



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 42 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH WAMBUA MWATHA.....ACCUSED

J U D G M E N T

1. **Joseph Wambua Mwatha**, hereinafter “the Accused” is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **8th day of July, 2013** at **Kathivo Sub-location, Kathivo Location** in **Kitui County** murdered **Joanina Nyambura Ndambu** (Deceased).

2. Facts of the case are that on the **8th July, 2013**, PW1 **Christine Kathini Wambua**, was at home with her grandchildren the Deceased, PW4 **Boniface Nduati** among others. At about **7.00 p.m.**, some three women sought refuge at her home. The Accused, her grandson also went home. PW1 served them supper. The Accused, however, did not take his supper. He went out to where other children, the Deceased inclusive were playing. He disappeared. The Deceased was found the next day, the **9th day of July, 2013**, having been defiled and murdered.

3. A post-mortem conducted revealed that the cause of death was cardio-pulmonary collapse due to strangulation.

4. When put on his defence the Accused denied having committed the offence in issue. He gave sworn evidence where he stated that he worked away from home. Ordinarily he would go home in December. In **July, 2013** he was required to go home as his sister who was married in **Makindu** was visiting their home to perform some customary rites. He went to receive visitors in his capacity as the eldest son, their parents having passed on. The ceremony ended well. On the day he was leaving home (the **5th day of July, 2013 at 2.30 p.m.**) his cousins, PW3 Boniface Nduati and his sibling the Deceased escorted him until the shopping centre and they parted ways. They returned home as they were preparing to leave the following day. He went back to his place of work and stayed until the **20th day of July, 2013** when he was arrested by officers who found him at home. He denied having owned a hat like the one that was produced in court as an exhibit.

5. At the close of the defence case submissions were filed that I have duly taken into consideration.

6. This being a case of Murder the Prosecution had a duty of proving beyond doubt that:

- Death occurred;
- It was caused by the Accused person;
- And he did it with malice aforethought.

7. Evidence of the death of the Deceased was adduced by PW8, **No. 64510 Corporal Livingstone Katui** who photographed the scene where the Deceased was found brutally murdered; PW6 **Dr. Patrick Mutuku** who conducted the autopsy ascertained the cause of death as having been cardiopulmonary collapse due to strangulation. The Deceased had also been defiled.

8. There was no direct evidence adduced as to who caused the death of the Deceased. This court must therefore consider circumstantial evidence. Principles to rely on in such case were stated by the Court of Appeal in **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** where it stated that:

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

i. The circumstances from which an 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 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.”

9. The unfolding events in this case happened at night. PW1 **Christine Kathini Wambua**, served food and gave the Deceased. She had hosted some three ladies at her home who were in the main house. The Accused entered the kitchen. There was tin lamp in the kitchen that enabled her to see him. She served him food which he did not eat. He went outside. She learnt from **Nduati** her grandson that the Accused had gone away with the Deceased.

10. PW4 **Boniface Nduati** the brother to the Deceased stated that on the material date the Accused went to PW1’s home and asked him the whereabouts of his father. He then asked him to call the Deceased who was inside the house. He complied and he left the two (2) standing outside. Approximately ten (10) minutes later PW1 asked him where the Deceased was and he gave her relevant information. They searched for her in vain.

11. Although the Accused denied having been at PW1’S home on the fateful night, evidence adduced by PW1, PW3 **Robert Nganga Mwatha** and PW4 was that he was present. PW1 recognized him as his grandson. She would not have been mistaken as to his identity, following their verbal communication. She also identified him visually. And so did PW3 his biological brother.

12. It was the evidence of PW1 that some three (3) ladies she knew nothing about (complete strangers) sought refuge at her house on the fateful night. Evidence of how they left PW1’s home was not adduced. PW1 sent the Deceased to take food to the ladies. When PW4 called her she was inside the house where the ladies were. He left her outside as he entered the main house. Ten (10) – thirty (30) minutes later she was missing when PW1 went looking for her.

13. PW4 did not see either the Deceased or the Accused leaving the homestead on the material night. It was assumed that they left together because the Accused had called her and the Accused was also nowhere to be seen.

14. According to the Scene of Crime Support Service Officer, PW6, he found “a cap trademarked Manchester United at the scene”. The machine knitted cap popularly known as marvin hat was not linked to the Accused. In her evidence PW1 stated that the Accused had a big hat but she could not describe how it looked like. She did not identify the marvin/beanie hat that was recovered at the scene.

15. The Accused was suspected to have committed the offence because he asked for the Deceased on the fateful night. PW4 said he called the Deceased out and entered the house leaving them outside. No evidence was adduced of how the Deceased left the homestead. According to the Prosecution, the Accused was the last person to be seen with the Deceased.

16. In the case of **Sawe vs. Republic (2003) KLR 364** the court held that:

“suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

17. And in the case of **Kariuki Karanja vs. Republic (1986) KLR** the court held:

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused The burden of proving facts justifying the drawing of the inference is on the prosecution.”

18. The Prosecution in this matter sought to prove that the Accused was last seen with the Deceased according to the testimony of PW4, therefore must have been the person who murdered her following an act of defilement.

19. There were however strangers at the home on the fateful night who seem to have been disregarded by the Investigating Officer. Questions that remain unanswered were: What came of the visitors? Where did they go to after the Deceased served them food? Did PW4 find them inside the house after calling out the Deceased?

20. The Accused had no duty of proving his innocence. As clearly stated in the **Kariuki Karanja** case, the Prosecution had a duty of filling up all loopholes in their case to remove any doubt that was established by questions that easily popped up. This was not done. Consequently circumstances that existed upon which an inference of guilt could be drawn on the part of the Accused as the person who strangled and defiled the Deceased thereby causing her death were not firmly established. Circumstances that existed could point at the Accused or even the three strangers who were at PW1’s home on the fateful night.

21. In the circumstances, there is no proof beyond doubt that the Accused caused the death of the Deceased. In the result, he is not guilty and is acquitted of the offence of murder. He will be released forthwith unless otherwise lawfully held.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 15th day of March, 2016.

L. N. MUTENDE

JUDGE