



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 111 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JAMES OBONG'O ABEL.....ACCUSED

JUDGMENT

Introduction

James Obong'o Abel, 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 4th day of October 2013 in Utawala Area Embakasi District within Nairobi County he murdered Enock Muthiani Munyoki. The accused has denied committing this offence necessitating the case to go on trial.

Prosecution Case

The prosecution called a total of twelve (12) witnesses. The summary of their evidence is that Enock Muthiani Munyoki, the deceased, went missing on 4th October 2013. On that day in the morning at about 6.00am the deceased received a call from an unknown person and left in a hurry in motor vehicle number KBE 558E Toyota Fielder. He was not reachable thereafter by his wife Christine Muthina Muiya, PW1, (Christine) his brother Frederick Musyoka Munyoki, PW3, (Frederick) and his employer Rashid Njau, PW2, (Njau). Efforts to trace the deceased in various police stations including Makongeni, Buruburu and Shauri Moyo, bore no fruits. The matter was reported at Shauri Moyo Police Station and investigations started.

Evidence shows that the deceased's body was discovered on 1st November 2013 in a water storage tank located within the compound of Caroline Wanjiku Ribiru, PW5, (Caroline). The body was spotted by Kennedy Christopher Ribiru, PW8, (Kennedy), the son of Caroline when drawing water to use in their house. Caroline reported to the police at Buruburu Police Station. Police made arrangements to have the body retrieved. The body was in a bad state. The face was decomposed to a state that it was difficult to recognize. Frederick told the court that he was able to identify the body of his brother the deceased by observing his clothes and shoes.

The scene where the body was found was photographed by James Muthomi Rintaugu, PW9, (James). He took a total of sixteen (16) photographs. These were produced in court as Exhibit 1 (a) to 1 (p) all inclusive. James also prepared a report in respect of the photographs and produced it in court as Exhibit 2.

The vehicle in which the deceased left driving and whose details are given above was found parked at Ruai Police Station. Evidence in regard to the recovery of that vehicle shows that the vehicle was towed

by the police from Utawala Shopping Centre from where it had been left unattended for several days and taken to Ruai Police Station. The evidence of Patrick Muli Kiminya, PW7, (Patrick) in respect to that vehicle is that the vehicle was co-owned by the deceased and Patrick.

The accused was arrested in connection with the disappearance of the deceased. The circumstances surrounding his arrest are that police traced him through mobile telephone call data. The accused had communicated with the deceased on several occasions on the date the deceased went missing. The evidence of PC Quinto Odeke, PW12, (PC Odeke) is that on 4th October 2013 the date the deceased went missing, his mobile phone hand set bearing International Mobile Equipment Identity (IMEI) No. 358042031882130 was handled by three people. In the morning of that day up to 9.19am the handset was paired to Subscriber Identity Module (SIM) Card No. 07222***** belonging to the deceased. It then changed hands and was paired to SIM Card No. 07002***** belonging to the accused James Abel Obong'o. On the same day at 15.04pm the handset changed hands and was paired to SIM Card No. 07172***** belonging to one Benson Mayaka. The handset changed hands from Benson Mayaka to Lazarus Muga of Identity Card No. 1022***** on 15th October 2013. PC Odeke did not give the telephone number of Lazarus Muga the last person to use the handset. PC Odeke's evidence further places the accused and the deceased at Utawala area on 4th October 2013.

The accused was detained at Buruburu Police Station together with his brother Victor Abuga Abel and cousin, Benson Mayaka. In the first instance they were charged with abduction. After investigations, Victor Abuga and Benson Mayaka were released leaving the accused in police custody. He was charged with murder of the deceased and arraigned in court.

Defense Case

In his defense, the accused gave unsworn defense. He admitted having been friends with the deceased and having been with him on 4th October 2013, the day the deceased went missing. The accused told the court that the deceased had borrowed money from him on 4th October 2013 and that he had given the deceased Kshs 2000. He said that the deceased gave him his phone, make Samsung, to sell for him and that he sold the phone to his cousin Benson Mayaka for Kshs 4,000.

He further testified that he was living with Caroline and her son Kennedy in Utawala. He referred to Caroline as his wife. He admitted to constructing a dog kennel for Kennedy in their compound but denied blocking access to water from the storage tank in the compound as testified by Caroline and her son Kennedy. He further stated that he did not notice anything amiss as he constructed the dog kennel.

