



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 16 OF 2011

REPUBLIC PROSECUTOR

V E R S U S

JULIUS MURIUNGI KIMATHI (alias Kuguru)1ST ACCUSED

GEDION KINYUA 2ND ACCUSED

JUDGMENT

Julius Muriungi Kimathi alias Kuguru (accused 1) and **Gedion Kinyua** were charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on 31/12/2010 at Kaubau Village, Ukuu Sub-Location, Uruku Location, murdered **Jane Kiruki**. The prosecution called a total of 6 witnesses to support their case whereas the Accused testified on oath but did not call any other witness. The prosecution was partially led by Mr. Mungai and Mr. Mulochi, Learned Counsel for the State while the accused was represented by Mr. Kiogora Advocate. Gedion Kinyua (accused 2) was acquitted under **Section 306 CPC** when the court found that he had no case to answer.

Edward Mwiti Joseph (PW1), a business man at Ukuu Market recalled that on 30/12/2010 about 6.00 p.m., he was at Ukuu Market when he saw a lady who was drunk and making noise. According to PW1, she was a visitor in the market. At night, she was still within the market, making noise like that of a drunkard. About 9.00 p.m., he saw accused near the lady. At night he heard screams and went out with a torch and saw accused 1 standing near the lady. When he flashed a torch at them, accused 1 abused him and he went back to sleep. Next day he heard that a body had been found in a nearby tea plantation and he went to see only to find that it was the body of the lady that he had seen with accused 1. He told the Chief that he had seen accused 1 with the lady.

PW2 Peter Mwenda, testified that he was at work on 31/12/2010 when he was informed that the body of a lady had been found in a tea plantation and he went to see the body. He knew nothing about the death of the lady.

PW3 Faith Ntinyari Morris resides at Ukuu Market where she works at Friends Pub, closed the pub at 10.30 p.m. and on the way to her rented house, she met a lady who was with Kuguru (accused 1). After a while, she heard the lady screaming, and came out to see what was happening; that her neighbour Mwiti (PW1) also came out of his house; that accused 1 abused PW1 and they both returned to their houses. Next day, she learnt that the lady had been found murdered and she informed the Chief what she had seen.

The post mortem was performed on deceased's body by **Dr. Kahovi** of Meru Hospital and the post mortem report (PEX No.1) was produced in court by **Dr. Bett**. The Doctor found strangulation marks around the circumference of the deceased's body as well as trousers on her external genitalia. Internally, he found the trachea to have been compressed and distorted and formed the opinion that the cause of death was cardio pulmonary arrest due to respiratory failure due to airway obstruction as a result of strangulation of the trachea.

PW6, Chief Inspector Francis Wafula testified on behalf of the **late IP Makori** who was the Investigations Officer in this case.

In his sworn defence, accused told the court that as of 30/12/2010, he was living at Ukuu Market where he worked. On 30/12/2010 he was at work from morning. Sombdody bought stone from him and remained with a balance. He went to collect the balance from Nkubu which he did. After payment he entered a bar, ordered for meat, and started to drink alcohol till 8.00 p.m. when he got a taxi to take him home at Umuku. On arrival at Ukuu, he did not talk to anybody but heard people talking and singing. He was arrested in March, 2011 because he had abused each other with Mwiti (PW1) and was also informed that he killed a lady but he denied having committed the offence; that Mwiti had threatened him.

In his closing submissions, Mr. Kiogora, accused's Counsel submitted that PW1 and 4 gave contradictory evidence; that there was bad blood between pw1 and accused and that there were no exhibits produced.

In reply, Mr. Mulochi submitted that the prosecution has proved its case beyond reasonable doubt because accused1 was known to PW1; PW1 and 3 saw accused 1 with deceased before she was found murdered. Counsel relied on the decision of ***John Macharia Gachanja v Rep CRC 289/06*** where the court held that where a person is the last to be seen with a person who is later found dead, he has to explain because he had special knowledge as to what happened to the deceased.

