



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 39 OF 2012.

REPUBLIC.....PROSECUTOR

VERSUS

SELINA NJOKI KAMAU.....ACCUSED

JUDGMENT

The charge

1. **Selina Njoki Kamau** (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 night of 12th April 2014 at Eastleigh Area California Estate within Nairobi County murdered **Paul Nganga Mucheru**.

The prosecution case

2. The prosecution case against the accused is founded on the theory that the deceased was last seen in her company. She is alleged to have met the deceased at Athuri bar where she booked room No.16 and after briefly drinking together left the bar. The deceased is said to have followed her soon thereafter. He did not return home and his body was later traced to Kenyatta Hospital Mortuary.

3. **Patrick Njachi Kabaria (PW1)** told the court that the deceased was his friend and that they had spent the time together on 12th April 2012. They first met at Mijikenda bar around 3.00p.m where they ate meat and drank before moving to Athuri Bar in the evening where they drank some more. It was there that they were joined by the accused briefly before she paid for a room and left after exchanging numbers with the deceased. The deceased followed her after about 10 minutes later.

4. **Veronica Nzilani Katumo (PW2)** a bar attendant at Athuri Bar and Lodging, confirmed having served the deceased whom she knew as a regular customer there. He was in the company of PW1 and were joined by the accused whom she also confirmed paid for a room and left the bar soon after conversing with the deceased. Nzilani saw the deceased leave shortly after. **Alfred Kinandi Jaindi (PW11)** confirmed having seen the deceased, whom he said was his neighbour at Athuri bar that evening. The deceased was in the company of a man and a woman a lady whom he didn't know. He saw them drink and leave. The following day, he heard from other neighbours that the deceased was missing.

5. The deceased's wife **Beatrice Nginya Mwaka (PW3)** reported her husband's disappearance the following day to their relatives and friends and later to the police. She learnt of his death on 18th April 2012 when her father in law informed her that the body was found at the City Mortuary. The deceased's

father **Peter Mucheru Nganga (PW4)** traced the body to City Mortuary after a frantic search. He found records at Kenyatta National Hospital which showed the deceased had been admitted there on the night of 12th April 2012 around 11.00p.m by one Gilford Mwamba. He (the deceased) had both internal and external injuries.

6. The deceased's mobile phone Nokia X2 (prosecution Exhibit No.1) was traced to one **Stephen Nganga Karanja (PW8)** a barber and a resident of Eastleigh Section 8. PW8 had acquired the phone from one **Josephat Moranga (PW10)** an electronics technician at Eastleigh Section 3. **Josephat Muburi Moranga** said that he bought the phone on 4th April 2012 (probably meant 14th April 2012) from one **Shem Gitau** for Kshs.1,200. **Shem Gitau Amin (PW5)** confirmed to having sold the phone to **Josephat (PW10)**. **Shem** said that his friend one **Patrick Maina (PW6)** had inadvertently left the phone in his (**Shem's**) house and he (**Shem**) sold it to **Josephat**. **Patrick Maina Kamau (PW6)** on the other hand confirmed having been in possession of the said phone at one time. He said that he lost the phone one day when he passed by his friend's (**Shem's**) house on the way to school and that Shem had denied having seen the phone. **Patrick** testified that he had recovered the said phone from an accident scene on the road near his home. He said that the person had been hit by a car near Delta Petrol Station in Eastleigh. Shem's mother **Joyce Wairimu (PW7)** confirmed having seen the son with the phone. She said that he told her he had recovered it from the accident scene the previous night and she advised him to keep it until someone inquired about it.

7. The investigating officer **Cpl. Owuor Steve (PW13)** testified that the police traced and arrested the accused at Mwiki and that upon arrest; she admitted having been together with the deceased in some brothel. He said that the accused later changed her story and told them that they were attacked on their way to some unknown lodging by three men; and that she took the deceased to Kenyatta National Hospital with the help of two men.

The Defence Case

8. After hearing the prosecution's case, the court found sufficient evidence to put the accused on her defence. She gave a sworn statement in which she denied having killed the deceased. The accused told the court that she was a commercial sex worker who operated from Athuri Bar. She admitted having met the deceased at Athuri Bar on the material night. She said that she was in the process of paying for a room when the deceased greeted her and invited her for a drink. That she joined the deceased and his friend at their table where on being offered a drink, ordered Smirnoff ice.

