



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 24 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ELLY WAGA OMONDI.....ACCUSED

JUDGEMENT

Introduction

Elly Waga Omondi, hereinafter “the accused”, is 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 25th March, 2012 in House [particulars withheld] at Mbotela Teleposta Staff Quarters in Nairobi within Nairobi County he murdered E N M. The accused pleaded not guilty to the charge. The case proceeded to trial. Thirteen (13) witnesses have testified for the prosecution. The accused was the sole witness for the defence.

Background

The accused was arraigned in court for the first time on 29th March 2012. The plea was not taken on that day for reasons appearing on the record that the accused did not have legal representation. When the case came to court on 5th April 2012 the court record shows one Mr. Agwara appeared in court holding brief for Mr. Ojienda for the accused. The plea was taken by Hon. Lady Justice Mwilu (as she then was) and the accused pleaded guilty despite caution by the court. The court deferred presentation of facts until 12th April 2012. On 12th April 2012 the matter was placed before Hon. Mr. Justice Ochieng. The accused was represented by Mr. Ojienda and Mr. Onyango. Again the plea was taken and this time the accused pleaded not guilty. There is nothing on record to show why the plea had to be taken again or to address the earlier order of the plea of guilty. Be that as it may, the case did not take off for the reasons recorded on the court file until 26th November 2014 when hearing commenced before me.

Prosecution case

E N, the deceased, was younger sister to N B, PW1 (Nancy). They lived with their uncle R B, PW2, (B) in Mbotela Teleposta Flats in Nairobi in a two bed-roomed flat. The two sisters shared a bedroom. The second bedroom was occupied by their uncle B. At that time N was a student at [particulars withheld] in Nairobi.

On 24th March 2012 N left Mbotela to go to Ongata Rongai to visit a friend. She left her sister and uncle in Mbotela. She stayed overnight in Ongata Rongai. On 25th March 2012 about 5.00pm or 6.00pm N received a text message from the deceased’s phone telling her to send “Daddy to go to their house and

help the deceased because one Ken was attempting to break open the door to their house with intention of raping the deceased. "Daddy" is accused's nickname. N travelled to Mbotela and arrived at 8.00pm. She found the key at the window where they normally kept it. She opened the door. Inside she found everything neat and in order. Her sister was not at home. She went to sleep leaving the key at the usual place for her sister.

By morning of 26th March 2012 the deceased had not come home. N went to college expecting to find her sister home when she returned in the evening. She returned home about 3.00pm and found her sister not at home. N thought her sister may have come and gone to visit friends. N went to visit her aunt at Makongeni across the road from Mbotela and returned home at 9.00pm. She found her sister not at home. She found the clothes her sister had washed still on the drying lines. This is when it dawned on her that her sister had not come home at all. She became suspicious and decided to check under the bed using a flashlight on her mobile phone. She saw someone under the bed. She called the name of her sister but there was no response.

N knocked at their uncle's bedroom but there was no response. She went outside to call for help. She found the accused with his friends. She told the accused what she had seen and sent him to go to their house and check if the person under the bed was the deceased. The accused, a former boyfriend of N's, went upstairs alone and confirmed it was the deceased under the bed.

The death of the deceased was communicated to their father Z M (PW3) and her aunt J N (PW11) who went to the scene. The matter was also reported at Makongeni Police Station and was received by SGT Godfrey Hinga (PW10). SGT Hinga told the court that one Sammy Kipkorir, who was alone at the time, reported the death of the deceased to him on 26th March 2012. In company of other police officers SGT Hinga visited the scene. SGT Hinga and his colleagues were the first officers at the scene. His evidence is that they found the body of the deceased lying under the bed at the far corner of the house with blood oozing from her nose and bloodstained hair. He testified that he called scenes of crime to take photographs after which the police collected the body and took it to Chiromo Mortuary where it was preserved awaiting post mortem. The accused was arrested on 28th March 2012 and charged with this offence.

Defence case

The accused person testified under oath. He gave a lengthy statement in his defence in which he narrated the events of 25th, 26, 27th and 28th March 2012. He admitted visiting the deceased on 25th March 2012 at about 9.00am. He told the court that he was taking some photographs the deceased has asked to see. He told the court that he had known the deceased for three months prior to the circumstances of this case and that she was his girlfriend. He said he knocked at the deceased's house and the deceased opened the door for him and that both went to the balcony where the deceased viewed the photos after which he left. He said he went downstairs with the deceased and that the deceased entered House No. 4 where one Denis lived while he, accused, went outside.

