REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 57 OF 2011

REPUBLIC……..…….PROSECUTOR

VERSUS

G N K……ACCUSED

JUDGMENT

Introduction

This is a judgment in a murder case against G N K, hereinafter called "the accused". He is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code where it is alleged that on the night of 29th and 30th June 2011 at Eastleigh in Kamukunji District within Nairobi Area of Nairobi Province (*sic*) he murdered R M M.

This case is an old one. I took over the conduct of these proceedings on 15th June 2015 when the trial commenced. This was exactly four (4) years since the accused was taken to court. I have perused the court file. I have noted that the delay in expeditiously prosecuting this case is attributed to several factors. Firstly, when the accused was brought to court for the first time on 5th July 2011, he had not been examined to determine his mental status. It took time to have this issue settled and the plea taken on 10th October 2011. Secondly, the witnesses were not available when the matter came for hearing, thirdly the parties took time trying to pursue plea bargain offer which was finally rejected by the Director of Prosecutions and finally, the report from the Government Chemist was not available.

Prosecution Case

The prosecution called a total of nine (9) witnesses in support of their case. The evidence by the prosecution is straightforward. The accused is last born of the deceased. He and his brother F K K, PW3, (F) were the only children of R M M, hereinafter called "the deceased". The deceased was a widow, having lost her husband some years before she met her death. She lived with the accused in a single-roomed, iron sheets constructed structure in Wood Street Eastleigh. This court was told by John Ngulukyo Kisule also referred to as Mutuku PW4, (Kisule), who had rented the structure to the deceased, that the room was 8 feet by 8 feet in size. At the time the deceased and the accused lived in that structure, there were six such structure at the place and they belonged to Kisule. Kisule told the court that only two of those houses were occupied: the one he lived in and the one occupied by the deceased. The rest of the structures were used as stores.

The accused was at the time of the incident causing the death of the deceased aged about 28 years. He was not employed. This court learned that the accused had trained as a mechanic but could not maintain a job. He lived with his mother the deceased who supported him. The structure in which they lived did not

have beds. It had only one big mattress. It is a puzzle to this court how the deceased and her son the accused lived in that house but that is beyond the issue at hand.

The deceased used to eke out a living by selling vegetables with her sister F K M, PW1, (Florence). The deceased used to take up odd jobs of washing clothes for pay for a woman referred in evidence as Mama Wayua (not a witness). On 30th June 2011, Mama Wayua called F to ask her about the whereabouts of the deceased since the deceased had not arrived at Mama Wayua's home to wash clothes. F did not know where her sister was and she decided to go to her home and find out. At the door of deceased's house, Florence found the accused locking the door to their house. The accused was holding a paper bag that had contents. F asked the accused where the deceased was. The accused told her that the deceased had left and gone to work. F noted that the accused was wearing sports shoes (Exhibit 4) and T-shirt (Exhibit 9) that were spotted with blood stains. She did not ask him about the stains apparently because she was afraid to ask. After the accused left, F peeped through the iron sheets on the wall of deceased's house and noticed that the household items were strewn all over the place. Concerned, Florence called Kisule. Kisule broke open the door and both entered the house. Inside the house both Kisule and Florence noted items scattered all over the house. They also found a building block with blood stains (Exhibit 3(a)) and bloodstains everywhere in the house, according to the evidence of F. The house was not cemented and the two witnesses saw wet soil and a carpet covering the floor. They lifted the carpet and removed some soil from the floor. The found the body of the deceased covered in a piece of cloth (leso) and buried in the soil. They suspected the accused.

The matter was reported to the police at Pangani Police Station. The report was received by CPL Joseph Mulwa, PW8 (CPL Mulwa). He visited the scene. He confirmed that the household items were scattered in the house and there were blood stains. He also saw the body of the deceased and next to the body was the blood stained big building stone. He also noted a deep cut on the deceased's head. CPL Mulwa called scenes of crime to the scene. The scene was photographed and the body removed from the scene.

The accused was arrested by members of the public on the same day, 30th June 2011, and handed over to the police at Pangani Police Station. According to CPL Mulwa, the accused was wearing sports shoes and a T-shirt. These were blood stained.