9. The accused further told the court that the deceased seduced her and after exchanging phone numbers she went to the room where the deceased joined her around 8.00p.m for commercial sex. That he left her in the room but called her at about 10.00p.m. to tell her that he looked forward to meeting her the following weekend. The accused said that she continued with her work until 5.00a.m. in the morning when she left for her home in Kasarani.

10. The accused denied any knowledge of the deceased having been hit by a motor vehicle and being with the people who took him to hospital. She also denied having recorded any statement with the police stating that she was with the deceased when they were attacked on the road and that she hired a taxi to take him to hospital. She insisted that the deceased paid her Kshs.3,000 and not Kshs.300 and that she did not know where he went after he left her room.

The Law

11. This being a murder case, the prosecution must prove the three critical elements of offence as required by **Section 203 of the Penal Code**. It must prove the death of the deceased, the cause of such death and that the accused in causing such death acted with malice aforethought. The standard of proof is one beyond reasonable doubt and onus is on the prosecution and never shifts to the accused (**See Woolmington v. DPP [1935] EA 462 and Sawe v. Republic, Criminal Appeal No. 2 of 2002.**)

Death of the deceased

12. Evidence before court showed that the deceased was last seen alive and well at the Athuri Bar on the night of 13th April 2012. He was drinking with his friend **PW1**. The Bar attendant (**PW2**) testified to having served them. The accused also admitted to having been with him. When he was reported missing, his father (**PW4**) traced records at Kenyatta National Hospital which showed that he had been admitted on the night of 12th April 2012. The postmortem report showed that he succumbed to injuries on 13th April 2012. With this evidence, the court found the fact of death proved.

Cause of death

13. **Dr. Okemwa Minda (PW12)** testified that he conducted an autopsy on 23rd April, 2012. The body was identified by the deceased's father **Mucheru Nganga (PW4)** and one **Njogu Kanywa**. He observed that the body had multiple injuries. It had multiple big bruises on the left trunk, injuries on upper limbs and knee joints; and tears and abrasions on the forehead, face and chin. Internally, there were rib fractures, a ruptured spleen and internal bleeding. **Dr. Minda** formed the opinion that the deceased died of **Dr. Minda** multiple injuries resulting from blunt force trauma. He produced the postmortem report (**Exhibit No.1**). In cross-examination said that he could not tell what had caused the injuries and that he did not know when exactly the deceased had been admitted at Kenyatta National Hospital. I accepted the postmortem report as conclusive proof of death of the deceased. From the testimony of **PW12** and the postmortem report, it was obvious that the deceased met an unlawful death.

Whether the accused was linked to the unlawful death of the deceased

14. There was no eye witness in this case. All the witnesses said was that the accused and the deceased were last seen together when they conversed at Athuri Bar on the night of 13th April 2012. This was the evidence of **PW1** and **PW2**. I had no reason to doubt their testimony. **PW1** was the deceased's friend. They were drinking together at the bar. **PW2** on the other hand was the bar attendant who sold them the drinks and also hired out room No.16 to the accused.

15. Besides the prosecution evidence above, the accused herself admitted having been with the deceased after they left Athuri bar. This admission would bring the accused within the provisions of **Section 111 of the Evidence Act**. She would bear the burden of explaining what happened to the deceased. As stated by **Ouko J** (as he then was) in **R. v. Josephat Mururu, HCC(Meru) No 168 of 2003 [2008] eKLR**:

'section 111 of the Evidence Act places the burden on the accused in certain situations to explain the circumstances leading to the deceased person's death or at least how they parted company. The case also held that where the suspect fails to offer an explanation then by dint of section 119 of the Evidence Act, a presumption is raised that either the suspect alone or in concert with others caused the death of the deceased. It is the duty of the suspect to offer an explanation on a balance of probability which would discharge the above presumption'.

16. The prosecution also presented evidence which showed that the deceased ended up in Kenyatta National Hospital on the night of 12th April 2012. He was admitted there with serious injuries. This evidence came from the deceased's father (**PW 4**) who said that after finding the body of his son at the City Mortuary, he traced records back to Kenyatta National Hospital where he had been admitted. The records at Kenyatta National Hospital showed that the deceased had been taken there by a woman and two men one of whom gave his name as **Gilford Mwamba**. The admission of the deceased at Kenyatta National Hospital was corroborated by the investigating officer (**PW13**) who said that he could not trace the said Gilford as the number he had left at the hospital was not in use **Dr. Minda**, the pathologist who conducted the autopsy also stated that the history (records) showed that the deceased had been admitted to Kenyatta National Hospital and succumbed to injuries on 13th April 2012.