Nobody witnessed, saw how or who murdered the deceased. The evidence linking the accused to the offence is circumstantial. It is therefore my duty to closely examine the evidence on record to ascertain whether it satisfies the principles upon which the court may convict based on circumstantial evidence. The requirements are as set out in the case of ***Rep v Kipkering Arap Koske & Another 16 EACA 135***:

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

In ***Musoke v Rep (1958) EA 215***, the court added another principle:

“It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

The accused1 was known to both PW1 and PW3. In fact, PW3 knew and referred to accused 1 by his nickname 'Kuguru'. Although PW1 did not say that he saw PW3 on the fateful night, PW3 said that she is a neighbor to PW1 and saw him come out of his house and flash a torch at accused and the lady who was screaming. Both of them testified to have seen accused 1 with a lady outside a bar near their residence and later heard the lady scream, went out to see what was happening. Both were in agreement that PW1 flashed a torch at accused 1 and at the lady as a result of which accused 1 abused PW1. Their evidence was consistent. PW1 had seen both accused and the lady together before dark and then later in the night after he heard the lady scream. Accused1 and the lady were still together.

In his defence, accused alleged that PW4 had earlier threatened him. He did not explain why PW1 threatened him and when that happened. I have no reason to doubt PW1 and 3's evidence that they saw accused 1 on the night before deceased was found murdered. Accused steered clear of the allegation that he was the last to be seen with the deceased. The law is that the burden always lies on the prosecution to prove its case beyond any doubt. In such a case however, where the accused the last to be seen with the

deceased who was later found dead with serious injuries, the rebuttable presumption is that the accused is the only one who could have known what happened to the deceased. The presumption arises under **Section 111 (1) of the Evidence Act** States:

“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.

2. Nothing in this section shall –

a) Prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

b) Impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or

c) Affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

In this case, the accused having been the last person to be seen with the deceased before her death, is the only one who had special knowledge of what may have happened to her and he should have given to this court a plausible explanation as to what happened. It does not mean that the burden of proof has shifted to him. He did not discharge that burden and steered clear of the said allegation.

The accused raised an alibi that he was at work till 11.00 a.m., then went to Nkubu the rest of the day and came back to Ukuu at 8.00 p.m. Even when an accused raises an alibi defence that he was not present at the scene of crime but elsewhere, the burden still remains on the prosecution to prove its case. The alibi defence need only cast a doubt on the prosecution case. See *Uganda v Sebyala & Others [1969] EA 204*, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

After considering the prosecution evidence on record, I find that the alibi has not dislodged the prosecution evidence in any way. I have found earlier that accused had a duty to explain what happened to the deceased having been the last person with her which he did not do.

In a charge of murder, the prosecution has the duty to prove beyond any doubt the following ingredients:

1. the death of the deceased;

2. that the accused caused the death through unlawful act or omission;

3. that accused had malice aforethought.

In this case, PW1-4 did see the deceased's body after it was found in the tea plantation. The post mortem confirmed the death. I have found above that accused has failed to explain what happened to the deceased after he was last seen with her as she screamed. Having failed to give a plausible explanation, the presumption arises that he is the perpetrator of the offence.

After a careful consideration of all the evidence on record in its totality, the accused failed to explain what he did with deceased after he was seen with her the night before. I am satisfied that the prosecution has proved beyond any doubt that the accused is the only person who was involved in the injury and eventual death of the deceased. The circumstantial evidence does point at none else but the accused as the person who murdered the deceased through strangulation. Strangulation is a deliberate act which points to malice aforethought. I find that all the above three requirements are proved. I find accused guilty as charged and convict him under **Section 322 (1) of the CPC.**

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JULY, 2016.

R.P.V. WENDOH

JUDGE

26/7/2016

PRESENT

Mr. Mulochi for State

Mr. Kiogora for Accused

Ibrahim, Court Assistant

Present, Accused