



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO 12 OF 2014

REPUBLIC

VERSUS

GEORGE MASEGHE

JUDGMENT

INTRODUCTION

1. The Accused person, George Masege, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the offence were that :-

“On the 27th day of August 2012 at Werugha Trading Centre, Werugha Location within Taita Taveta County, murdered MERCY MAMBORI MWASINA.”

2. This matter was initially heard by Muya J. He took the evidence of Dalton Maligange Korenge (hereinafter referred to as “PW 1”) and Garmalias Mwasina Kisdhagulu (hereinafter referred to as “PW 2”). This court took over conduct of the matter on 6th October 2015 and continued from where the said Learned Judge had reached after the Accused person, his counsel and counsel for the state confirmed to the court that it could proceed accordingly.

3. The Prosecution called a total of seven (7) witnesses to demonstrate the following ingredients of murder found in Section 203 of the Penal Code:-

a. Proof of the fact and cause of death of the deceased;

b. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused; and

c. Proof that the said unlawful act or omission was committed with malice aforethought.

4. On 15th December 2016, this court found that a *prima facie* case had been established against the Accused person to warrant him being put on his defence. His defence case was heard on 2nd March 2017. At the conclusion of his case, he filed Written Submissions dated 19th April 2017 on the same date. He also indicated that he would be relying on his Written Submissions dated 27th October 2016 that he had filed on 28th October 2016 in respect of the question of whether or not he had a case to answer. The State filed its Written Submissions dated and filed on 18th April 2017.

5. When the matter came up on 19th April 2017, counsel for the Accused person and counsel for the State informed this court that they would rely on their respective Written Submissions in their entirety without highlighting the same. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. The State summarised the evidence that was adduced by the Prosecution witnesses. The same has been set out in detail later on in the Judgment herein. In demonstrating that it established proof of fact and cause of the deceased's death, it pointed out that Nicodemus Masanju Manamo (hereinafter referred to as "PW 5") testified that on 27th August 2012 at about 3.00pm, he was on duty at the Barber shop owned by the Accused person when Mercy Mambori Mwasina (hereinafter referred to as "the deceased") came and went with the Accused person to his room, which was behind the Barber shop. He said that the deceased was lying on the bed and had scratch wounds on the neck with dried blood.

7. It added that the Accused person did not provide proof to demonstrate that PW 5 or the deceased had keys that she used to open the door to his room as he had contended that she went to his room without his knowledge. It said that it was also not clear why the Accused person did not seek medical assistance or seek help from neighbours if he was not certain that the deceased was dead(**sic**).

8. It contended that although the Accused person testified that it was PW 5 who found the deceased lying on his bed, during his Cross-examination, he stated that PW 5 never left the Barber shop. It also averred that whereas the Accused person stated that he was with PW 5 when he first saw the deceased lying on his bed, PW 5 testified that he first saw the deceased lying on the bed when the police came to the scene.

9. It added that although there was no direct evidence of how the injury inflicted on the deceased caused her death, the Accused person was in contact with the deceased before she died. It stated that Dr Naima Abdullahi (hereinafter referred to as "PW 6") testified that the deceased's cause of death was cardio pulmonary arrest secondary to asphyxia as a result of strangulation.

10. It argued that the Accused person's defence was wanting and incapable of displacing the evidence that was adduced by the Prosecution witnesses and that his alibi defence was not supported by PW 5. It was emphatic that the Accused person did not also demonstrate that there was any existing grudge between him and the Investigating Officer herein, No 88391 PC David Masinde (hereinafter referred to as "PW 7") which would have motivated him to prefer the charges against him.

11. It was therefore its submission that the totality of the evidence that was adduced by the Prosecution witnesses irresistibly proved that the Accused person caused the death of the deceased and that he did so with malice aforethought.

12. It relied on the case of **Musoke vs Republic [1958] EA 715** citing with approval **Teper vs Republic [1952] AL 480** where it was stated as follows:-

"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."

13. On his part, the Accused person, who adduced sworn evidence, submitted that the evidence that was adduced by the Prosecution witnesses did not support the charges that had been preferred against him. He contended that the entire Prosecution case comprised of heresy and contradictions that rendered its case weak.

14. It was his argument that none of the Prosecution witnesses alluded to him having *mens rea* or having been directly connected to the *actus* in the alleged offence and that suspicion or speculation alone were not sufficient to sustain a conviction.

15. He denied having murdered the deceased if indeed the said offence was committed in his Barber shop.

It was his submission that if he chose to remain silent, then the circumstances of the case would warrant his acquittal under Section 210 of the Criminal Procedure Code. He therefore urged this court to acquit him accordingly.