He testified that on 26th March 2012 he was busy cooking food to take to Jogoo Road Secondary School from where an order for food had been placed; that he delivered the food and went to practice football and returned home to cook supper; that N met him that evening and asked him to go to N's house and confirm if the body she had seen under the bed was that of the deceased. The accused said that N did not accompany him to the house but went to House No. 4 to find out who Ken was; that he used N's phone to flash under the bed where he saw the body of someone whom he confirmed to be the deceased. He said he removed the mattress and the sheet covering the body and touched the deceased's neck to confirm whether she was alive. He said that he went and told N what he had found and that N started screaming attracting neighbours to the scene.

The accused further testified that in company of other neighbours he and N went to report the matter at Makongeni Police Station and that he escorted N to her aunt's home to inform her about the death of the deceased.

The accused told the court that he was arrested on 28th March 2012. He gave a detailed account of the torture he underwent in the hands of PW13 SGT Shegu and how he admitted committing this offence for fear of PW13. He said he was hit with an iron rod on the knee joints, punched on the stomach and threatened with a pistol. He said he admitted he committed the offence to save himself and pleaded guilty in court the first time because of the fear inflicted on him by PW13.

He told the court that PW13 took him to his (accused's) house and took photographs of a phone which the accused had no idea of; that he did not know who had placed the phone in his house and that he did not know how a SIM card got to the scene where it was found. He said that PW13 was forcing him to point at the items so that photographs could be taken. He denied killing the deceased and said she was his lover. He also denied knowledge of the clothes (pair of jeans (Ex. 10), T-shirt (Ex. 11) allegedly recovered from his house.

Submissions

At the close of the defence case, Mr. Onyango for the accused submitted that the accused pleaded guilty when he was arraigned in court for the first time in unexplained circumstances; that he changed the plea to not guilty after getting legal representation; that the prosecution has not provided evidence, direct or circumstantial, linking the accused with this offence. Counsel submitted that it is not explained why it took police three days to arrest the accused; that there is no report from the Government Chemist on the samples taken from him and the deceased to determine if sexual activity took place; that Denis who is said to be the one who tipped PW13 was also arrested as a suspect and released in unexplained circumstances; that the investigations were poorly conducted; that the scene was not secured and may have been tampered with before police arrived; that the evidence from Safaricom did not establish that the accused was at the scene of crime and that the piece of wood suspected to be the murder weapon was not subjected to forensic examination. Mr. Onyango asked this court to acquit the accused person because the prosecution has failed to prove the case against him beyond reasonable doubt.

On the other hand, Ms Onunga for the prosecution submitted that the prosecution has proved the case against the accused beyond reasonable doubt. She submitted that the accused knew where Nancy and the deceased kept the key to their house; that it has been confirmed that he is the one who sent the text message to N using the deceased's phone; that the deceased's phone was found in his house and therefore the burden shifts to him to explain how he came by the deceased's phone; and that he entered the deceased's house alone and could have concealed evidence. Counsel asked the court to convict the accused for the murder of E N.

Determination

The offence of murder is defined under 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.

The State, through the Office of the Public Prosecutor (ODPP) is mandated to prosecute criminal cases. The onus of proving a criminal case therefore rests with that office. The threshold to be met is proof beyond reasonable doubt. This burden of proof in a criminal case never shifts to the accused person. The prosecutor must prove that:

- i. Death of a person has occurred.
- ii. The death was caused by an unlawful act or omission.
- iii. The unlawful act or omission was by the accused person being tried for murder.
- iv. In causing that death the accused person possessed malice aforethought.

The law under section 206 of the Penal Code defines malice aforethought to include an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not and knowledge that the act or omission causing the death will probably cause the death or grievous harm

to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

The case for the prosecution is based on circumstantial evidence for the obvious reason that there is no direct evidence linking the accused before me to the death of the deceased. This court must therefore turn to the circumstances surrounding the death of the deceased to get the answers it is seeking to determine whether the prosecution has met the threshold of proof beyond reasonable doubt.

