



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. 27 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JACOB PARMASEI MASIKONDE.....ACCUSED

JUDGEMENT

1. The accused is charged with the murder of Lanoi Masiar, which is expressed to be contrary to section 203 as read with 204 of the Penal Code (Cap 63) Laws of Kenya. He pleaded not guilty. The prosecution called 11 witnesses in support of the charge.

2. The accused made an unsworn statement in his defence. He did not call any witness.

THE PROSECUTION EVIDENCE

3. The prosecution called Kamakil Ole Masiaba (PW1), a resident and a farmer at Ereteti in Narok. He testified that on 18/10/2015 he was at home at about 11.00 am when a child by the name of Lanoi of about 20 years was sent to a posho mill but never returned. It is his evidence that the next day, he sent his son to go and look for her. He came back with a report that she had gone to the mill, ground her maize and left.

4. PW1 further testified that they searched for Lanoi and later on a guy found flour scattered in a bush. Later her body was found in a river. They called the chief who contacted the police and her body was retrieved and taken to the police station.

5. It was the evidence of PW 1 that flour was scattered over the path going home and the deceased body had no injuries and that it was buried under the muddy river. He suspected that the deceased had been strangled. He also added that bold foot prints were seen.

6. Furthermore, Lekayuni Ratia (PW2), a resident of Murwa and a pastor at Retet, testified that he was on his way from church at 3.00pm after crossing a river to his home, he met with the accused person. He knew the accused, who was in the company of the deceased. The deceased was a sister to his wife and he greeted them as he understood the accused was escorting the deceased home.

7. PW2 testified that he later met with two men and spoke with them for 40 minutes, before he proceeded to his home, where he reached at 7.00pm. It is his evidence that when he reached home, he got visitors and went to the centre where they met the accused with a stranger, whom he introduced to them as 'masai' and because it was dusk they came closer and he was able to see them.

8. PW2 further testified that the next day he received a call that the deceased was missing and since he knew that the deceased was carrying gumboots, meat and flour when he met her, he joined the elders on the next day and told them what he had seen and that the accused was accompanied by the deceased. PW2 testified that the items which the deceased had were later recovered.

9. Another witness David Koonyo (PW3), a farmer and a resident of Retet testified that on 18/10/15 on a Sunday at about 11.00 am when he was at home, his sister (the deceased) was sent to Murwa to grind maize. PW3 further testified that the next day he met with Leina Masai, who was looking for the deceased as she was missing, so he accompanied him in searching for the deceased. It is his evidence that they came across some flour scattered on the ground and when they looked around they saw footsteps in the mud, since it had previously rained and followed them towards the river where they ended.

10. It is the evidence of PW 3 that they noticed a piece of clothing on the river bed and when they looked closely they saw a body in the mud by the river bed. They ran and called villagers and proceeded to pull out the body, stayed with it as the police were called until 8.00 pm, when the police arrived. PW3 testified that he knew the accused, but did not participate in his arrest.

11. Leina Masai (PW4) a farmer and resident of Eretet testified that the deceased who, is his sister had been sent to Murwa at around

11.00am to grind maize but never returned prompting a search for her. It is his evidence that the deceased body was found buried in the mud by the river bed. He further testified that once they found the body they called elders; the body was removed and taken to a mortuary.

12. Ntukai Masai (PW5), a farmer and a resident of Eretet gave evidence that on 19/10/2015 he had come to Narok and returned to his home at around 6.00pm when he heard screams from PW1's home. He rushed there and on arrival learned that the deceased, who is his niece had been killed. He further stated that he called the chief and organized for her body to be taken to the mortuary. It is also his evidence that he visited the scene close to 7.00pm, where the deceased body was by the river side already retrieved and had no injuries. He further stated that he also saw scattered flour close by. PW5 indicated that he participated in the arrest of the accused and that he was arrested at Murwa trading centre. It is also his evidence that he did not witness the murder of the deceased.

