



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. 3 OF 2015
REPUBLIC.....PROSECUTOR
VERSUS
MUSEE MUE 'ALIAS' NOAH.....ACCUSED

JUDGEMENT

1. The accused herein stand 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 night of 23rd and 24th February 2015 at Thitha village in Nzeu location within Kitui County murdered Ndusya Kikwalu Kitheka alias Ndusya Munyu.

2. He has pleaded not guilty to the charge. In support of this case the prosecution has called 8 witnesses.

PW1 is Munanie Mwanza a sister in law of the deceased and an aunt of the accused. It was her evidence that the deceased was an unmarried old woman whose only son had died. That as usual in the morning of 24th February, 2015 she went to wake up the deceased whose house was about 40 metres away from the father's home of the accused, to go and pick charcoal. According to her, the deceased slept in a house whose door was covered only by a curtain made of a piece of cloth secured with stones.

3. She stated that she found the deceased motionless and after touching her legs and shoulder, she alerted her daughter in law Mercy (PW2) and informed her that the deceased had died and then called her sons Karanja and Sammy on phone and the matter was reported to the chief and the police. The police arrived at the scene where they met the chief.

4. The body of the deceased in her observations had an injury on the head and blood stains were visible near her. According to this witness, by the time the police arrived from Mwingi, people had already gathered. She stated that the police used a gadget which led them to the accused's house where they arrested him. Together with the police and her daughter in law (PW2) they accompanied the body in the police vehicle to the police station at Mwingi.

5. According to this witness also, in January 2015 there was an issue involving division of a farm wherein the deceased got a portion after she brought a surveyor when the accused opposed the survey. According to her, during that exercise the accused made verbal threats that no one would live on that land. She stated that though the accused got his own piece of land, in that survey exercise, he wanted to grab the land which was divided to Ndusya the deceased.

6. In cross examination, he stated that Chief Makau was no longer in service and maintained that the police used an instrument which produced bright light at the scene and vibration which led them to arrest the accused person. She stated that though she slept about 70 metres away from the deceased's house, she did not hear screams that night. She said that the accused said during the survey that nobody would be

alive on that land by the planting season. She then clarified that the land was divided into four pieces, firstly to herself, secondly to Ndusya the deceased, thirdly the father of the accused, and fourthly to Martin a brother of the accused, and the accused inherited his father's portion as the father had died.

7. PW2 was Mercy Samuel from Thitha in Mwingi a niece of the deceased and cousin of the accused.

8. It was her evidence that the deceased was an old woman who had left the rural home to seek employment elsewhere but returned in early 2015. It was her further evidence that on 24th February 2015, at 6.30 am while milking goats, PW1 called her to go with haste. When she arrived they entered the house and saw the deceased lying down with blood around her, wearing only a piece of cloth popularly known as "leso".

9. She observed blood and brain material at the scene where the deceased lay on a mattress. They then called the chief and her husband on phone, and the police then arrived from Mwingi in a motor vehicle, took measurements, and proceeded to the accused's house where they arrested him. According to her the police also took the body of the deceased and she boarded the police vehicle together with PW1.

10. She stated that in a land dispute which had been addressed in the recent past, the accused made a verbal threat that by March nobody would be alive on the land which was allocated to the deceased. According to her, the accused made the threat to Ndusya the deceased.

11. In cross examination, she maintained that she informed the police that the accused had threatened the deceased. She then said that it was actually the deceased who explained to her that the accused had threatened her.

12. PW3 was Teresia Mwathi Muthangia a niece of the deceased. She stated that the accused was a nephew of the deceased.

13. It was her evidence that on 24th April, 2015 at 7.00 am she opened the door for the chicken but was shortly called by Mercy PW2 to meet her near the river where Mercy asked her whether she knew of Ndusya's death. They then proceeded to Ndusya's house and saw her lying down.

14. It was her further evidence that Ndusya the deceased slept alone in her mother's house. She said that Ndusya had a cut on the head and that blood was split all over the floor. She stated also that photographs were taken of the injuries and the scene by the police.

15. According to her though the relationship between the accused and the deceased was good, the accused had made a threat to the deceased because of a land dispute stating that by the end of March she would not be alive. She was informed about the threat by Ndusya.

16. According to her also the accused had sold his land and cultivated the land of the deceased in her absence, and on the date of survey to subdivide the land, the accused threatened Ndusya. She said that the door of the deceased had no shutter but she did not hear any screams that night though she slept nearby. According to her the deceased and her mother reported the threat at Thitha police station. She also said that the accused had sold part of the land to somebody called Ngundu.