On the issue death of the deceased, it is my finding that this has been proved beyond reasonable doubt. Available evidence shows that the deceased was found dead under the bed in the room she shared with N. Dr. Oduor Johansen (PW9) examined the body of the deceased on 27th March 2012 and confirmed that the deceased had died due to head injury due to blunt trauma. The doctor noted a laceration on the left side of the head, haematoma on the scalp and extensive acute bleeding on the brain. He also noted whitish secretion on the vagina and vulva evidence of sexual activity. The doctor collected samples from the vagina, deceased clothes and nail clippings for further analysis. In view of this evidence by the doctor I find as a fact that death of the deceased has been proved beyond reasonable doubt.

I now turn to the twin issues: the identity of the person who killed the deceased and whether the death was pre-meditated. I will start with elimination of witnesses whose evidence has little value, or none at all, to prosecution case. Z M (PW3) learned of the death of his daughter around 9.30pm on 26th March 2012 and went to the scene. He saw the body of the deceased under the bed. He said he became very emotional and started crying. He also said police took photographs after which the body was removed and taken to the mortuary. He did not know the suspect.

Dr. Zephania Kamau (PW6) examined the accused on 2nd April 2012 and found him mentally fit to stand trial. The doctor confirmed that the accused did not have physical injuries on his body. CIP Robert Kyaa (PW7 and PW2 in trial within trial) took a statement under enquiry from the accused person on 25th March 2012. The statement was not admitted in evidence after a trial within a trial was conducted. Josphat Kipkosgei Magut (PW8) lived in House No. 4 at Mbotela Telephosta with one Denis, among others. He learned of deceased's death on 26th March 2012 at around 9.00pm. He is also one of the young men from deceased's neighbourhood who were arrested by the police in respect of this case but were later released. There is also J N (PW11) the deceased's and N's aunt. She knew the accused as N's boyfriend. She too learned of deceased's death on 26th March 2012 around 10.00pm through N and the accused who went to inform her. J told the court that on a Thursday before her niece died, the accused had sent her to tell the deceased to stop leaving the key at the window because anyone could access it. Perhaps this evidence was given to show that the accused knew where the key was kept.

There is R B (PW2). He heard the deceased talk to a man and saw the accused and the deceased going downstairs. The evidence of B may seem to refer to one man but read keenly both in chief and during cross examination, it becomes clear that he was referring to two men. At first, the deceased was talking to Ken a neighbour around 9.00am as the deceased washed clothes at the balcony. Shortly after B heard someone knocking at their door and heard the deceased opening the door to allow the person into the house. B said he spied on the deceased and the man as they left the house and confirmed it was the accused with her. He saw the deceased enter house No. 4 and the accused walk downstairs alone. He put the time at 12.00noon. The defence does not deny that the accused visited the deceased on that day 25th March 2012. The accused admitted this happened and explained that he had taken some photos of his that the deceased wanted to view. After seeing the two go down, B continued with his chores. He is said to have called out at his niece' room in the evening of 25th March 2012 after he saw their door ajar. N who was inside the room told B to go to bed and that she would talk to him in the morning. He learned of the deceased's death on 26th March 2012 around 9.00pm when he returned home and found neighbours gathered at their residence.

Kennedy Kiprop Tarus (PW4) lived in house No. 11 which was next to deceased's house. This court was told that House No. 10 could not directly be accessed from House No. 11 but people could talk across the

two houses. Evidence is not clear whether this is how PW4 was talking to the deceased since B did not mention hearing PW4 enter their house. Kennedy had given the deceased his phone because the deceased had lost hers. Kennedy said he gave his phone to the deceased about 1½ months before this incident. I noted that N and B referred to Kennedy as 'Ken' but Kennedy said he is not known by that name but as Kennedy. He said that after this case, he heard for the first time, witnesses referring to him as 'Ken.' Could this be the 'Ken' referred to in the text said to have been sent by the deceased to N? Kennedy identified the telephone, Ex. 9, allegedly recovered at the accused's house as the telephone he had given to the deceased. He denied having talked to the deceased on 25th March 2012 but admitted having been arrested with PW8 Josphat Kipkosgei and Denis in respect of this case.

The evidence of Godfrey Hinga that one Sammy Kipkorir reported the death of the deceased to him at Makongeni Police Station on 26th March 2012 cannot be doubted. He told the court that no other person came to report the matter to him. According to the accused person, he took N to her aunt's place and left the neighbours to report the matter to the police.