13. Dr. Allan Soita (PW6) was called as a witness to produce the postmortem report that was prepared by Dr. Ngulungu. He was called on the basis that he had worked with Dr. Soita for 3½ years and was therefore familiar with both his signature and handwriting.

14. In his finding it was established that the cause of death was due to asphyxia due to mouth/nose covering. He also found that pressure had been applied in keeping with smothering type of strangulation with laceration on her genital organs.

15. It was PW 6's evidence that various specimen were collected for further examination namely nail clippings, pubic hair and vaginal swab for DNA profile and matching. It was also his evidence that no matching report from Government chemist was received.

16. No. 216906 CPL Simon Koskei (PW7), testified that on 20/10/2015 he received a call notifying him that a female body had been found and had already been taken away and the area chief wanted them to go and meet PW2 who had seen the accused with the deceased on the day of the murder.

17. PW 7 left his contacts with the villagers and he later received a call from one David Mashana who saw the accused at the centre. It is also his evidence that the police interrogated the accused.

18. Rispus Kibon Koima (PW8) a resident of Murwa centre, who operated a shop. He testified that on 15/10/2015, he was at the shop up to around 2.00pm. He opened the shop and a girl whom he identified as a regular customer asked if he had gumboots size 8, which he sold to her at Ksh.750/= and she also asked for 5kg flour and she then left her shop.

19. On the following day at around 10.00am the brother of the deceased came to ask him if he had seen the girl. He responded that the girl was there and she had bought gumboots and then left. It is PW 8's evidence that in the evening, he heard that the body of the girl was found at the river and on 20/10/2015 the father of the deceased notified him that the girl had died.

20. PW 8 was able to identify the gumboots that he had sold to the deceased as gumboots Kenafric make size 8.

21. Henry Kiprono Sang (PW9), a Government analyst testified that his duties included the examination of human specimens to determine their origin.

22. It was his evidence that on 2/12/2015 he received the following:

1. Nail clippings in a khaki envelope marked A- deceased
2. Hair (pubic) hair marked B
3. Vaginal swab in an envelope marked C
4. Blood samples marked D-Jacob Parmaseu Masikonde

23. PW 9 testified that on 5/4/2016 they received the below mentioned items from PC Charles Obade of Narok Police station seeking that they develop profiles and make comparisons namely

- a. Pair of whitish sports shoes marked A-accused
- b. Pair of long trousers and white trousers marked B-accused
- c. Pair of gumboots marked C-accused
- d. soil sample in a polythene bag marked D-taken from scene

24. The finding for PW 9 were that:

1. Hair sample (B) and vaginal swabs (C) not stained with semen.
2. No bleeding stains on pair of sport shoes item A or long trousers or gumboots, soil sample- B, C, D.
3. Analysis on nail clippings DNA profiles in vaginal swabs marked DNA and nail clippings had no similarities.

25. NO. 67045 PC Charles Obade (PW10), based at Bondo Police Station testified that on 19/10/2015, while at Narok Police Station the father of the deceased came with the body of the deceased and reported her death. That he recorded their statement and on 20/10/2015 he himself together with CP Kiilu proceeded to the scene. It was also his evidence that they met the family of the deceased at the scene and took photographs and later proceeded to another scene at Melili.

26. On 21/10/2015 the area chief was arrested and was brought to the station where PW10 interviewed him. It was his further evidence that again with CP Kiilu they went to the home of the accused.

27. PW10 further testified that the shop owner, Koima, identified the gumboots (exhibit 2) as those bought by the deceased. Under the bed was a black khaki trouser of the accused which was muddy (exhibit 6) and shirt (exhibit 7) and about 100 metres from the home of the accused they discovered one shoe belonging to the accused (exhibit 8). He proceeded to testify that they took photographs and some soil from the scene.

28. It is also his evidence that Dr. Ngulungu took vaginal swab, nail clipping and blood samples of the deceased. He further testified that he arranged all these items and took them to the government analyst.

