



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 41 OF 2015

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

MWENDO MWANZIA.....ACCUSED

RULING

1. The accused person **MWENDO MWANZIA** was charged with one count of Murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were:

“On the 25th day of March, 2015 at Majengo slums in Kamukunji District within Nairobi County murdered GRACE WANGECHI NDUTA.”

2. The prosecution called a total of 5 witnesses. The prosecution case was that the mother of the deceased, PW1, found the deceased lying dead on her bed in her house where she lived alone. After investigations were carried out it was found that the deceased had been in the company of PW2, her employer on the evening of 25th March 2015. This was at the liquor selling den belonging to PW2.

3. PW2 testified that the deceased had bought some liquor for the accused on the evening before she was found dead. The accused drunk the liquor before leaving the den alone. PW2 then left the liquor den together with the deceased but along the way the deceased branched off and entered Maji Matamu liquor premises alone.

4. PW4 was a neighbour of the deceased in Majengo where they lived. Her testimony was to the effect that on the night of 25th March 2015, at about 3 a.m. she heard the deceased scream once. PW4 did nothing and as she explained in cross-examination, it was normal for deceased to scream at night. PW4 testified that the deceased screamed often and would wake up the whole plot owners. On checking on her, nothing was ever found in her house.

5. The initial report that PW1 made to the police, including PW5 was that the deceased had been raped and murdered in her house. Analysis carried out on vaginal swabs taken from the deceased proved negative for any evidence of sexual assault. It was P.exh.2.

6. The cause of the deceased death was asphyxia due to manual strangulation. The Report was P.Exh.3.

7. The prosecution had the burden to adduce evidence to prove that the accused person strangled the deceased causing her death, as the post mortem results proved.

8. The prosecution seemed to rely on circumstantial evidence that accused had been with the deceased on the night she was murdered. Such evidence needed to establish beyond any reasonable doubt that the accused was the last person to have been seen with or in the company of the deceased when she was still alive.

9. If such evidence were adduced then under **sections 111(1) and 119** of the **Evidence Act**, the accused would have a statutory burden to explain the circumstances under which either the deceased met her death, or they parted.

10. The law under the **Evidence Act** places a rebuttable presumption upon an accused which requires him to make a reasonable explanation of how a deceased died or how they parted ways if he was the one with whom the deceased person was last seen when alive. If not rebutted, such explanation forms a basis to either corroborate the prosecution evidence or form a basis of conviction. Sections 111(1) and 119 of the Evidence Act provides as follows:

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

11. In this case, there was no evidence adduced to show that the deceased had last been seen alive with the accused. PW2 who was the last person to have seen the deceased alive said that the deceased had been walking home with her after work but that she branched off and entered another bar where she left her.

12. There was no evidence adduced that would bring the facts of the case within the purview of the **Evidence Act, section 111(1) and section 119** of the **Act**. Neither can the rebuttable presumption be invoked in the circumstances of this case.

13. The only other evidence which may have been important to point at the accused guilt was the results of the Government Analysis of swabs taken from the deceased. The fluids from the deceased body were analysed and they brought the result that they were from a woman. They were definitely not those of the accused whose blood was compared with the said results and found to be negative.

14. There was other evidence which was by PW1, the mother of the deceased. Her testimony was that after the incident and during the morning period before deceased was buried she received a visitor in her house. That was on the 31st March 2015, six days after deceased death.

15. PW1 testified that the visitor identified as the accused entered her house and asked her why she was suspecting him of causing her daughter's death. PW1 then asked others who had also visited her to take

the accused out of her house. She went out later to find the accused being subjected to mob justice.

16. PW1 testified that the accused then told her, “**mathe sikua peke yangu**” that is interpreted to mean “Mother I was not alone”. That is how the accused was taken to Shauri Moyo police station and eventually charged for this offence.

17. The issue is whether the statement attributed to the accused was a confession and whether it carries any evidential weight?

18. The statement PW1 heard accused make was “mathe sikua peke yangu”. Translated it means “mother, I was not alone.” Loosely interpreted a confession is an admission to an offence. The words the accused allegedly spoke do not admit anything standing on their own. There was no reference to an offence or an accusation to having committed an offence in those words. There is no evidence adduced as to the question, if any which was put to the accused to which he answered by those words. The said words do not in the circumstances amount to a confession. It is impossible for the court to understand what the accused meant. In other words, there is nothing in those words which is an admission to causing the deceased death.

19. Furthermore the circumstance under which the statement was made was clearly spelt out in PW1’s evidence. The accused was being subjected to mob justice. He was therefore not only under duress but his very life was threatened and in danger. A statement made under such circumstances is of no probative value even if it was admitted in evidence.

20. There was nothing to stop the police from obtaining a statement from the accused in the course of investigations to ascertain whether he was admitting the offence or was confessing to being a party or the one who caused the deceased death.

21. Having considered the evidence adduced in this case, I find that the prosecution adduced evidence was little probative value and therefore failed to adduce any evidence which can justify placing the accused to his defence. I find that no prima facie evidence has been established against the accused.

22. Accordingly, I give the accused the benefit of doubt acquit him at this stage of the charge of murder contrary to **section 203 of Penal Code** under **section 306** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 16TH DAY OF JUNE, 2016.

LESITT, J

JUDGE.