



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 31 OF 2010

REPUBLICPROSECUTOR

VERSUS

KIDRON KIPROP KOECHACCUSED

JUDGMENT

1. *Kidron Kiprop Koech*, the accused herein faces a charge of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. It is alleged that on the night of 8th and 9th April, 2010 at Nandi Hills Township, Nandi South District within the Rift Valley province, he murdered *Janet Chepkemboi*. He denied the charges.

2. In support of its case, the prosecution called a total of nine witnesses. The court record shows that the trial opened before *Hon. Mshilla J* on 31st January, 2012. She heard seven witnesses before she was transferred to another station. I took over the case on 13th October, 2014 and following the accused's election, I continued with the case from where my predecessor stopped. I then heard the remaining prosecution witnesses and the defence case.

3. In summary, the prosecution case is that the deceased was employed by PW1 *Sammy Kipkemoi* to sell milk in his shop at Nandi Hills. The accused is the deceased's son and he used to live with the deceased in a room behind the shop but according to PW4, at the time the offence was committed, he had offered the accused accommodation in another house within the same building that housed the shop.

4. In his evidence, PW1 recalled that on 9th April 2010 at 8 a.m, he went to his shop to deliver milk for sale. On arrival, he found both the front and rear doors of the shop locked. He called the deceased on her phone but there was no response. He delivered the milk to another business man to sell and then went home.

5. At 4 p.m, he went back to the shop but still found it locked. He got anxious as the deceased had worked for him for ten years and she never left without notice. He called her brother and cousin but both said they had not seen her. He went home. On the following morning, when he found the shop still locked, he decided to report the matter to the police. The police allowed him to break open the shop and when he did so, he found the deceased's body lying on the floor of the shop. The head was facing down and blood was oozing from her nose. He locked the shop and went back to the police station to report what he had discovered. The police including PW7 accompanied him back to the shop.

6. PW7 *Sgt. Stephen Amukoye* recalled that on accompanying PW1 to the shop, he found the body of the deceased lying on its stomach covered with a white blood stained sheet (PExb 2) in the room behind the shop. There was a blue coloured cord tightly fixed around its neck – (Pexbt 3). He proceeded to the next

room used as a shop and found that the cashbox had been broken into and an unknown amount of money stolen. He organized to have the deceased's body taken to Kapsabet District Mortuary but he continued with his investigations.

7. In the course of investigations, he visited the house which had been given to the accused by PW4 to use as his temporary residence. In the house, he recovered a blood stained white short on the bed and nylon papers which according to him were similar to those that the deceased used to wrap the shop's daily collections. He also recovered an old Kshs.20 currency note and Kshs.55 in coins form. All the recovered items were handed over to PC Wanyama who testified as PW9 who had also accompanied PW1 and PW7 to the scene. They were produced in evidence as PExhibit 5 to PExhibit 7 respectively. It is perhaps important to point out at this juncture that due to some inadvertence on the part of the parties in the trial, PW7 testified twice in this trial. He testified again as PW10 on 27th July, 2016.

8. In his evidence under cross examination, PW7 stated that the scene of crime (the room in which the body was found) appeared intact and it had no signs of struggle. In the course of his investigations, he escorted the recovered blood stained white short, blood samples taken from the accused and from the deceased to the Government Chemist for analysis. The items were examined by PW6, a Government analyst. He found that the blood type of the blood sample taken from the deceased was group 'A' while that of the accused was group 'O'. On analysing the white short, he established that the blood stains on it came from human blood of type 'A' which matched the blood type of the deceased.

9. On 12th April 2010, a post mortem examination was conducted on the body of the deceased by PW8 *Dr. Daniel Kemboi*. The body was identified by PW2 and PW5. Upon examining the body, PW8 found that it had peripheral and central synopses, bruises on both arms and bruises on the thighs of each leg. There was a groove like track on the neck's anterior.

Internally, both lungs were congested and there was a tear on the body's trachea (windpipe); the liver was enlarged and there was evidence to show that the deceased suffered from chronic stomach ulcers.

10. In his opinion, the cause of death was asphyxia -strangulation with a rope. He compiled the post – mortem report which he produced as Pexhbt 2.

When cross examined by learned counsel *Mr. Miyienda*, PW8 opined that the strangulation that caused the deceased's death was forced by someone given the bruises on the body's arms and thighs which in his view were evidence of some struggle before her death. He however admitted that people who commit suicide can struggle before dying; most importantly, PW8 conceded that the deceased could have died of other causes other than forced strangulation.

11. According to PW3 PC *Hillary Yegon*, he was on duty at Mombasa on 19th May 2010 when the accused surrendered himself to him alleging that he had strangled his mother to death at Nandi Hills Township using a rope. He arrested him and handed him over to a police officer from Nandi Hills police station. He was then charged with the present offence.

12. At the close of the prosecution case, this court determined that the accused had a case to answer and I accordingly put him on his defence. In his defence, the accused elected to give a sworn statement. He did not call any other witness.