Defense Case

The accused testified without taking oath. He raised alibi defense. He told the court that he was not at home on the night of 29th and 30th June 2011. He said he had been working at Garissa Lodge in Eastleigh offloading goods from a lorry. He said he returned home in the morning and met his aunt F at the main gate of their house. He said that F asked him where deceased was and he told her that he did not know. He said he decided to pass time within Eastleigh and after 30 minutes he returned home. He said he found people surrounding their home and heard someone say, "***that is the one***" while pointing at him. He said he was assaulted and his clothes torn and that he was arrested. He said that the members of public entered into his house, picked some clothes and shoes for him and told him to wear them since the clothes he had had been torn. He said he was taken to the home of F in Mathare where he was locked up until 7.00pm when he was handed over to the police.

Submissions

At the conclusion of the case, defense counsel Mrs Nyamongo indicated to the court that she would file submissions. This court allowed submissions to be filed on or before 23rd June 2017 and scheduled judgment for 21st September 2017. By the time of writing this judgment in August 2017, there were no submissions filed. I have read the submissions made by the defense after the prosecution closed its case. The defense counsel discredited the evidence by the prosecution terming it as hearsay and rumours. She also submitted that evidence that the accused used to be violent towards the deceased and that he used drugs lacked corroboration. She further raised issue with the evidence surrounding the blood stained building stone recovered from the house of the deceased and suspected to be the murder weapon. She submitted that the stone was not dusted for fingerprints to determine who handled it.

Analysis and Determination

I have carefully read all the evidence and considered all the exhibits produced in evidence including the eleven (11) photographs (Exhibit 2) and the report (Exhibit 1) produced by SSP Martin Mwaka, PW6, on behalf of Mr. Samuel Kagiri Wambugu who had taken the photographs but had retired from the service and therefore not able to attend court and produce them. It is clear to me that the case for the prosecution is based purely on circumstantial evidence. There is no witness who told the court that they saw the accused committing this offence. There is evidence by Kisule that he heard the sound of something being hit but he was not able to determine the source of that sound or where it was. On the other hand, the accused has introduced the defense of alibi.

The offence of murder is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission as provided under Section 203 of the Penal Code. This definition clearly demonstrates the ingredients of murder that the prosecution must prove to the standard of beyond reasonable doubt before an accused person charged with murder can be convicted. The prosecution must prove death of a human being has occurred, the act or omission causing that death and the unlawfulness of that act or omission, the person that unlawfully acted or omitted to act and the intention (malice aforethought) of the person who so acted or omitted to act. Malice aforethought has been defined under Section 206 of the Penal Code in the following manner:

> ***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.***

In determining whether the prosecution has met the threshold of proving this case beyond reasonable doubt, I have to turn to circumstantial evidence. Evidence of surrounding circumstances to a crime is said to be the best evidence. Courts in this country have taken cognizance of this fact in various decisions. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that: ***"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics."***

However, caution is called for when relying on circumstantial evidence. While recognizing the dangers in relying on circumstantial evidence without exercising this caution the Court in **Teper v. R [1952] AC at p. 489** had this to say:

> ***"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."***

The facts in this case are clear that the deceased died on the night of 29th and 30th June 2011. Her body was found buried inside her house in Eastleigh. Kisule who was accompanied by Florence had to dig the top soil to expose the body. It had been covered with a piece of cloth and buried and then covered with

the floor mat. This is the position the police found the body and took it to the mortuary. Dr. Joel Mungai, PW7, (Dr. Mungai) the pathologist who examined the body of the deceased told the court as follows in respect of the injuries suffered by the deceased:

> ***"There were bruises and lacerations on the left side and back of the head with fracturing of the skull exposing the brain. There were multiple fractures on 3rd and 7th ribs. There was blood in the chest and lungs had lacerations. There was swelling and bruising of the vulva. There were no other injuries. My opinion was cause of death due to blunt trauma on chest and head."***

This evidence is sufficient to me as proof beyond reasonable doubt that death of the deceased, which death was caused by unlawful act, multiple injuries caused by blunt object, occurred. The fact that the body was concealed under the soil inside deceased's house and the shallow grave covered with a floor mat means that the culprit intended to conceal the fact of death. It is also obvious to this court that the circumstances of this case point irresistibly towards the accused person to the exclusion of any other person as the person who caused this death.

