



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 97 OF 2013**

**REPUBLIC.....STATE**

**VERSUS**

**J K N.....ACCUSED**

**JUDGMENT**

The accused **J K N** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

***“On the 27<sup>th</sup> day of October, 2013 at Timboroa in Koibatek District within Baringo County, jointly with another not before court murdered M W K”***

The accused pleaded 'Not Guilty' to the charge. The trial commenced on 13/5/2014 before **Hon. Lady Justice Hellen Omondi** who heard the evidence of the first six (6) prosecution witnesses. Following the transfer of the trial Judge I took over the matter and recorded the evidence of five (5) witnesses. A total of eleven (11) witnesses testified in this case.

The brief facts of the prosecution were as follows. The accused and the deceased who were secondary school children became lovers. This led to the deceased dropping out from school and the two left their homes to go and cohabit in Timboroa.

**PW4 H W** who was the mother of the deceased told the court that three months after eloping to Kericho with the accused, the deceased returned to her mother and requested to be taken back to school as she wished to complete her studies.

**PW4** told the court that on 27/9/2013 she was taking a bathe when she realized that she needed soap. **PW4** called out to her daughter the deceased to bring her some soap but the deceased did not respond. **PW4** came out of the bathroom to find that the food which the deceased was supposed to have been cooking had burnt. She was later called by one 'Mwaniki' and informed that the deceased was lying dead in the toilet.

**PW1 PETER NJOROGE** was at the material time a resident of Timboroa who knew the deceased well. **PW1** told the court that on 27/9/2013 at about 9.30pm he closed his posho mill and went to a video shop belonging to one 'Mwaniki'. While there **PW1** felt the urge to go to the toilet. When he got to the toilet he stepped on something. He looked down and realized that it was a human body. Initially **PW1** thought the person was drunk. He ran to call 'Mwaniki' who came with his mobile phone. They shone the light of the phone and realized it was a lady lying on the floor of the toilet. They called the mother of the deceased who came and turned the body. They saw blood oozing from the mouth of the deceased.

Police were alerted of the incident and they came to the scene and removed the body to the mortuary.

**PW11 CHIEF INSPECTOR DAVID MWANGI** was the investigating officer. He told the court that after receiving the report of the incident, he went to the scene where he found the body of the deceased lying on the floor of the latrine. **PW11** removed the body to the mortuary at Eldama Ravine.

**PW11** told the court that when he went to the scene he recovered a mobile phone make Fone Black in colour with a red strip round it. **P. exb 2**. Later **PW11** revisited the scene and recovered a blue jumper with red patches **P. exb 2** and a mobile phone make Samsung **P. Exb 4**.

The accused who was not found at the scene later surrendered himself at Busia Police Station. Upon completion of police investigations the

accused was charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave an unsworn defence in which he denied any involvement in the murder of the deceased. This court must now analyse the evidence on record to determine whether the charge of murder has been proved beyond reasonable doubt.

The offence of murder is defined by Section 203 of the Penal Code in the following terms

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”***

Therefore in order to prove a charge of murder the prosecution is required to tender evidence to prove beyond reasonable doubt the following key ingredients of the offence

- (i) Proof of the fact as well as the cause of death of the deceased
- (ii) Proof that the deceased met her death due to an unlawful act or omission on the part of the accused
- (iii) Proof that said unlawful act or omission was committed with malice aforethought

In this case the fact of the death of the deceased was readily proved. **PW4** the mother of the deceased and **PW1** a villager who knew the deceased well both testify that they found the deceased lying dead on the latrine floor with blood oozing from her mouth. **PW11** was the officer who went to the scene and removed the body to the mortuary. **PW10 S M** an uncle to the deceased told the court that he went to the mortuary where he identified the body of the deceased to the doctor who performed the autopsy examination. All these witnesses who knew the deceased very well identified her as 'M W K'

**PW6 DR. TOROITICH** gave evidence regarding the cause of death of the deceased. **PW6** testified that the autopsy conducted by his colleague 'Dr Odhiambo' noted that the body had stab wounds on the left side, lower neck and eye. The cause of death was opined to be 'cardio vascular haemothorax'. The duly filled and signed post-mortem report was produced in court as an exhibit **P.exb 4**. This was medical opinion evidence which was not challenged at all by the defence. I therefore find as a fact that the deceased met her untimely death as the result of having been stabbed.

Having proved the fact as well as the cause of death the prosecution must go further and tender evidence to prove that it was the accused who stabbed and killed the deceased.