16. In determining whether or not the Accused person was guilty as charged, this court analysed the evidence of the Prosecution witnesses. PW 1 was the deceased's uncle. He said that he had known the Accused person for about two (2) years as he used to visit his Barber shop twice a week for shaving.

17. His evidence was that on 27th August 2012 at about 6.10 pm, the Accused person called him and informed him that he was with his niece and that they had been attacked by a man who strangled the deceased and that he was going to the local chief to report the matter. He said that the Accused person did not give him the name of their attacker. It was his testimony that the Accused person and the deceased had been lovers for about six (6) to seven (7) months.

18. It was his further evidence that the Accused person called him while he was at Wundanyi Police Station and informed him that he had been put in the cells and that the deceased was inside the Barber shop. He said that he then went to the Barber shop where he found police had already arrived. The deceased's body was later transferred to Wesu District Hospital.

19. During his Cross-examination, he stated that the Accused person told him that he was with the deceased at the time he was going to report the incident of their attack to the Local Chief but that when he was going to report to the police, he was in the company of someone else, who he assumed must have been the deceased.

20. PW 2 was the deceased's father. He stated that he had known the Accused person about a week before the incident herein but he was not aware that he was a friend to the deceased as she had not informed him of her relationship with the Accused person. His evidence was that on 27th August 2012 at about 8.00am, he asked the deceased to take her sister Dianasi(sic), to Makadeni (sic)Hospital and also to collect mosquito nets that were being given for free.

21. As he was returning to his house at about 8.00pm, he heard screams and was informed by PW 1 that the deceased had been killed. He then went to the scene of crime and later to the police station and thereafter to the Wesu District Hospital where he noted that the deceased had injuries on the neck. He said that he did not attend her Postmortem examination.

22. Dyness Walowe Mwasina (hereinafter referred to as "PW 3") was the deceased's sister. She corroborated PW 2's evidence that on the material date, the deceased was to take her to Makadenyi Dispensary and to collect mosquito nets. She said that they passed by the Accused person's Barber shop where the deceased left her phone for charging.

23. She added that the deceased left her at the Dispensary and went to Kese to see her auntie, Mamake Anne, where she said she would find her. However, when she went to her auntie's house, there was no one. She then left for her home. At about 6.00pm, another auntie, Mamake Wakesho, informed her that the deceased had been killed.

24. During her Cross-examination, she stated that the deceased had told her that the Barber shop belonged to the Accused person and was categorical that the deceased left her phone to be charged at the said shop, a fact she also reiterated during her Re-examination.

25. No 93081 PC Shem Asher (hereinafter referred to as "PW 4") was the Scene of Crime Officer. He adduced in evidence photographs showing the deceased having injuries to her neck with dried blood around the neck.

26. PW 5 explained that the Accused person's room and the Barber shop were connected by a door. The Accused person's room also had another door through which one could access the rear or back of the premises. He stated that on the material date at about 1.00pm, he was with the Accused person inside the

Barber shop when the deceased came. He said that he only heard her say that she was going to the hospital.

27. He testified that the deceased came back to the Barber shop at about 3.00pm. At the time, he was sitting outside the shop. The Accused person asked him to continue shaving a customer he had been shaving and entered his room with the deceased. He heard the door, which had latches on both sides, being latched. He said he could not hear anything from the Accused person's room as music was blaring in the Barber shop.

28. It was his evidence that at about 5.30 pm, the Accused person called him and informed him that he was leaving. His testimony was that the Accused person used the back (rear) door of the room. He said that at about 6.15 pm, an Administration Police (AP) came and asked him to open the door to the Accused person's room. Since it was latched from the inside, they went round the premises. He then saw the deceased being removed from the Accused person's room. He was categorical that he saw the deceased while he was in the company of the AP.

29. The State counsel referred him to the Statement that he had recorded in which he was said to have stated that the Accused person called him from Wundanyi and asked him to check on the deceased. In the statement, it was indicated that he had tried to open the door to the Accused person's from the Barber shop but because it was latched from inside, he went to the rear of the building. He had said that he called the Accused person and told him that the deceased was sleeping whereafter an AP came, shook Mercy and found that she was dead.

30. He was emphatic that he could not remember everything he had recorded in his Witness Statement as he was under a lot of tension and averred that he was standing by the evidence he adduced in court.

31. During his Cross-examination, he denied having entered the Accused person's room and maintained that he was standing at the door when he saw injuries on her neck with dried blood. It was his testimony that there was light in the Accused person's room. He stated that he had worked for the Accused person for about three (3) months and that he saw the deceased for the first time on that material date. He added that his Statement was recorded by PW 7 and at the time he was recording the same, several police officers were harassing him.

