone set.

5.PW4 Samuel Kamau Gachuchu's a neighbour of the deceased at Memo testified that on the morning of 22nd December 2012, at around 5.00a.m. while at his cow shed preparing to milk his cows, he saw someone sleeping near the cows and upon calling got no answer.

At his gate he met other two people and together they went to inspect the person when they found it was the deceased's body covered with a *lesso*. It was his evidence that there were no blood stains at the scene and he did not hear or see anybody killing the deceased. Likewise **PW5 Elisphan Kinyanjui**, son to the deceased did not know who killed his mother as he was informed of the death on the 22nd December 2012.

6.The postmortem on the body of the deceased was conducted by Dr. Okenwa at the Nakuru Provincial Hospital on the 23rd December 2012, but produced by Dr. Titus Ngulungu, a pathologist at the same hospital as Dr. Okenwa had gone abroad for post graduate studies. According to the report, the cause of death was due to blunt trauma to the head caused by a blunt object. He also suspected sexual assault.

7. A Government Analyst Lawrence Kinyua testified as PW6.

He received for analysis items from the police station on the 24th December 2012 including blood sample of the deceased, Buccal swabs, finger nails, blood sample of the accused and other suspects, David Ndungu Kamau, Peter Kimani and a green jacket wrapped in *Khaki* paper (of the accused) Red, blue, green and yellow handkerchief, piece of *Khaki* paper, piece of wood and creaminess trouser for examination and determination of any DNA of the accused.

The results and conclusions are stated in his report dated 14th May 2014 PExt 1.

8.The investigating officer, one P.C. Kennedy Mutunga Nzuki visited the scene of crime and collected the body. His testimony was that he found the body tied with a *lesso* on the neck with blood all over the ground and two cedar posts with blood stains near the body.

He testified that upon investigations, he found that the deceased was seen in the bar in the company of other men and the accused who he concluded was her lover but had no proof of that allegation and upon such evidence and a telephone handset alleged to have belonged to the deceased and recovered from the accused's mother charged the accused with the offence of murder.

9.In his unsworn evidence, the accused denied killing or participating in the murder of the deceased. It was his evidence that anyone who was at the Memo *Saba-saba* bar on the night of the murder was rounded up for questioning and were all released and later on the 9th February 2013 he was arrested and arraigned in court. He denied knowledge of who could have killed the deceased.

10.I have considered the evidence of all the prosecution witnesses as well as the defence. It is evident that none of the seven witnesses saw or knew who the killer or killers of the deceased were. None of the items presented for analysis by the Government analyst was matched to the accused's DNA.

The Report by the Government analyst (PExt1) and conclusions gave generalised DNA profiles from blood stains on the wooden posts (K(1) and (2) collected from the scene of murder. They were not produced in court as exhibits, and no reason was advanced for the failure.

These items as stated in the report maintained the DNA blood profile from the deceased. No DNA matching the accused's was found on the suspected murder weapons.

11.On other items like the nail clippings, vaginal swabs, the accused DNA were missing on them.

On the cream trouser (item G), the analysts conclusion was that the DNA found was that of the accused.

However, the DNA of the deceased was not found on the said trouser.

The trouser was produced in court as exhibit. It was alleged to have had blood stains on the front. The defence upon inspection could not find any blood stains on the trouser. The court upon looking at it too could not see any blood stains.

It is therefore doubtful that the said exhibit was the one presented to the Government analyst for examination.

Likewise, an alleged telephone handset allegedly recovered from the accused's mother could not be proved to have belonged to the deceased as no Safaricom data was produced to prove that the said phone indeed belonged to the deceased, or even a purchase receipt.

12. Sections 107-109 of the Evidence Act is clear that an allegation of fact must be proved by the maker. The court finds no link between the telephone handset produced in court to the deceased nor to the accused.

The Investigating officer's allegation of an intimate relationship between the deceased and the accused was not proved. In its totality, the investigations into the murder were shoddy and what was presented to court was all hearsay, the same not having been recorded in the investigation officer's statement/report.

13. Section 203 of the Penal Code defines murder as the unlawful homicide committed with malice aforethought. It reads:

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

14 Malice Aforethought is deemed to be established by evidence proving anyone of the following circumstances:

Section 206:

(a) An intention to cause the death or to do grievous harm to any person whether that person is the person actually killed or not.

(b) Knowledge that the act or commission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not-----

15. None of the prosecution witnesses linked the killing to the accused. The circumstantial evidence adduced of both the deceased and the accused having been seen at the *Saba-saba* bar on the fateful night, and not sitting at the same table is not sufficient to come to the inference that the accused is the one who killed the deceased. Indeed no evidence was adduced that the two walked out of the bar together at the same time or at all.

16. To prove the offence of Murder, the prosecution is mandated to prove the following ingredients.

(a) The fact and cause of death of the deceased person.

(b) That the death of the deceased was as a result of an unlawful act or omission on the part of the accused person.

(c) That such unlawful act or omission was committed with malice aforethought.

None of the above preconditions for a murder conviction were proved.

See **R -vs- Daniel Musyoka Muasya & 2 Others (2014) e KLR.**

17. In a case depending exclusively on circumstantial evidence, the court must before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.

See **Mwangi -vs- R(1983) e KLR, and Daniel Musyoka(Supra)**.

Apart from the investigating officers hearsay evidence that the deceased was a lover to the deceased, no other witness suggested that. And even if the two were lovers, no evidence was adduced creating a nexus between the deceased's death to the accused.

18. In its totality, the evidence lacks cogency. Suspicion alone cannot be a sufficient ground to sustain a conviction on a murder trial.

The degree of proof on a murder trial is beyond a reasonable doubt. See **Bhatt -vs- R (1957) EA 332**.

19. In the premises, I find that there is reasonable doubt created that the accused was the perpetrator of the heinous murder of the deceased on the material date and time.

20. The result is that the prosecution has failed to prove its case against the accused beyond reasonable doubt. I find the accused not guilty of the offence of Murder as charged. He is hereby acquitted.

Dated Signed and Delivered this 31st Day of May 2017.

J. N. MULWA

JUDGE