



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 21 OF 2014

REPUBLIC.....PROSECUTOR

=VERSUS=

SAFARI BENJAMIN CHEA ALIAS OWILO.....ACCUSED

J U D G M E N T

The accused person is charge with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that the accused on the 14th day of November 2013 in Magarini District within Kilifi County murdered N G W.

Eleven witnesses testified for the prosecution: PW1, ELISHA KATOI MWAKOMBE informed the court that on 14th November 2013 at about 5.00 pm he was at his place of work when the accused went to the deceased's home. The accused told the deceased that his father had visited him and he wanted her to know him. PW1 is a neighbour to both the deceased and the accused. It is his evidence that he saw the deceased whom he had known for over 10 years: The following day he heard that the deceased, N, had died. He went to where the body was found at a nearby farm. The body was hanging on a chashewnut tree. The body had injuries. He saw the hands appeared broken as well as the teeth.

It is PW1's further evidence that his house is like 15 meters from the deceased's home. His house is between that of the deceased and that of the accused. On 15th November 2013, the deceased's mother went to PW1's house looking for the deceased. At that time PW1 did not know that N had died.

PW2 K K is 16 years old and a class 7 pupil at [particulars] Primary School. On 14th November 2013 at about 8.00 pm was outside their house taking a bath when he heard a female voice saying “**mama yangu nakufa peke yangu - oh my mother, I am dying alone**”. The voice was coming from the accused's house. He moved closer to the accused's house but did not hear the voice again. He was in the company of PW3, A K, his uncle. It is PW2's evidence that he recognised the voice as that of the deceased. The deceased was also a student at [particulars] Primary School. The accused's house has five rooms. There are other tenants in that house. The accused's room is at the end of the house and it is PW2's evidence that the voice came from the room that is at the end of the house. According to him, the deceased was like in problems when he heard the voice.

PW3 A K is 13 years old. He is a class five pupil at [particulars] Primary School. On 14th November 2013 at about 8.00 pm he was taking a bath with PW2 outside their house. They heard someone screaming “mama yangu, nakufa peke yangu”. The voice was coming from the accused's house. They knew the accused. He recognised the voice as that of N K their nieghbour who was also a class eight

student at [particulars] Primary School. PW3 and PW2 were the only ones at home as their mother had gone to the farm. They moved closer to the accused's house but the screams had stopped. The following morning he did not see N. It is his evidence that when they heard the voice coming from the house where the accused lives, he did not see any other tenant at that time.

KOMBE KAINGU testified as PW4. On 15th November 2013 he went to his farm at Marafa at about 1.00 pm. Some children and a woman saw the deceased's body hanging on small cashewnut tree. The children called him. He went to where the body is and saw the deceased hanging on a tree. The deceased's legs were touching the ground. The deceased was bleeding from the mouth and the thighs appeared to have been pricked. PW4 did not know the deceased. The deceased's mother went to the scene and identified the body.

PW5, L J G is the deceased's mother. On 14th November 2013, a Thursday, she left home to buy fish for business purposes. The deceased was preparing tea. It was 6.00 am. PW5 returned home at about 8.30 pm but did not find the deceased. Her other children were at their uncle's place except E F who was at home. E told her that N was around and had just cooked porridge for their baby. PW5 saw the porridge cooked by the deceased on the jiko. The deceased did not go back home that night. The following day PW5 went to sell her fish at about 11:00 am. At about 2.00 pm she heard screams coming from the neighbourhood; about 200 meters from her house. She went there and saw her daughter hanging from a cashewnut tree. The deceased was bleeding from the nose and private parts. The cashewnut tree was not very high.

It is PW5's evidence that the accused used to seduce the deceased but she was against it. Her daughter was a class eight student at [particulars] Primary School and was doing her exams. She had reported the deceased's relationship with the accused to PW9 who counsels young girls. The deceased had promised not to be confused by the accused and had written him a letter in September 2013 indicating that she wished to continue with her studies. It is PW5's evidence that PW1 informed her that he had seen the deceased in the morning heading to school.

PW6 G W Is the deceased's father. He works as a driver with a bakery firm. He was notified about the death of his daughter on 15th November 2013. He went home and reached the scene at about 4.00 pm. He saw his daughter's body hanging from a cashewnut tree. The body was almost touching the ground and ants were already invading the body.

PW7 M C is the deceased's grandmother. On 14th November 2013 the deceased went to her house at 2.00 pm. She was from school. The deceased then left heading to their home. The following morning some children saw the deceased's body in the bush. They did not recognise her and they called PW7. She went to the scene and saw the deceased's body hanging from a short tree. PW8 CORPORAL BENSON NDUNDI was based at Marafa AP Camp. On 14th October 2014 he was asked to escort the accused from Marafa to Marereni Police Station where he handed over the accused to Marereni Police Officer commanding Station.