The accused lived with the deceased in that tiny structure. The accused was old and mature enough to work but he could not keep a job according to his brother F. For the two months prior to the death of the deceased, the accused was not working. According to F the accused was sickly and could not work. F told the court that the deceased had told him that the accused used steal from her and was rough to her, would not go to work and would demand money from their mother.

The situation in the deceased house was dire. It was a single room which did not have a bed, only a big mattress. Where did the accused sleep? In the African culture, a grown up young man does not share a house with his parents let alone a room. Kisule told the court that he used to ask the deceased why she always disagreed with the accused but she refused to tell him the reasons. F told the court that the deceased used to take care of the accused by cooking for him and that the accused used to threaten the deceased.

I find sufficient evidence to show that the relationship between the accused and his mother the deceased was not good. I have no other evidence to show that they shared their house with anyone else. The accused was found by his aunt F locking their house he shared with his mother with a padlock the morning the body of the deceased was found buried inside the house. F and Kisule had to break open the house to gain entry. The clothes and the shoes the accused was wearing had blood stains. The stone inside the house also had blood stains. I believe that this is the stone used to hit the deceased. The blood on the stone and that on the T-shirt worn by the accused belonged to the deceased. This has been confirmed by DNA results from the profiles generated by Mr. Lawrence Kinyua Muthuri, PW5, a Government Analyst. However the stains found on the shoes and the jeans worn by the accused were found to have blood belonging to the accused.

The house of the deceased was in disarray. This is a sign of a struggle and it is possible that the deceased fought in self-defense. Evidence from the pathologist is that the deceased had a swollen and bruised vulva and to me this is suggestive of forced sexual activity. I shudder to imagine that the accused could have been the one who subjected his mother to this ordeal! Since I do not have evidence of the results of the vaginal swab taken from the deceased, I have no conclusive evidence on what happened to her in respect to the injuries on her vulva.

I have considered the defense of the accused. I am alive to the principle that the law places no burden on his to prove his innocence. But his defense raises more questions than answers. He said he was not at home that night. He came home in the morning and met F, then decided to go to pass time within Eastleigh before returning home after 30 minutes. Why would he go away to pass time instead of going home to rest given he was working throughout the night if his evidence were to be believed? And if he had entered the house before leaving he would have seen the state the house was in and would have gone to report the matter to the police or at the very least, tell F his aunt. He said he returned 30 minutes later. This cannot be true because the police was at the scene and he was not around until the evening when he was handed over to the police by members of the public. His defense is a lie.

In respect to the defense of alibi, I am alive to the principle that by setting up an alibi defense, the accused does not assume the burden of proving the alibi (***Ssentale v. Uganda [1968] EA 36)***. The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt ***(Wang'ombe v. Republic [1976-80) 1 KLR 1683).***

However, the accused was required to raise the defense of alibi at the earliest opportunity to enable the prosecution and the investigating officer time to check it out to determine its veracity or lack thereof. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In ***R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145***, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

> ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".***

The accused in this case raised his defense of alibi four years after the offence was committed. Is it an after-thought? In ***Festo Androa ASenua v. Uganda, Cr. App. No. 1 of 1998*** the Court made the following:

> ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

The prosecution did not call for evidence to disprove the alibi raised by the accused and therefore this court must weigh the alibi against the evidence of the prosecution. I have compared the alibi by the accused and the evidence by the prosecution. My view on the matter is that the accused is telling lies to the court. I find that I am convinced beyond reasonable doubt that all the circumstantial evidence satisfies the principles of circumstantial evidence as enunciated in numerous authorities including the case of **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

> ***"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."***

This principle was expanded by the same Court in **Simoni Musoke V. R. [1958] EA 715**, which cited with approval the following passage from the Privy Council decision in **Teper V. R. [1952] AC 480 at P.489**, to add the following:

> ***"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".***

In conclusion therefore, I am satisfied with the evidence against the accused and I find that it proves all the ingredients of murder. In my considered view the accused must have had knowledge, in the absence of evidence to the contrary, that the injuries caused on the deceased were capable of causing death or at

the very least grievous harm to her. In view of this I hereby reject the defense of the accused and find that he is guilty of the murder of the deceased. I enter conviction accordingly. Orders shall issue accordingly.

Delivered, signed and dated this 21st September 2017.

S. N. Mutuku

Judge