N herself was not present when her sister met her death. I find her evidence a little strange. N came home after receiving a text message from her sister's telephone number telling her to send the accused to their house to help her because one 'Ken' had attempted to break open the door with the intention of raping her. N found everything in order and the bedroom neat. In her own words she had expected to find a house in disarray because she thought there must have been some commotion with the said 'Ken' attempting the break open the door. She found their key in its usual place at the window. She entered the house and spent the night without any clue that there was a body under the bed, if indeed that body was under the bed all this time! She was asked in cross examination specifically whether she detected any smell in the house and she said she did not.

This court was not told how big the room N shared with the deceased was or how big the bed was. By the time the body was removed from the house, 24 hours must have elapsed. Evidence shows that deceased went missing on 25th March in the evening and her body was not found until the evening of 26th March 2012. N could not confirm whether the body of the deceased had been in their room all this time or whether it had been taken there later.

N brought in evidence to show that the accused had at one time attacked her from behind. Further cross examination on this issue revealed that N was not sure who the person who had allegedly attacked her was. She told the court that the accused killed her sister then went on to state that the accused was arrested by the police and she did not know why he was arrested and cannot say why he was charged with this offence.

Although Godfrey Hinga told the court that scenes of crime went to take photographs of the scene before the body of the deceased was removed, which would have been on 26th March 2012, no such photographs were exhibited in court. The photos that formed part of the evidence are the ones taken on 28th March 2012 by CPL Livingstone Lihanda (PW5). This witness took 28 photographs Ex. 2(a) to 2(z), 2(aa) and 2(ab) which includes photographs from the house of the deceased and that of the accused. By the time he took these photographs, the body had been removed from the scene.

Exhibit 9 (phone) is said to have been recovered from the kitchen in accused's house where it had been hidden in a box. Photograph Exhibit 2(e) shows SGT Shegu (PW13) pointing at the alleged box where Ex. 9 was found. Photograph Exhibit 2(f) shows the same officer opening the same box. Photograph Exhibit 2(h) and 2(i) show the phone (Exhibit. (9) after it had been removed from the box. Exhibit 2(k) and 2(l) show the accused in handcuffs bending to point at a spot where it was alleged that a broken SIM card for Exhibit 9 was found. Photographs Exhibit 2(q) and 2(r) show where a piece of wood, alleged the murder weapon, was recovered with accused in Exhibit 2(q) pointing at the spot. There are no other people in those photographs and one wonders where the curious members of public were at the time the photographs were taken. Had they been cleared off? From the evidence of CPL Lihanda there were no other police officers other SGT Shegu and himself unless he forgot to tell the court this bit of information. CPL Lihanda told the court that he could not tell whether the door to accused's house was locked or not

and if locked who opened the door.

I have carefully read the evidence of SGT Shegu including his evidence during trial within trial. At one time he told the court that he took the accused's phone and deceased's phone and confirmed both were at the same place during the time of deceased's death. I also find contradictions in his evidence in regard to the person who tipped him off about the accused. During trial within trial, SGT Shegu said it was Kennedy Kiprop who informed him. Indeed every time SGT Shegu took the witness stand, whether during trial within trial or during his evidence in the main trial, the prosecution had to request the court to be cleared so that the officer could be free to name his informers. During the main trial, at cross-examination stage he named Denis Rotich and Kennedy Kiprop Tarus as his informers. He insisted both testified for the prosecution. Record shows Kennedy testifying as PW4 but Denis did not testify. It is strange that Kennedy did not say anything about who could have killed the deceased during his testimony! SGT Shegu told the court that Denis, whom he referred to as PW3, told him that the accused was seen entering deceased's house. I said elsewhere in this judgement that the fact that the accused went to the deceased's house is not denied. The accused admitted going to see deceased and walk out with her. I find no other evidence to show accused went back into this house other than when sent by N to check if the body under the bed was that of the deceased.

In my view, PW13 gave evidence to show that the accused led them to his house where Exhibit 9 was recovered, led them to deceased's house where a piece of wood allegedly the murder weapon was recovered and led them to the recovery of a broken SIM card. Further, that the accused sent a text message to Nancy purporting it to have been sent by the deceased. PW13 relied on informers Kennedy and Denis to implicate the accused. The evidence of PW13 has caused me some anxiety. It disturbs me that Kennedy who was a witness did not implicate the accused. Denis did not testify at all and one wonders why PW13 kept on calling them his informers! Secondly, Exhibit 9 is alleged to have been recovered from accused's house and the SIM card at another location. This worries me because there is no other evidence to corroborate that of PW13. This witness was the arresting officer and the investigating officer. While this may not be a problem, in my considered view, PW13 was in a hurry to prove the accused was involved in the murder of the deceased. During trial within trial he told the court that he had to have the accused's statement recorded as soon as possible because he did not know this could wait.