PW9, JOYCE DAMA KAMBI works with "Sauti ya wanawake, Magarini a Non Governmental Organisation which deals with girl child education. The relationship between the deceased and the accused was reported to her. The deceased was 15 years old and was not going to school. She was in a love affair with the accused. PW9 went to [particulars] Primary School and was given 11 such cases including that of the deceased. The deceased told her that she was in love with a boy. The deceased committed herself to leave the accused and continue with her studies. She signed a letter dated 20th September 2013 indicating that she would leave the accused and continue with her studies. PW9 also signed that letter. The letter was written by the deceased herself in the offices of PW9. PW9's duty is to counsel the girls so that they can finish their studies.

PW10 DR. MINA MUMBA is a Medical Doctor based at Malindi Hospital. She produced the postmortem report prepared by her colleague, Dr. Muumin Aweis on 17th November 2013. The deceased had blisters on her limbs, inflamed genitalia, wrist fracture and signs of rape. There were marks around

her neck. The cause of death was severe asphyxia, assault and rape.

PW11, Inspector JOAKIM GICHURU Investigated the case. The matter was reported at the Marereni Police Station where he was working on 15th November 2013 at 4.00 pm. He sent Scene of Crime Officers to the scene. The body was taken to Malindi Hospital mortuary and a postmortem was conducted. He investigated the case and had the accused charged with the offence. His investigations revealed that the accused was the deceased's boyfriend. The deceased was seen entering the accused's house. Screams were heard from the accused's house. It is his evidence that another suspect, Emmanuel Kadenge was arrested but later released.

In his sworn evidence, the accused denied committing the offence. He testified that he is a Disco Joker (D.J). He knew the deceased. She was his prospective wife. On 14th November 2013 at about 8.00 pm he was at a burial place. He stayed there that night. It was a burial ceremony for one Charo Mwambire. He was playing music at the ceremony. He went to his house in the morning where he stays alone and changed clothes. He heard that the deceased had disappeared. He later heard that the body had been found. He went to the scene. The village elder and the police went to the scene. He went to the deceased's home but later left to go to his work. The Administration Police Officers called him on phone and he went to their office. He was told that he had stolen a motorbike. He slept at the station. He was taken to Marereni Police Station the following morning and informed that he was a murder suspect. Police took him to his home where they searched but nothing was found. He was charged in court with one Emmanuel Ngono who was acquitted. He was also acquitted and released after investigations. Six months later he was re-arrested and charged with the offence of murder.

It is his evidence that he does not know Pw1. He was not at home on 14th November 2013 at 5.00 pm. He knows PW2 and PW3. They know his room where he lives. The house where he lives is a rental place with about ten (10) rooms. He had not disagreed with the deceased. He used to visit the deceased at their place but she never used to go to his house.

Mr. Shujaa, counsel for the accused submitted that no one saw the accused kill the deceased. The evidence of PW1 that he saw the deceased with the accused is suspicious. Counsel maintains that in his statement to the police, PW1 stated that he did not see the accused leave with the deceased. This was five days after the incident. Two years later, PW1 gave a different version. PW1 told the deceased mother that he had not seen the deceased. Counsel further submitted that where the accused lives, there are ten (10) rooms. Even if PW2 and PW3 heard the deceased's voice, that is not enough evidence that its the accused who inflicted the injuries on the deceased. The deceased's body was found on 15th November 2013. The charge sheet gives the date of death as 14th November 2013. Anyone could have been with the deceased between those dates. Counsel contends that another person was arrested for the same offence. No reason was given for his release. Accused had no ill against the deceased.

Miss Mathangani for the state reiterated that although the evidence is circumstantial, it did prove that charge. PW2 and PW3 heard the deceased screaming from the accused's room. PW2 and PW3 knew the deceased very well. They knew it was the deceased raising alarm. According to Miss Mathangani, the deceased wanted to continue with her education. The postmortem shows that he deceased did not commit suicide.

The prosecution evidence shows that none of the witnesses saw the accused kill the deceased. The evidence is circumstantial. It is the evidence of PW1 that he saw the accused taking the deceased to his house. Although counsel for the accused contends that PW1 did not give that information to the police, it is the evidence of PW1 that his testimony is what he told the police. I believe that it was PW1 who told the police that he had seen the accused with the deceased which made the police to make PW1 a witness. When PW5, the deceased's mother, went to ask whether PW1 had seen the deceased, it is clear from the evidence that PW1 was not aware that the deceased had passed on. That is why PW1 told her that he had not. This was on 15th November 2013. It is PW1's evidence that he had seen the deceased on 14th November 2013.