32. As was stated hereinabove, PW 6 concluded that the cause of the deceased's death was cardio pulmonary arrest secondary to asphyxia as a result of strangulation. The deceased also had two (2) small cuts of two (2) centimetres at the base of the right thumb, two (2) small cuts measuring half (1/2) a centimetre on the abdomen and haematoma on the inner part of the upper right thigh measuring about three (3) by four (4) centimetres.

33. PW 7 testified that on the material date at about 6.00pm, he went to the scene of crime after the Accused person had reported an incident at Wundanyi Police Station. The Accused person, who he said was shaking and looking confused, told him that the deceased had fallen ill at his Barber shop. According to him, this was a cover up as the Accused person already knew he had committed a heinous crime.

34. When he was Cross-examined, he stated that he had known the Accused person for about one (1) year and denied that they had had any disagreements between them. He argued that if the Accused person had seen the deceased unconscious then he ought to have taken her to Makadenyi Clinic which was about two hundred (200) metres from his Barber shop.

35. He also stated that he called PW 5 after he was given his number by the Accused person who informed him that there was a girl sleeping in the Accused person's bed.

36. In his sworn evidence, the Accused person said that the deceased had been his girlfriend for about five (5) years. He stated that the deceased passed by his Barber shop on the material date at about 9.00 am on her way to hospital with PW 3. He stated that he saw her at 3.00 pm through the window when she gestured that she would come back as he had a customer and then again, at about 4.30 pm.

37. He said that PW 5 informed him that she was resting in his room having accessed his room from the rear. It was his evidence that at all times that he was shaving his customers' hair, he never knew that the deceased was in his room. He confirmed PW 5's assertions that one could not hear a person entering his room from the Barber shop as the music was amplified.

38. His evidence was that "they" went to his room and PW 5 said that it looked like the deceased had died. He said that he asked him how he knew and PW 5 told him that she did not look normal. His evidence was that on hearing PW 5 say that, several tenants came and said that they should call the Chief. He, however, went to Wundanyi Police Station where he reported what had transpired.

39. His testimony was that initially PW 7 refused to go to the scene and that is how he ended up staying at the Police Station. He, however, also stated that PW 7 and his colleagues came back to the Police Station at 7.00pm and never told them what they had found at the scene but they nonetheless, put him in the cell. He contended that PW 7 had a grudge with him after he refused to transport charcoal for him and that is why he had charged him with the present offence.

40. During his Cross-examination, he reiterated that PW 5 told him that the deceased was in his room and that he saw her again at 4.30pm. He mentioned that PW 5 did not take any break but that if PW 5 had gone to his room to drink water, it would not have bothered him because it was not unusual for him to enter his room and that in fact, he had entered his room at 11.00 am to take lunch.

41. A careful analysis of the evidence that was adduced by the Prosecution witnesses reveals the following undisputed facts:-

a. deceased was the Accused person's girlfriend.

b. The deceased went to the Accused person's Barber shop on the material date in the morning and at about 3.00pm.

c. The Accused person was present when the deceased went to his Barber shop.

d. The deceased was strangled, which was not a natural cause of death and also had cut wounds and a haematoma.

e. The police removed the deceased from the Accused person's room which was adjoined to his Barber shop.

42. The pertinent question that now arose was, who killed the deceased? It did appear that a certain part of the statement PW 5 recorded at the police station was completely different from what he testified in court. His recorded statement that the Accused person called him from Wundanyi asking him to check on the deceased and his evidence in court that the Accused person called and told him that he was leaving was so diametrically opposite that it led this court to believe that PW 5 had not been fully truthful.

43. There was a higher probability that the statement PW 5 recorded with the police was actually the correct one because he recorded it immediately after the incident and the facts were fresh in his mind. A detail of the Accused person calling him to check on the deceased and informing him that she was "asleep" was not a minor detail that he could have recorded in his Witness State if the same was not true.

44. Having said so, it is not uncommon for witnesses to try and remove themselves from the scene of an incident. There was a possibility that at some point that afternoon, PW 5 actually entered the Accused person's room and noted that the deceased was dead. This could explain his insistence during trial that he entered the Accused person's room for the first time when police arrived at the scene, a clear departure from what was recorded in his statement that he entered his room to check on the deceased after the Accused person called and asked him to check on her.

45. Be that as it may, the contradiction in PW 5's evidence of whether or not he entered the Accused

person's room and the time he did so was not a material fact because he was not on trial for the death of the deceased and that it was not in dispute that the deceased was found in the Accused person's room. In addition, the Accused person was the first to report the fact that the deceased was not "alright" at Wundanyi Police Station before the police officers came to the scene.

46. The question of whether the Accused person said that the deceased was ill or if she looked dead was material in the circumstances of the case herein. If he as PW 7 said the Accused person told him that the deceased was unwell, the question that arose is why the Accused person did not rush the deceased to hospital which was said to be about two hundred (200) metres from the Barber shop.