Thirdly, the SIM card was said to be broken and of no use because no information could be retrieved from it. Fourthly, PW13 contradicted SPL Lihanda. PW13 said the plank or piece of wood suspected to have been used to hit the deceased was found under the bed in the other room not where the body was found. Evidence shows that the only other bedroom in that house was the room occupied by B. Is this where the piece of wood was found according to PW13? Contrary to this evidence, CPL Lihanda said the piece of wood was found under a seat in the deceased's house. Indeed the accused is seen in one of the photographs bending and pointing at the piece of wood at the room with seats one on which PW13 was sitting! It cannot therefore be true that the piece of wood was found under the bed. Fifthly, the box allegedly containing the phone, the piece of wood or the SIM card were not subjected to forensic examination to either lift fingerprints or determine presence of any evidence that could have linked the accused to this crime. Besides, PW13 handled these exhibits with bare hands!

Turning on to the evidence of SGT Saumu (PW12) her evidence confirms that N was the registered Mpesa owner of telephone number [particulars withheld] and that on 25th March 2012 there was a text message from this number to number [particulars withheld] at 7.09pm. She said she did not know the registered owner of [particulars withheld] and could not tell the location of these two telephone handsets at the time the text was sent because she had not carried with her the charts where the location details are recorded.

Does the prosecution evidence satisfy the requirements of circumstantial evidence? For the prosecution to prove this case beyond reasonable doubt using circumstantial evidence the circumstantial evidence sought to be relied on must point irresistibly to the accused person to the exclusion of any other person. There must be no co-existing factor or circumstances which may weaken or destroy the inference of the guilt of the accused person. See **R. v. Kipkering Arap Koske (1949) 16 EACA 135**; and **Neema Mwandoro Ndurya v. R [2008] eKLR**).

I have given this case much thought in view of the evidence presented before me and I have reasoned in this judgement to justify the decision I am going to arrive at in my conclusion of this case. I hold the view that the prosecution evidence does not pass the legal test for circumstantial evidence. There is no water tight evidence that the deceased was killed in the room she shared with N. The investigations did not establish whether she was killed in this room or elsewhere and the body transferred. Investigations in that room where the body of the deceased was found were not thorough. By the time PW13 arrived at the scene the same had been tampered with and the police did not seem to have secured it. There were many neighbours in the vicinity yet not much seems to have been done to secure their evidence. PW13 did not wear gloves when handling exhibits he allegedly recovered from the accused and no fingerprints impressions were lifted from them to determine who may have handled them. The officer himself handled the exhibits carelessly. He also contradicted himself on material evidence on the recovery of the alleged murder weapon. Evidence further shows that the vaginal swab and nail clippings taken from the deceased by Dr. Oduor Johansen were not examined or if they were, there is no evidence about them and the mobile phone data was not helpful as it did not show who, if any, sent the alleged message asking N to send the accused to help the deceased. It was not established who 'Ken' was given that PW4 denied that the name refers to him and finally anyone could have attacked the deceased.

Conclusion

While this court empathizes with the family of the deceased, the law must be followed. This court must have evidence that implicates the accused with this offence with exactitude. The threshold – beyond reasonable doubt – has not been met. The law dictates that where there are doubts in a case then the accused person benefits from the doubts created by evidence. This court, as an administrator of justice, has no alternative but to give that benefit to the accused person.

While I find the act causing the unlawful death of the deceased has been proved beyond reasonable doubt, I do not have evidence proving that the accused person, to the exclusion of any other person is the one who caused that death. There is no evidence to prove motive to cause the death of the deceased on the part of the accused person and there is also no evidence to prove that the death of the deceased was pre-meditated by the accused. I therefore find Elly Waga Omondi not guilty of the murder of E N M. He has been in custody since 29th March 2012, which is one month over four years to this day. I find no reason to hold him in custody any further and I hereby order his immediate release from custody unless for any other lawful reason is so held. Orders shall issue accordingly.

Dated, signed and delivered this 28th day of April 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Esther Macharia, prosecution counsel

Mr. Robert Onyango, defence counsel

Mr. Elly Waga Omondi, the accused

Mr. Daniel Ngumbi, court clerk