PW2 and PW3 testified that they heard the deceased screaming that she was dying alone. It was about 7.00 pm on 14th November 2013. These two witnesses cannot be held to be eye witnesses. They did not see the accused killing the deceased.

The law on circumstantial evidence is quite clear. It should irresistibly point to the accused's guilt. In the case of **R v Kipkering Arap Koske & Another, 16 [1949] EACA, 135** the court stated the following:

“In order to justify the interference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypotheses that that of his guilt.”

The main issue for this court's determination is whether the evidence on record is sufficient to convict the accused on the offence of murder as charged. The inculpatory facts as per the prosecution evidence is that the accused was seen by PW1 calling the deceased from their home by PW1: According to PW1, this was about 5:00 pm on 14th November 2013. It is PW1's evidence that the accused informed the deceased he wanted to show her his father. The other inculpatory evidence is that of PW2 and PW3. They knew the deceased as they were neighbours as well as attending the same school. They knew the accused's room amongst the rooms in the house occupied by the accused. It is the evidence of PW3 that he did not see any other person at house occupied by the accused.

It is the accused's sworn defence that on the material day he was not at home. He went to play music at a burial ceremony and slept there. He was not with the deceased. He got information that the deceased had died and went to their home as she was his prospective wife. It is the accused's evidence that he was charged in court and acquitted. It is clear that the accused was not charged with the offence of murder. I take notice of the fact that the offence occurred on 14th November 2014.

The test set in the Kikering case was broken down by Justice Githinji in the case of *Ali v Republic* [1990] KLR 154 as follows:

3. For a conviction based on circumstantial evidence to be deemed proper:-

(a) The inculpatory facts relied on as circumstantial evidence must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty.

(b) It is also necessary to be sure that there are no other co-existing circumstances which would weaken or destroy the interference of an accused person's guilty, delivered from circumstantial evidence.

It is the evidence of PW7, M C, the deceased's grandmother, that the deceased passed by at her place and greeted her. The deceased then went home. According to PW5, she went back home at 8.30 pm. She was told by her other children that the deceased was around and had cooked porridge for the baby. PW5 saw the porridge still on the jiko. PW2 and PW3 heard deceased screaming from the accused's home. This was around 7.00 pm. Its about one and a half hour difference from the time PW2 and PW3 heard the deceased screaming and when PW5 arrived home and found the deceased missing. The screams from the deceased were that she was dying alone. The deceased did not go back home that night. According to the accused, he was not at home that evening. PW`1 testified that he saw the accused with the deceased at about 5.00 pm. This is about two hours to 7.00 pm when PW2 and PW3 heard the deceased's voice coming from the house occupied by the deceased.

Given the evidence on record, I do find that the circumstances evidence points to the accused's guilty. The possibility that the deceased left the accused's home and was killed by other people is discounted by the fact that the deceased was sending distress calls while in the accused's house. I do find that the deceased was inside the accused's room and not in any other room amongst the rooms forming the house where the accused lived. PW2 and PW3 knew the accused's room. The accused in his defence confirmed that the two witnesses knew his room. The inculpatory facts irresistibly points to the accused's guilt. The

deceased's body was found not far away from their home. The postmortem report shows that the deceased's wrist was fractured. She was raped and her genitalia was inflamed. It can be concluded that the deceased was killed and her body transported to where it was found.

According to PW6, the deceased's father, the body was touching the ground. The postmortem rules out suicide.

It is evident from the evidence that the deceased had a relationship with the accused. The deceased opted to stop the friendship and pursue her studies. I am satisfied that PW1 saw the accused taking the deceased to his room. The accused lured the deceased on the pretext that he wanted to show her his father. PW2 and PW3's evidence is reliable. They had no reason to incriminate the accused. I do find that the circumstances leading to the deceased's death points to the accused's guilt. It is none other than the accused who killed the deceased. The accused was present on 14th November 2013 at his house. The defence evidence that he was at a burial ceremony is displaced by the prosecution evidence that he was seen with the deceased at 5.00 pm and the deceased was screaming from his room at about 7.00 pm. Her body was found hanging the following day at about 1:00 pm. Its the evidence of PW6 that ants had started invading the body.

In the end, I do find that the prosecution has proved its case beyond reasonable doubt that it is the accused who killed the deceased. The accused is found guilty of the offence of murder as charged and is convicted accordingly.

Dated and delivered in Malindi this **29th** day of **February**, 2016.

S.CHITEMBWE

JUDGE