13. In denying the offence, the accused raised an alibi. He testified that on 6th March, 2010, he left his home in Nandi County and went to Mombasa in search of employment. He started hawking in April, 2010, but he was arrested for hawking without a licence. He was confined at Nyali police station. He gave a police officer the mobile telephone number of his mother so that she could be notified that he had been arrested in Mombasa. Instead of getting her response, he was escorted to Nandi Hills Police station and it was only after his arrival there that he was informed that his mother had been murdered. He denied any knowledge regarding how his mother met her death. He denied the prosecution's claim that he ordinarily used to live in the house in which the blood stained short was recovered. He testified that he used to stay with his grandmother at Kaptumo but used to stay in that house occasionally when he visited

his mother.

14. Learned counsel for the accused *Mr. Miyiinda* and learned prosecuting counsel *Ms. Kigegi* made oral final submissions at the close of the defence case which I have duly considered. I have also carefully evaluated the evidence adduced in this case in its entirety.

15. It is trite law that in all criminal cases, the prosecution has the onus of proving the charges proffered against an accused person beyond any reasonable doubt. And this burden, as a general rule does not shift to an accused person at any stage of the trial. See: *Section 111 of the Evidence Act; **Bhatt V Republic [1957] EA 332; Abdalla Bin Wendo & Another V Republic (1953) EACA 166.***

16. In this case, since the accused is charged with the offence of murder, the prosecution had to prove beyond reasonable doubt the three key essential ingredients of the offence in order to sustain a conviction. These are;

- (a) The death of the deceased,
- (b) That the death was caused by an unlawful act or omission by the accused and;
- (c) That in causing that death, the accused had malice aforethought.

17. Malice aforethought simply put is the intention to kill another person. It is defined in *Section 206 of the Penal Code* as follows;

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(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 the person 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.

(c) An intent to commit a felony.

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

18. On my appraisal of the evidence in this case, I find that no direct evidence was adduced by the prosecution linking the accused to the commission of the offence. I say so because none of the witnesses who testified in this case witnessed the murder.

The prosecution's case is solely based on circumstantial evidence. And for circumstantial evidence to form the basis of a conviction, it must point irresistibly to the guilt of the accused as charged. It must be incompatible with his innocence and incapable of any other explanation other than the accused's guilt as charged.

19. The Court of Appeal when expounding on this legal principle pronounced itself in ***Sawe V Republic (2003) KLR 364*** as follows:-

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the

drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused”.

20. In this case, I am satisfied that the prosecution has proved beyond doubt the death of the deceased. What this court must determine is whether the evidence adduced by the prosecution establishes beyond doubt that it is the accused who, with malice aforethought, caused the death of the deceased.

21. In my view, the only pieces of evidence relied on by the prosecution to connect the accused to the death of his mother was the alleged confession of the accused to PW3 and the recovery of a white blood stained short in a house associated with him.

22. The law on admissibility of confessions is clear. *Section 25(A)* of the *Evidence Act* provides that;

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice.
“

In this case, the statement in which the accused allegedly admitted having killed his mother was made to PW3 who was a police officer of the rank of a Police Constable. It was not made in the manner and to any of the persons envisaged in *Section 25 (A)* of the *Evidence Act*. The result is that his alleged statement does not amount to a confession and it is therefore inadmissible in evidence. PW3’s evidence did not therefore aid the prosecution case in any way.

23. As regards the recovery of the blood stained white short, the accused denied in his defence that he ordinarily resided in the house in which it was recovered. He claimed that when the offence was committed, he was already in Mombasa. By implication, he denied that the short belonged to him.

The prosecution did not make any attempt to discount or controvert the alibi defence offered by the accused. It did not also lead any evidence to prove that the white short indeed belonged to the accused person and not to any other person. This could have been done by for example adducing evidence to show that the accused had been seen wearing it.

24. According to PW4, when he visited the house upon learning of the deceased’s demise, he found it locked with a different key from the one he had given to the accused. Given this evidence, the question that immediately comes to mind is this – is there a possibility that another person could have been living in the said house?

Secondly, the blood stains on the short were found to be of a blood type that matched the blood type of the deceased. None of the blood stains were found to have come from the blood of the accused’s blood type. Given the foregoing, I find that the prosecution failed to adduce evidence which linked the accused to the blood stained white short.

25. After my evaluation of all the evidence on record, I have come to the conclusion that the circumstantial evidence adduced by the prosecution in this case does not meet the threshold of proof beyond any reasonable doubt. It falls short of establishing that it is the accused who caused the death of his mother with malice aforethought. Put another way, it does not point irresistibly to the guilt of the accused as charged. In the circumstances, I enter a finding of not guilty. The accused is consequently acquitted. He shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

C. W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of July, 2017

In the presence of:

Accused

Ms Mokuu for the state

Mr. Miyianda for the accused

Mr. Lobolia – Court clerk