47. If as the Accused person said the deceased looked dead, several questions arose. If PW 5 did not take a break between 3.30 pm – 4.30 pm, the latter time being when the Accused person said he saw the deceased, at what point did PW 5 enter the Accused person's room? His evidence was silent on this point.

48. If the deceased had gone to rest in the Accused person's room, why did the Accused person go into his room with PW 5 at 4.30 pm? If nothing bad had happened to the deceased by 4.30 pm, why did the Accused person go into his room with PW 5? The only inference this court could make was that it was normal for an employer to ask his employee who had only been employed for three (3) months to go into his room to check on the employer's girlfriend.

49. If both the Accused person and PW 5 were in the Barber shop, why did PW 5 have to tell the Accused person that the deceased had gone into his room? The Accused person did not adduce any evidence to demonstrate that PW 5 was in a better position to know that the deceased had entered his room more so as she had gestured that she would be back.

50. If PW 5 did not leave the Barber shop, how did he know that the deceased had entered the Accused person's room from the rear entrance? How could PW 5 have seen the deceased entering the Accused person's room from the rear door? Again, the Accused person's evidence in this regard was silent.

51. Did the deceased have keys to access the rear door? This was a detail the Accused person ought to have been keen to address as PW 5 had already testified that he entered his room with the deceased through the door separating the Barber shop from his room.

52. If there were other tenants who actually were so close as to hear PW5 say that the deceased did not look normal and the deceased did not have keys but used the rear door, it was not logical or prudent for the Accused person to have left the rear door of his room open the whole day due to security reasons.

53. In view of the fact that the Accused person's room had a rear door and he was at the front in the Barber shop from where one could not hear the goings on in the room, it was unlikely that he would have left the door open for a person to walk in.

54. Notably, the answers to questions that arose in the mind of this court led it to infer inference of guilt against the Accused person. The deceased was his girlfriend and she was last found in his room, dead. He did not adduce any evidence to show that PW 5 killed the deceased or that he had any motive to kill her. Indeed, in his evidence, PW 5 stated that he saw the deceased for the very first time on the material date.

55. If the Accused person would have remained silent as he had a right to do so, the evidence of the Prosecution witnesses was still overwhelming against him. Once the deceased was found in the Accused person's room, the burden of proof shifted on him to explain in a cogent and concise manner how she ended up in his room as is envisaged in Section 111 (1) of the Evidence Act Cap 80 (Laws of Kenya) that stipulates as follows:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

56. As was rightly pointed out by the State, there was no direct evidence to link the Accused person to the deceased's death as no one saw him kill her. It was thus a case based on circumstantial evidence. Circumstantial evidence can be accepted when an accused person's guilt can be inferred based on the evidence adduced by the prosecution in which case it can only be displaced by an accused person giving his side of the story. The chain of events in a case based on circumstantial evidence must be so connected that an accused person would find it difficult, if not impossible, to extricate himself or herself from the unlawful act he is being accused of.

57. The Accused person did not present any other co-existing circumstances that would have weakened or destroyed this court's inference of his guilt as was set out in the case of **Musoke vs Republic [1958] EA 715** that was relied upon by the Prosecution.

58. Although the Accused person had submitted that no one saw him commit the offence or no witness adduced evidence pointing to his guilty mind, as was rightly observed by the Prosecution, his defence of alibi was not supported by PW 5. PW 5 was categorical that he saw the Accused person enter his room with the deceased from where she never walked out alive as she was later found dead in his room.

59. In fact, the Accused person's call to PW 1 informing him that he was with the deceased and they had been attacked by persons he never identified by name, was controverted by PW 5's evidence as aforesaid. His assertions that PW 7 had a grudge against him were therefore not convincing to this court.

60. The fact that the cause of the deceased's death was strangulation and she had cut wounds which were caused by a penetrating object and a sizeable haematoma on her thigh was indicative of the fact the Accused person intended to cause her death. The injuries were not merely to cause her harm but rather, they were intended to cause her death.

61. This court was satisfied that the Prosecution had demonstrated beyond reasonable doubt that the deceased died as a result of the Accused person's unlawful commissions or omissions and that the said commissions and/or omissions were committed with malice aforethought, which is defined in Section 206 of the Penal Code as follows:-

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 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.

62. In this respect, this court came to the firm conclusion that the Prosecution had proved beyond reasonable doubt that the Accused person was involved in the death of the deceased and that he was guilty of the offence that he had been charged with.

DISPOSITION

63. For the foregoing reasons, the Accused person is hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

64. It is so ordered.

DATED and **DELIVERED** at **VOI** this 22ND day of **JUNE** 2017

J. KAMAU

JUDGE

In the presence of:-

Were - for Accused Person

Miss Karani - for State

Josephat Mavu – Court Clerk