17. Further evidence presented by the prosecution related to the tracing of the deceased's mobile telephone. As stated earlier the deceased's telephone was traced to one **Stephen Nganga Karanja (PW8)**. He had acquired it from one **Josephat Moranga (PW 10)** who had got it from **Shem (PW 5)**

who in turn had taken it from his friend **Patrick Maina Kamau (PW8)**. **Patrick Maina's** explanation of how he got the phone was that he picked it from an accident scene near his home.

18. As earlier stated, the accused maintained in her defence that she parted with the deceased at her room and he went on his way. That he even called her and expressed his desire to meet her again. In final submission, the defence insisted that the deceased was either attacked by thugs on his way home or was involved in a road accident as suggested by the testimony of **PW 6**.

19. On the other hand, the prosecution submitted at the close of its case that the accused was the last person that the deceased had been seen alive with. At the defence stage, the prosecution cross-examined the accused on her statement under inquiry to the police. The cross-examination suggested that the accused had given the police a statement on 19th May 2012 in which she had stated that she was with the deceased on the material night when he was attacked by four unknown thugs who hit him on the head. That she took cover and after the thugs left, she hired a taxi to take the deceased to Kenyatta National Hospital.

20. From the prosecution evidence tendered three possibilities emerge on the demise of the deceased. The first is that he was last seen in the company of the accused. They spent some time in a room at Athuri Bar and thereafter his body was traced to the City Mortuary. The second is that the deceased was attacked and injured by unknown persons. He may or may not have been in the company of the accused. The third is that the deceased was involved in a road accident, in which he was hit by a vehicle and was taken to Kenyatta National Hospital where he succumbed to the injuries. The question that cuts across the three scenarios painted by the prosecution witnesses is whether the accused person was the key actor and therefore responsible for the death of the deceased.

21. The fact that the accused and the deceased were together on the material night was admitted before court by the accused. She told the court that she was a commercial sex worker and had a transaction with the deceased that night in room No.16 of Athuri Bar which she had paid for. As stated earlier **PW2** confirmed having hired out the room to the accused and having seen her in the company of the deceased before she (the accused) left the bar followed shortly by the deceased.

22. The admission by the accused that she was with the deceased would have squarely placed the responsibility for his death on her had the prosecution evidence ended there. She would have been the person last seen with the deceased. She would have had the burden of proving that she did not harm the deceased as provided for under **Section 111 of the Evidence Act**. However, the prosecution brought evidence suggesting that the deceased was hit by a car. This was the evidence of **Patrick Maina Kamau (PW6)** who testified that he picked the deceased's phone from an accident scene near his home in Eastleigh.

23. The fact of there having been an accident was however not corroborated by any other witness. Patrick's mother (**PW 7**) only said that she heard some commotion or noise at the road. How the deceased's phone came into the possession of **PW6** therefore remains a grey area. It is possible that he picked it from a person involved in an accident or a person who was being attacked and mugged. There is the possibility that he may have been one of the attackers, or one of the good Samaritans that took the deceased to hospital. Nothing in the evidence however showed or even suggested that **PW6** was in any way connected to the persons who were with the deceased at that particular moment. I find that the investigators did not investigate whether such an accident did indeed happen and the persons involved in it.

24. The deceased was taken to Kenyatta National Hospital by some people. According to the deceased's father (**PW4**), he found records at Kenyatta National Hospital which showed that he had been booked in by one **Gilford Mwamba** who gave his phone number as 0726598534. **PW4** found that the number had never been in use and therefore could not trace the said Gilford. He however found that the deceased must have been alive at the time of admission as he filled the wife's name on the admission record.

25. The investigating officer (**PW 13**), corroborated the fact of the deceased having been taken to

Kenyatta National Hospital by the said **Gilford Mwamba**. He said that when he conducted investigations at Kenyatta National Hospital, he found that the deceased had been taken to the casualty by two men and a woman. One of the men was **Gilford Mwamba** who recorded a phone number which was not working then. The pathologist (**PW12**) also confirmed that the deceased had been admitted at Kenyatta National Hospital where he died while undergoing treatment.

