



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CRIMINAL/MURDER CASE NUMBER 5 OF 2016
(Formerly Kitale HCCR.C NO. 5 OF 2011)

REPUBLIC.....PROSECUTION

VERSUS

LOTUW KEDISHIA LOSHAKAMAR.....ACCUSED

RULING

LOTUW KEDISHIA LOSHAKAMAR is charged 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 on the 19th day of January, 2011 at Kadungdung village, within West Pokot County, the accused murdered Bwatat Akadongor.

The prosecution called three witnesses before they closed their case. The evidence adduced by them reveals that the deceased one Bwatat Akadongor was married to PW-2 and were living at Marich. The accused is their neighbor. According to PW-1, it was suspected in the area that the accused had an illicit love affair with PW-2. PW-2 in her evidence-in-chief stated that on 18th January, 2011 she was asleep with the deceased in their house when the accused arrived there and sexually assaulted her. She was fought and raped. The deceased intervened. The accused later denied the incident. The accused later assaulted the deceased using a heavy wood and a wooden stick with a metal end. She screamed and neighbours went to rescue her husband. The accused chased her away from the scene.

PW-2 was asleep on 19.1.2013 when he was woken up by screams emanating from the deceased's house. He went there and saw the accused running away. That same day in the morning hours PW-1 was called by neighbours and told about the incident. He proceeded to the scene. He found the accused there. The accused on seeing him tried to flee. PW-1 who's a Kenya Police Reservist ordered him to stop. He was then (PW-1) armed with a gun. He arrested the accused and took him to Sigor Police Station. At the scene, the deceased's body was on the ground covered with a bed sheet. PW-2 handed him a stick and wood as the weapons used.

The prosecution did not call the doctor and the investigating officer before they closed their case.

In determining whether the accused person has a case to answer, I have considered that the charge sheet gives the date of the offence as 19th January, 2011. It does not however give the time. The three prosecution witnesses do not also state the time of the offence. The evidence of PW-1 indicates he was called in the morning hours after the incident, which suggests it may have happened early morning hours, at night. The evidence of PW-3 buttresses that point as he stated he was asleep when he was awakened

by screams. Most people normally sleep at night which suggests it could have been at night. I don't know why the state prosecutor decided to leave this crucial point to suspicion or guess work, instead of ascertaining it with his witnesses. Given that there is no evidence which positively suggest the incident happened during the day, and the available evidence suggesting the contrary, one can only logically conclude it was at night.

None of the three witnesses indicated how they were able to see and recognize the accused person at night. We were not told of the source of light that was in place. Their evidence is that they saw, and they had an obligation to disclose how they were able to see at night. This factual lacuna in evidence is the Achilles' heel in the prosecution case.

The doctor who performed the postmortem on the deceased did not adduce evidence. The cause of death to the deceased was not therefore established. This is also a vital gap in the prosecution case.

The foregoing indicated shortcoming in the prosecution's case renders it short of establishing a prima facie case against the accused person. He is accordingly acquitted of the offence under Section 210 of the CPC.

S. M. GITHINJI

JUDGE

28.6.2016

Judgment read and signed in the open court in presence of Mr. Bororio for the accused and Mr. Mark for the State, this 28th day of June, 2016.

S. M. GITHINJI

JUDGE

28.6.2016