There was no witness who saw the accused attack or stab the deceased on the material day. Indeed no witness claims to have seen the accused in the company of the deceased that day. In his evidence **PW6** states that

***“On the night of the incident I did not see the accused. I know the accused. I had not seen him [during] the entire incident. I saw him 3 days after the incident. I can't recall how long ago I had seen accused before the incident but it was certainly more than a week before”.***

There being no direct evidence placing the accused at the scene the prosecution seeks to rely on circumstantial evidence to link the accused to this offence. Circumstantial evidence is that evidence which though not direct points at an accused with unerring accuracy as the perpetrator of the offence in question. In the case of **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009]eKLR** the Court held

***“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests***

- (i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established***
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused***
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”.***

In this case the prosecution sought to rely on various elements of circumstantial evidence to link the accused to the murder of the deceased. **PW5 E N** the father of the accused confirmed to the court that his son and the deceased were lovers who had at one point eloped together to Kericho. **PW5** narrated to the court about an incident when he was summoned to Timboroa Police Station and informed that the accused was involved in a love affair with one 'Yvonne Nduta'. The accused had been placed in cells allegedly for stealing from the 'Yvonne Nduta'. It is not clear where **PW5** was going with this whole narration but he eventually paid this 'Yvonne Nduta' a sum of Ksh 5,000/= to withdraw the case and to reclaim a mobile phone the accused had given to this lady. It may be that the aim of **PW5** narrating this story was to imply that there may have been bad blood between accused and deceased due to his alleged affair with 'Yvonne Nduta'.

There was no proof of any bad blood between accused and deceased. The named 'Yvonne Nduta' was never called to testify in this case. Indeed under cross examination by defence counsel **PW5** stated

***“I did not notice any misunderstanding between J and M.....”***

**PW6 P W** told the court that the accused was his brother **PW6** further told the court that on 7/5/2013 he left his Techo Mobile phone in his room, locked the room and went to school. Upon his return **PW6** found the door to his room had been broken and his Techno mobile phone was missing. At the same time the accused was found to have gone missing from the home having eloped to Kericho with the deceased.

**PW5** told the court that this was the mobile phone which the accused had given to 'Yvonne Nduta' to secure his debt to her. It is suggested that it was the accused who broke into the room of **PW6** and stole his mobile phone. There is absolutely no proof that it was accused who broke into that room. The very real possibility that any other person may have broken into the room was not sufficiently excluded. This piece of circumstantial evidence falls flat on its face.

**PW5** the father of the accused told the court that he gave to the accused his

Samsung mobile phone which was black in colour. **PW11** told the court that when he went to the scene he recovered a black Samsung mobile phone. **PW5** later went to the police station and identified this mobile phone as the one which he had given to the accused **P. exb 2**. He gave the police the receipt for the purchase of the phone **P. exb 2b**.

Here again the implication is that the recovery of this mobile phone at the scene links the accused to the murder by way of circumstantial evidence. In order to suffice as proof of guilt-the circumstantial evidence must provide the only possible explanation for the set of facts.

In his defence the accused readily concedes that the black Samsung mobile phone belonged to him, having been given to him by his father. However the accused told the court that he had given that phone to the deceased to use. Given that the deceased was the lover of the accused and given that the two had once cohabited, it is not strange or outside the realm of possibility that the accused could well have given this phone to his girlfriend to use.

The possibility that the deceased had this phone with her on the day she met her death has not been ruled out. The presence of that phone at the scene does not prove that it was the accused who took that phone there.

**PW11** also mentioned having recovered a blue/red jumper at the scene. **PW7 EDWARD WAWERU** the Assistant Chief told the court that he went to the house of the deceased with the chief and found a blue dotted sweater which was blood-stained **P.exb 1**. The sweater was hanging on a post in the compound. The significance of this jumper was not explained by the prosecution. The court is not told who the sweater belonged to. The exhibits were said to have been handed over to the DCIO. There is no evidence that this sweater was taken to the government analysis and no report on the analysis of this sweater was produced in court. There is therefore no proof or evidence that the blood on this sweater was the blood of the deceased or of another person. My finding is that the recovery of this sweater is of no consequence in this case.

**PW9 SERGEANT OUMA** told the court that on 23/10/2013 he was based at Busia Police Station as the Ag OCS when the accused came and surrendered himself at the police station. **PW9** stated that he interviewed the accused and the accused told **PW9** that he had killed a lady called 'W' in Timboroa. If indeed the accused did make such a statement to **PW1** then this would amount to a confession. The law relating to the admissibility of confessions is clearly provided for in Section 25A of the Evidence Act, Cap 81, Laws of Kenya. A confession is only admissible in law if it is recorded in writing **after** the accused has been properly cautioned and only if recorded before a Chief Inspector of police. **PW9** was not of the rank of Chief Inspector. He had no authority to record a confession. There was no evidence that the accused was properly cautioned before he made this admission.

**PW9** recorded what the accused told him in the OB and produced a copy of that OB extract as an exhibit **P. exb 3**. It appears that **PW9** believed that the OB report provides sufficient proof of what he claims the accused told him. An OB entry does not amount to proof of any fact. It is merely a report which is subject to verification after investigations. The OB report is valueless and cannot be taken as proof of an admission of any fact by the accused. It cannot be deemed to amount to proof of the guilt of the accused.

Finally I find that the circumstantial evidence does not pass muster. The alleged confession by the accused is not admissible in law. There exists no tangible evidence to link the accused to the murder of the deceased. The prosecution case lacks cogency and is not persuasive at all. The *actus reus* for the offence of murder has not been proved as against the accused. I therefore enter a verdict of 'Not Guilty' and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated in Nakuru this 17<sup>th</sup> day of November, 2017.**

Mr. Orege holding brief for Mr. Wambeyi

Mr. Chigiti for State

**MAUREEN A. ODERO**

**JUDGE**