17. PW4 was Josphat Kithome Mutava a guard at Mutuangombe location and an in law of the family of the deceased. It was his evidence that on 25th February 2015 he was called on the phone by Peter Musyoka and proceeded to his in laws home at 11.30 am only to be informed that Ndusya had died. On 5th March, 2016 he was given money to buy burial items. He remembered witnessing the post mortem examination of the deceased together with Samuel Mwanza.

18. In cross examination, he stated that Mwanza lived 500 metres away from the deceased. He also said that the deceased' house had no door shutter.

19. PW5 was Samuel Mwanza Munyu. It was his evidence that he lived in Mombasa and on 24th February 2016 he was called on the phone by his sister Mercy and informed that Ndusya had died. On 5th March 2015 he witnesses post mortem examination with Josphat Mutava PW4.

20. In cross examination, he said that the house of the deceased merely had a curtain on the door. He said that his mother's house was 70 metres away from the deceased's house.

21. PW6 was Dr. Joram Ndirangu of Mwingi District Hospital, a doctor of one year experience. It was his evidence that the post mortem report of the deceased was done by Dr. Nzioka who had just resumed duty from maternity leave but could not attend court because she had delivered through an operation.

22. He said he was familiar with handwriting of Dr. Nzioka. The post mortem report was that there was a cut on the head 10 cm long, with exposed brain tissue and fracture of the bone. Cause of death was brain laceration secondary to penetrating head injury by a sharp object which was not identified. He stated that such injury could not have been caused by animal teeth. He produced the post mortem form as an exhibit.

23. PW7 was Daniel Mutuku Mutua a Land Educational Officer in Thitha area. It was his evidence that on 26th May 2014 he demarcated plot No. 608. However, a family member Munanie Mwanza PW1 said that the land did not belong to the accused but to Ndusya Kitheka the deceased. The accused then said that since Ndusya was absent, they would resolve that matter when she came. After a few months however, Ndusya came back and the dispute was brought to this office on 23rd November 2014 and he summoned the two to go to his office and later summoned them to meet him on the land. He visited the land on 27th January 2015 and found both parties present where upon the accused said that he had used the land for long and did not know why his aunt Ndusya was claiming it.

24. He then divided the land into equal parts one for Musee the accused which remained 608 and the other 4379 to Ndusya. According to him Musee said the land would not be cultivated as long as he was alive. He stated that on 24th February 2015 he was summoned to the police and recorded a statement.

25. In cross examination, he said he did not inform the police that Musee had sold the land nor did he inform them that Musee said Ndusya was not entitled to the land. He said that he informed the police that the two parties were satisfied and both planted napier grass on the boundary. He said also that the accused showed him land which he had sold on which had no disputes arose. He said lastly that initially the accused told him that he would settle the dispute amicably.

26. PW8 was PC Justus Kipchumba Bett of Mwingi police station. It was his evidence that on 24th February 2015 he received a report of a murder of a 70 years old woman. Together with the OCS and PC Wekesa they visited the scene with Corporal Waigwa. On arrival they met Administration Police officers who had secured the scene. Members of the public led them to a mud walled house where they found a body lying on a mattress on the floor half naked in a pool of blood. There was a deep cut on the right side of the head and there were no visible signs of a struggle.

27. Though he was not a scene of crime officer, he took photographs of the scene as the relevant officers were stationed far away at Kitui police station.

28. It was his evidence that on enquiry he found that there existed a land dispute which Chief Joseph Makau had tried to sort out. However, when he enquired, the accused denied committing the offence. It was his evidence that they searched for the murder weapon but did not find any. They arrested the accused and took to body to Mwingi hospital where post mortem was conducted by Dr. Nzioka. As the investigating officer he charged the accused person with the offence.

29. In cross examination he said that the accused's house was 50 metres away. He said that he did not get any further details from elders on the dispute and that the chief did not report the threat to the police. He however had information that the deceased complained 3 times to the chief but, may be, the chief did not take the matter seriously. He stated that the deceased had for long lived at Matuu and also at Karunga.

30. In his defence the accused gave unsworn testimony. It was short testimony in which he said that the police went to his house and asked what he does. They also asked what he knew about Ndusya. He said he did not say anything to the police. (I observed that when the accused was giving his short statement in his defence his hands were shaking)

31. This is a murder case. The accused is charged with the offence of murder. In all criminal cases the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. An accused person does not have a burden to prove his innocence. He can create doubts in the prosecution case. See the English case of Woolmington –vs- DPP (1936) AC 462.

32. In a case of murder, the prosecution is required to prove first of all that the deceased died. Secondly, whether the death was unlawful. Thirdly, whether the accused caused the death. Fourthly, the prosecution is required to prove malice aforethought.