The accused admitted having been called by the police and having been asked about the whereabouts of the deceased. He told the court that the deceased was his friend and that their relationship was cordial; that the deceased used to visit him at home in Utawala in company of one Nduku, Patrick, Paul Musau and others and that they used to drink and rest in the house when drunk.

The accused said that he and the deceased had operated a business together and that the deceased had access to his (accused's) room because the accused had given him the key to enable the deceased to store or pick some machines they were using at their business. He said that the death of the deceased shocked him.

Determination

Murder is an offence created by Section 203 of the Penal Code. It is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission. The burden of proving a criminal charge like this one lies with the prosecution who must prove it beyond reasonable doubt. It is the duty of the prosecution to prove beyond reasonable doubt that death of a human being has occurred; that the death was caused by the person charged before the court and that the death was caused by an unlawful act or omission on the part of the accused person. Malice aforethought is established by evidence proving the existence of any or all of the circumstances specified under Section 206 of the Penal

Code as shown below:

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. 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.

My careful reading of the evidence by the prosecution, and my understanding of the same, discloses that the case for the prosecution is anchored purely on circumstantial evidence. The evidence is clear, and I find no dispute over this, that the deceased left his home in the morning of 4th October 2013 after receiving a call from someone. It is not clear who called him and according to his wife, he left in a hurry around 6.00am. In the course of that morning he communicated on phone with the accused and met with him around Utawala Area. The evidence about what they did after meeting that morning is not available. Evidence is also not available in regard to whether he met other person(s) that morning or that day and what he did. In regard to what happened after meeting the accused, this could have been explained by the evidence of a statement of the accused taken under inquiry. However, this statement was not admitted in evidence. This court conducted a trial within a trial to determine the admissibility of that statement but the manner in which it was recorded came into question.

The deceased was in the home where the accused lived with Caroline and her son Kennedy. The fact that the body of the deceased was found in the water storage tank in the compound of Caroline means that the deceased may have been killed inside that compound. What is lacking is evidence explaining the reason behind the deceased's presence in that compound.

The body of the deceased was examined by Dr. Peter Muriuki Ndegwa, PW6, (Dr. Ndegwa) on 5th November 2013 at Shalom Athi River. Dr. Ndegwa found a severely decomposed body. The head was skeletonized and the skin was peeling off in most places. The doctor found a depressed fracture of the skull at the left temporo-parietal junction measuring 2cm in diameter with concentric rings and radiating fractures into the left temporal, left parietal and left occipital skull. The doctor's opinion is that the deceased died due to craniocerebral injuries due to blunt force trauma. This evidence by the doctor is not disputed. I have considered it and I have no reason to disbelieve it. It is my finding therefore that the fact of unlawful death of the deceased has been proved beyond reasonable doubt.

In respect to who caused that death and whether the person possessed malice aforethought I have carefully considered the evidence from the prosecution and the defense of the accused. He explained that the deceased gave him his (deceased's) phone to sell for him. In my view the accused was trying to explain how the phone belonging to the deceased found its way to the accused and to his cousin. It is, in my view, somewhat suspicious that the deceased would give the accused his phone to sell for him instead of selling it himself.

In relying on circumstantial evidence, it is trite law 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 reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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 (see **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135**).

While the evidence before this court shows that on 4th October 2013 the accused and the deceased

communicated and met, and that the accused used deceased's phone and further that the body of the deceased was found in a water storage tank in the compound of Caroline where the accused used to live, it is my considered view that this evidence does not meet the threshold set by the above cited authority. There are existing doubts that perhaps someone else or some other people caused the death of the deceased or he fell and sustained the fatal injuries that led to his death. With the existing doubts, this court is left with suspicions that perhaps the accused took part in killing the deceased and concealing his body where he thought no one would ever look for it. But suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt (**see Criminal Appeal No. 2 of 2002, Sawe v. Republic reported in [2003] eKLR**).

In conclusion therefore, it is my finding that the circumstantial evidence in the instant case does not irresistibly point to the accused to the exclusion of all others so as to justify conviction. It does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the accused. It is my duty therefore to find in favour of the accused. The prosecution has failed to prove beyond reasonable doubt that the accused killed the deceased. I find him not guilty of the murder of Enock Muthiani Munyoki and acquit him forthwith. He is at liberty to go home and enjoy his freedom unless for any other lawful course he is held in custody. Orders shall issue accordingly.

Delivered, dated and signed this 27th September 2017.

S. N. Mutuku

Judge