



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CRIMINAL/MURDER CASE NUMBER 22 OF 2016
(FORMERLY KITALE HCCR NO. 5 OF 2012)
REPUBLIC ::::::::::::::: PROSECUTION
VERSUS
SAMSON LOTUKEI LOITASIA :::::::::::::::ACCUSED
JUDGMENT

The accused herein, one SAMSON LOTUKEI LOITASIA was charged on 17.1.2012 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 3rd January, 2012 at Nyarpat Sub-Location within West Pokot County, the accused murdered Chebonyomosi Seromba.

The prosecution case is that on 3.1.2012 at about 6.00pm PW-1 was heading home from his farm where he had been safeguarding his maize plantation from destruction by monkeys. On the way home he found the deceased in this case, drinking traditional alcohol in the home of the accused person. They were with two other persons. The deceased asked PW-1 whether there were monkeys in the farm and PW-1 answered there weren't. PW-1 then proceeded home.

On 4.1.2012 at about 7.00am PW-2 was at home. He heard screams. He rushed to the scene and saw two persons carrying another. The two were the accused person and another called Madanyang Karoroh. When PW-2 got near the two, they dropped the person they were carrying and went away. PW-2 went to the person who was dropped. He realized it was the deceased in this case, and that she was dead. The body was in a grassy area in the farm of PW-2. It had injuries on the neck and the clothes were torn.

According to PW-1, many people gathered at the scene. The accused who was in his home about 50 meters away, disappeared when he saw people gathering. A person called Isaiah called him to the scene and he declined to.

PW-3, the husband to the deceased was called to the scene by a neighbour. The neighbour told him that the accused had killed the deceased. He went to the scene and found his wife dead. She had injuries on the neck. The body was later taken to Kapenguria District Hospital Mortuary.

On 5.1.2017 Dr. Rono performed the postmortem on the deceased. The postmortem report shows that no external injuries were noted on the body. The cause of death was indicated as cardiorespiratory arrest possibly due to asphyxiation. On cross-examination PW-4 indicated that asphyxiation can be caused by many things such as choking, strangulation and reduced air supply.

According to PW-5, the accused was arrested and charged as he was the last person seen with the deceased alive, and thereafter when he was dumping the body before he escaped.

The accused in his defence indicated that he was a police reservist. On 3.1.2012 he was home drinking beer. The deceased was also there taking beer. At 10.00pm the rest left. The following morning children said people were making noise on the lower side. He went there. He found a woman lying on the road about to die. She had no visible injury. Her relatives quarreled asking why she remained there. Her relatives started demolishing the accused houses. Accused went to the police to report about the death. The police later arrested him as the body was in his land.

The defence submitted that the case is founded on circumstantial evidence of which is not water tight to prove the case against the accused. They urged me to acquit the accused.

The prosecution however submitted otherwise. They alleged there are strong grounds on which the court can make inference that it is the accused who killed the deceased. The said evidence is that:-

- **The accused was the last person seen with the deceased prior to her death.**
- **He, the accused, was seen the following morning dumping the body of the deceased in the farm.**
- **He fled the area after being questioned about the death of deceased.**
- **The husband to the deceased had taken the accused to court for interfering with his wife of which the prosecution argued could have been the motive behind the killing.**

They relied on the case of *Republic versus Arthur Onyango Ondigo [2016] eKLR* and urged me to find the accused guilty of the offence of murder.

I have evaluated the entire evidence and there is no direct evidence that it is the accused who killed the deceased. The prosecution case is founded on circumstantial evidence. When PW-1 saw the deceased drinking traditional beer in the house of the accused, she was not only with the accused person. She was with other two persons whose identity was not disclosed by PW-1. It is therefore not correct to state that the accused was the last person seen with the deceased alive.

On 4th January, 2012 at about 7.00am when PW-2 went to the scene he saw the accused and another called Madanyang Karoroh carrying the deceased's body. They dropped the body in a grassy area and left. The accused was not therefore the only persons seen with the deceased's body.

The evidence is not clear on where, the time, and how the deceased met her death. Though witnesses said deceased's body had neck injuries the post mortem report shows no external injuries were noted and that she died of asphyxiation which is caused by lack of enough air. What made her lack enough air was not established.

The prosecution did not establish the other persons who were drinking beer with the deceased in the accused's house to find out what could have happened after PW-1 left. It is not clear whether this person called Madanyang Karoroh, who was seen by PW-2 dumping the body while in company of the accused was one of them. The police did not also get this person who was equally a suspect. There is no evidence that the deceased was killed, and if killed was by more than one person. Assuming she was killed, Madanyang Karoroh was as much a suspect as the accused, and one could just have helped the real culprit to dump the body. The prosecution has the obligation to establish the charge against the accused beyond reasonable doubt.

A case annexed on circumstantial evidence as this one, must satisfy the three test laid in the case of *Abanga alias Onyango versus Republic Cr. Appeal number 32 of 1990(UR)* That is:-

- 1. The circumstances from which an interference of guilt is sought to be drawn, must be cogently and firmly established;**

2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

3. The circumstances taken circumstantively, should form a chain so complete that there is no escape form the conclusion that within all human probability the crime was committed by the accused and none else.

In another case of *Republic versus Kipkering Arap Koske and Another 16 EACA 135*, regarding circumstantial evidence the court held that:-

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt.”

The prosecution case shows that other than the accused person, there are other persons who equally had the opportunity to kill the deceased, who were not exonerated from suspicion of having committed the offence by the prosecution, so as to leave the evidence pointing unerringly towards guilt of the accused. As such the evidence against the accused only raises grave suspicion against him, of which as was rightly pointed out in the case of *Neema Mwandoro Ndurya versus Republic [2008] eKLR*, suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.

I accordingly, therefore, find that the availed circumstantial evidence falls short of establishing the offence against the accused beyond reasonable doubt. He is accordingly acquitted of the offence of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code.**

S. M. GITHINJI

JUDGE

21.6.2017