33. Did the deceased die? The evidence of the prosecution witnesses PW1, PW2, and PW3 is that in that morning they saw the deceased lying in the house motionless with an injury on the head and blood scattered around her. A report was made to the police. The police arrived and confirmed the same story. The body was taken to the mortuary at Mwingi Hospital. A post mortem was conducted a few days thereafter and Dr. Nzioka found that the deceased had died and the cause of death was bleeding from injury in the head which exposed some brain matter. All this is not in dispute.

34. I find that in deed the deceased died and that the prosecution proved that fact beyond any reasonable doubt. The cause of death was the deep injury on the head breaking the skull and exposing the brain with resultant bleeding. Such injury was caused by a sharp object. The prosecution therefore proved beyond any reasonable doubt that the deceased died.

35. Was the death unlawful? There is no doubt in my mind that the death was caused by a sharp object. A suggestion has been made by the defence that the deceased was attacked by wild animals. However, there is no evidence of any marks or footprints of wild animals at the scene. There was also a suggestion by the defence that the death occurred elsewhere and the deceased was merely transported to that point. In my view such an act would be impossible for a person who was injured the way she was. If that had happened then blood stains would have been seen elsewhere rather than beyond the place where she lay. Even if that was true, the death would still be unlawful.

36. In my view the death occurred in the very house where the deceased was sleeping. It was unlawful death. I find no basis for finding that there was any legal justification for the death. I thus find that the prosecution has proved beyond any reasonable doubt that the death of the deceased was unlawful.

37. I now turn to the culprit. The accused has been alleged to be the person who killed the deceased. That is the hypothesis of the prosecution. He denied the charge and said that he was just arrested that morning in his house which was nearby.

38. Nobody witnessed the deceased being hit on the head. Nobody saw her being killed. The case thus is a case based on circumstantial evidence. A conviction can be founded in a criminal case on the basis of circumstantial evidence. However the incriminating facts should be consistent with any other hypothesis and there should be no other explanation other than that the accused person is the one who killed.

39. The evidence against the accused is that there was a land dispute between him and the deceased. I find from the evidence on record that in deed there was an issue of land which land was later divided by the Adjudication Officer Daniel Mutuku Mutua PW7 on 27th January 2015. It is said that the accused stated that the deceased would not be alive to cultivate the land by the next planting season in March. The deceased was found dead on 24th February 2015 just before March had arrived.

40. The problem with the evidence about that threat is that there is no evidence that that threat was made in the presence of the Adjudicating Office. If it were so then he would have included that in his police

statement which he did not. In his evidence in court the Adjudicating Officer (PW7) gave evidence of that threat but admitted that he did not inform the police about that threat but told the police that the deceased and the accused were satisfied with the subdivision.

41. PW1 Munanie Mwanza is the person who stated that there was such a threat. However, the evidence on record is that the deceased informed the chief about that threat. The Investigating Officer PW8 stated that his information was that the deceased made three reports to the chief about the threats to her life.

42. However the chief did not make any report to the police, nor was he called by the prosecution to testify and no elders in the local area were called to testify with regard to those threats. In my view therefore if the prosecution wanted to connect the accused circumstantially through the evidence of the threats, they should have called the chief or local elders to testify regarding those threats. In the absence of the prosecution doing that or giving a plausible explanation as to why they did not do so this court cannot say that such threats were made. In a case depending on circumstantial evidence that gap gives a window for a hypothesis other than that of the guilt of the accused. What appears to be in record is evidence of suspicion which cannot sustain a conviction in a criminal case. See Sawe –vs- Republic (2013) KLR 364.

43. The accused was also arrested from his home about 50 metres away from the deceased's house. Such conduct also, in my view, operates to exonerate him from a presumption that he committed the offence.

44. I find that the prosecution did not prove beyond any reasonable doubt that the accused caused the death of the deceased. On that account he will be acquitted.

45. With regard to malice and forethought, it is an intention to cause death or grievous bodily harm. The injury on the head of the deceased was quite severe and certainly intended to cause the death of the deceased. In my view, whoever caused such an injury on a defenseless old woman like the deceased, cannot say that he/she did not have malice aforethought. I find that the prosecution proved beyond any reasonable doubt that the death of the deceased was caused with malice and forethought.

46. As I have found that the prosecution did not prove beyond reasonable doubt that the accused caused the death of the deceased, I hereby proceed to find him not guilty and acquit him of the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The accused will thus be released unless otherwise lawfully held.

Dated and delivered at Garissa on 14th December, 2017.

George Dulu

JUDGE