29. Based on the evidence that he gathered and the statements recorded PW10 decided to charge the accused with murder.

30. NO. 46623 PC Paul Kiilu (PW11) based at DCIO Narok in the scenes of crime section testified that on 20/10/2015 at about 9.00am he was instructed by DCIO to proceed to Narok Mortuary to take photographs of the deceased. The same was taken and were produced as exhibit 3A – 3D.

31. On 22/10/2015 the accused was arrested and he led the police to the scene where other photos were taken. Photos 2, 3, 4 is a thick forest by the river, where the deceased and her goods were recovered. Photo 5 shows a close up view of the flour and meat in green paper bag. Photo 6 is a long shot of where the deceased's shoe was found. Photos 7, 8, 9 are a close up view of the shoes in the forest. Photos 11 and 12 are long and close up view of accused's house. Photo 13 shows the accused recovering gumboots from under the bed. Photo 14 shows a brand new gumboots. Photo 15 is a close up view of accused displaying clothes he wore and gumboots of the accused.

32. The Accused person was put on his defence and he made an unsworn statement and called no witnesses.

THE EVIDENCE OF THE ACCUSED

33. The accused person proceeded to identify himself as one Jacob Masikonde from Narok North, Olchoro Location, Siapei Sub location, Murua Village and that he was a student at Murua Primary School in class 8.

34. It was his evidence that he came to know that he was charged with murder, when he was charged in court. The accused testified that he recalls on 18/10/2015 on Sunday that he had woken up at around 6.00am and went to the shamba to harvest maize until 8.00am. Thereafter he went to have tea and then proceeded to church to teach Sunday school pupils.

35. He proceeded to testify that at 10.00am after he was done with the pupils he went to play piano in church and when the congregation arrived at the church, service commenced and went up to 2.00pm.

36. It was his evidence that after the church service, he went to the trading centre to buy sugar, cooking oil and rice, since his elder brother, Samson Masikonde had sent him and thereafter returned home. He further proceeded to give evidence that he ate his food and went back to the shamba to harvest maize until 6.00pm. He then returned home to sleep. It is also his evidence that he attended school the following day, which was on Monday.

37. The accused further testified that he went to school and returned home at around 4.30 pm and later went to the shamba to dig until 5.45pm, when his brother called and requested him to go and buy solar panel lamps to aid him read at night.

38. It was his evidence of the accused that he went to the trading centre and as he was entering the shop, he was arrested and handcuffed by the AP police officers. When he asked why he was being arrested, he was assaulted and his left ear injured. He was taken to Narok Police Station where he met the father of the deceased. He knew the father of the deceased since he was the chairman of their school. The accused proceeded to testify that the father of the deceased asked him as to why he had been arrested. He told the police officers and his brothers that he knew the accused very well and that they should return him home for more investigations to be done and to establish whether he was the one that had killed the deceased.

39. The accused further testified that the proposal of the father of the deceased was rejected and he was detained at the police station. Later he was charged with murder. The accused testified that when he was brought to court, the brothers of the deceased gave evidence stating that he was a suspect. The police officer also brought photographs, which the accused stated that they were taken, when he was being beaten by them and they produced them as exhibits showing that he had killed the deceased.

40. It is the evidence of the accused that he is surprised that he was charged with murder, when he knew that he was only a suspect.

41. The accused testified that he is a young man, who goes to church and works very hard to support his sisters and younger brothers, since their mother died a long time ago. He further proceed to testify that he has never killed anyone and he knew nothing about the killing of the deceased.

42. The accused finally testified that he wrote a statement at the police station. However he does not remember the contents of that

statement but confirmed that he denied the charges.

ISSUES FOR DETERMINATION

43. In the light of the prosecution evidence, the unsworn statement of the accused and the applicable law, I find the following to be the issues for determination.

1. Whether or not the circumstantial evidence points only to the guilt of the accused person.
2. Whether or not the recovery of the gumboots allegedly the property of the deceased were positively identified as her property.