26. From the evidence above, it is clear to the court that the deceased suffered extensive injuries and was admitted at Kenyatta National Hospital where he passed on. The question however is: was he attacked and severely injured or was he involved in an accident? The pathologist (**PW 12**) said in his testimony that he could not tell the cause of the injuries. What is clear from the evidence however is that whether the deceased was attacked or robbed in the cause of an accident, he lost his phone at that time. In any event, the question as to whether the accused was present in either scenario would still persist.

27. The investigating officer said in his testimony that the accused admitted in the course of interrogation that she left the brothel room in Eastleigh area with the deceased and were attacked by thugs while on the way to the deceased's room in California area. She hired a matatu and took the deceased to Kenyatta National Hospital. She was in the company of two young men. The accused however denied in her sworn defence that she had given the police such a statement or that she had made any admission at all. She insisted that they parted with the deceased when he left her room in Athuri Bar and she continued to look for other clients. She denied any knowledge of an attack or her having taken him to hospital.

28. There is a real possibility that the accused may have made an admission to the police of her involvement in the death of the deceased. In fact her statement under inquiry allegedly given on 19th May 2012, and to which prosecution counsel constantly referred her to in cross-examination, states that she was with deceased when they were attacked and she took him to Kenyatta National Hospital. The said statement was not however produced in evidence by the prosecution and for good reason; it was not taken as a confession and in compliance with the law. If the said statement was produced, it would have clearly linked the accused to the offence. Without that evidence being produced and admitted the identification of the accused as the woman who took the deceased to Kenyatta National Hospital in the company of two young men remains in doubt. The evidence showed that one of the young men was one **Gilford Mwamba**. However, the said Gilford was not traced and interrogated. If he was not the accused's accomplice, he may have identified her as the person who requested them to assist take the deceased to Kenyatta National Hospital.

29. Further, as stated earlier, the angle introduced by **PW6** that there was an accident in which he picked the deceased's phone was not investigated to confirm whether there was such an accident in which the deceased suffered injuries or if the alleged accident was just a story to cover up on how **PW6** came into possession of the deceased's phone. To my mind, if the deceased was attacked and assaulted by the accused either alone or with her accomplices, then the accident alleged by **PW6** may have been a cover up on how he came into possession of the deceased's phone. He may have been an accomplice in the attack of the deceased. Besides, there was no serious attempt by the investigation and the prosecution to link the recovery of the accused's phone from the various witnesses through whose hands the phone had passed to the accused and by extension to the death of the deceased. There was no attempt to show how the recovery of the phone demonstrated linkage between the accused and the deceased. In any case, the accused admitted to having communicated with the deceased supposedly after he left her room.

30. From my appreciation of the totality of the evidence, I find the prosecution case full of material gaps in linking the accused to the murder of the deceased. The evidence that she made an admission to the police in her statement under inquiry is not admissible in law and must be excluded while the evidence on the recovery of the deceased's phone has done little to link her to the offence. On the other hand, the evidence that she spent some time with the accused in a room 16 at Athuri Bar and that she may have attacked and robbed him over disagreement over payment for her sexual services; and that she was the person who took him to Kenyatta National Hospital; and, her disappearance for three days after the deceased's reported disappearance raises deep suspicion on her culpability. I highly suspect that she may have been involved in the ruthless attack of the deceased occasioning him serious injuries which caused his death.

31. As the law stands however, suspicion however strong cannot found a conviction. Sadly, though a life was lost, the police failed to conduct diligent investigations to secure strong evidence. It was upon the investigation to seal the material gaps aforesated and the prosecution to prove the case against the accused beyond reasonable doubt.

32. As I conclude this judgment, I observe that the prosecution of this case suggested that both the investigation and the prosecution were aware of the material gaps in the case. This is because on two occasions, the prosecution sought an adjournment to reconsider the evidence. Upon being granted the request however, the prosecution proceeded to call more witnesses and pursue the case to conclusion.

33. In the final analysis, I have come to the firm conclusion that the case against the accused has not been proved beyond reasonable doubt. I acquit her of the charge and set her at liberty forthwith unless otherwise lawfully held.

Judgment delivered, signed and dated at Nairobi this 28th day of June 2017

.....

R. LAGAT KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Accused

.....: For State

.....: For Accused