44. Issue No. 1

The evidence of Rispus Kibon Koima (PW 8) is that on 15/10/2015 the deceased had gone to his shop and bought size 8 gumboots for shs.750/- together with 5 kg flour and then left. PW 8 confirmed to the brother of the deceased that he had seen her the previous day. PW 8 was able to identify the gumboots that he sold to the deceased. These gumboots did not have any special marks.

45. Furthermore, there is the evidence of Henry Kiprono Sang (PW 9) that on 2/12/2015 he received nail clippings of the deceased, pubic hair and a swab from her vagina together with the blood samples of the accused person. Additionally, he also received a pair of long trousers and a pair of gumboots all of the accused person together with a soil sample taken from the scene of crime. PW 9 who is the government analyst found that those samples and the swabs from the vagina of the deceased were not stained with semen. He also found no blood stains on the pair of shorts, long trousers and the gumboots of the accused person. Furthermore, he found no blood stains on the soil samples that was collected from the scene. Finally, the analysis of the nail clippings, DNA profile and the swabs from the private parts of the deceased did not bear any similarities.

46. According to Dr. Allan Soita (PW 6), the cause of death was due to asphyxia due to mouth and nose covering which meant that the deceased was strangled to death.

47. Furthermore, there is the evidence of Lekayuni Ratia (PW 2), who testified that he had seen the accused in the company of the deceased person on the day when the deceased went missing. It was also his evidence that he saw the deceased carrying gumboots, meat and flour.

48. The accused was arrested on the basis that he was the last person seen with the deceased person. There is no eye witness who saw the accused person strangle the deceased. It therefore follows that the evidence against the accused person is of a circumstantial nature.

49. Furthermore, there is the evidence of No. 67045 PC Charles Obade (PW10), who testified that the father of the deceased reported the death of his daughter at Narok Police station. PW 10 went to the scene where the body of the deceased was recovered by Cpl Kiilu (PW 11), who then took photographs of the scene. His further evidence was that the accused person had been arrested by the area chief and taken to the police station. They then went to the home of the accused. Under the bed of the accused was a black khaki long trouser of the accused, which was muddy that was put in evidence as exhibit 6 and a shirt which was put in evidence as exhibit 7. One hundred (100) metres away, they recovered some shoes of the accused which were put in evidence as exhibit 8.

50. While under cross examination, PW 10 testified that the deceased and the accused were seen walking together on 18/10/2015. It was also his evidence that the gumboots which were purchased from the shop at PW 8 were recovered from the house of the accused.

51. In his defence, the accused denied the offence and explained his whereabouts on 18/10/2015 and in the following days thereafter. The law in this regard according to *Parvin Singh Dhalay v. R. (1997) eKLR* is that in order to convict on circumstantial evidence, the evidence must irresistibly point to the guilt of the accused person. The area chief was arrested by PW 10 and was then interviewed and thereafter released. PW 10 did not give reasons for his release. In the instant case, there was no eye witness. The gumboots that were recovered from the bed of the accused were brand new gumboots. According to PW 11, these gumboots belong to the deceased. Other than that they were new gumboots, they did not have any peculiar features that indicated that they belonged to the deceased. It is possible that they belonged to the deceased but the possibility that they belonged to the accused person has not disproved by the prosecution. It was upon the prosecution to positively prove that these were the properties of the deceased person. These boots are common items that easily change hands. The accused was arrested on 22/10/2015. This was 4 days after the murder of the accused.

52. In view of the applicable law and the totality of the evidence, I find that the prosecution have failed to prove their case beyond reasonable doubt. I therefore find that the accused is not guilty of the offence charged and is hereby acquitted under section 322 of the Criminal Procedure Code [Cap. 75] Laws of Kenya. He is hereby set free unless held on other lawful warrants.

Judgement delivered in open court this 21st day of December, 2017 in the presence of Ms Nyaraita for the state and Ms Mogere for the accused.

J. M. Bwonwonga

Judge

21/12/2017