



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCR NO. 19 OF 2015
(FORMERLY MERU HCCR NO. 60 OF 2013)

REPUBLIC.....PROSECUTOR

VERSUS

ENDELINA GATIRIA MAUKI.....ACCUSED

RULING

1. On the Sunday of 9th June, 2013 at about 6 p.m, the body of Robert Njeru Thunguthi alias Kavutu (hereinafter "*the deceased*") was found floating on River Thanantu. Pursuant thereto, on 19th June, 2013, the state lodged information in the High Court against Endelina Gatiria Mauki (hereinafter "*the Accused*") alleging that, on the night of 8th and 9th June, 2013 at Kanungu village in Gatue location of Tharaka Nithi County, jointly with others not before court, she murdered the deceased. The accused disputed the information and the state lined up nine (9) witnesses to prove the said allegations against her.

2. Dickson Nyaga Njeru (PW1), a son of the deceased, told the court that it was usual for the deceased to be drunk and come home late singing. That on 8th June, 2013 at about 11.00 pm, he heard the deceased singing from his compound going towards the homestead of PW1's grandmother where PW1 used to live. The following day at about 3 pm, the accused requested PW1 to start the generator for her to pump water for irrigation which he did. At about 6 pm, PW1 went to fetch water from River Thanantu and was shocked to see a body of a male adult which later turned to be that of his father, the deceased. In cross-examination, PW1 confirmed that it was possible for him to have heard any quarrel from the deceased's homestead if there was any that night but there was none. He saw the body of the deceased which had serious head injuries. PW2 was Samuel Mutegi Rwanda. He told the court how he took traditional liquor with the deceased at their sister's place upto 9.30 p.m. on the night of 8th June, 2013 when he left. That while drinking, the deceased had complained about the accused and had intimated that he would either burn his house or divorce the accused if he found her at home.

3. PW3 Naomi Mwendwa Rwanda testified how on she held a merry go round party at her home at Karethani, Gatunga on 8th June, 2013. That many people, including the deceased, attended the party. That while at that function the deceased complained about his wife and had threatened that he would divorce her. That the deceased left her home drunk at about 9.30p.m. PW4 was Esther Kagendi Njagi, a neighbour to the deceased and the accused. On 7th June, 2013, she heard the two quarrel about Kshs.200/- On 8th June, 2013 at about about 11.30 p.m, she heard the deceased shouting from his compound asking the accused to pick up her children and leave. However, he all over sudden fell silent. Then she heard voices of two (2) men from the deceased's compound as her dog furiously barked throughout the night. In cross-examination, PW4 stated that she heard the male voices from the deceased compound of the deceased after he had stopped shouting. On 9th June, 2013, she heard that the body of

the deceased had been found in river Thanantu. PW5 was Lucy Kaburi David, a neighbour to the accused and the deceased. She told the court that on the night of 8th June, 2013 at about 11 pm, she heard the deceased shout from the road that if she found the accused and her children at home, he will burn them. That on the following day, she assisted the accused with pipes for irrigation. In cross-examination, she stated that on 9th June, 2013 then accused had told her that the deceased had come and left at night. That was the reason she needed the witness to help her in starting the generator.

4. PW6 David Muchiemi Thungutha, a brother to the deceased, told the court how PW1 came to his home on 9th June, 2013 at about 6.30 pm and told him and his wife that he had seen a body floating on river Thanantu. That when he went to the scene, he was unable to identify the body. That when the accused was called, she was able to identify the body as that of her husband. When the body was removed from the water, it had five (5) panga cuts, two (2) on the neck, two (2) on the left cheek and one (1) above the left ear. The body was naked save for a shirt clinging on both hands. PW7, Julius Nthiga Thungutha attended Meru General Mortuary hospital on 13th June, 2013 and identified the body for post mortem.

5. PW8 Dr Brian Kiprop Beth produced the post mortem report dated 12th June, 2013 as PExh 1. On examining the body, it had multiple deep cuts on the right side of the face and a wound on the left side of the cheek. The trachea had also been severed and the skull fractured. The cause of death was opined to have been massive haemorrhage due to multiple cuts. PW9 Chief Inspector Charles Maruki was the investigations officer. He received information of the murder of the deceased on 9th June, 2013. He visited the scene on 10th June, 2013 and found that the accused had irrigated the farm which he thought was meant to destroy evidence. He took various statements from witnesses. On 18th June, 2013, the accused came to the station accompanied by her brother in law David Thungutha and offered to change her statement which amounted to a confession. He asked Chief Inspector Mwangi to record the confession. After the confession, he accompanied the accused to her home where he recovered a spade that was allegedly used to scoop blood that was oozing from the deceased after he had been fatally injured. That the accused's confession was to the effect that, she murdered the deceased when he came home drunk on the night of 8th June, 2013 and that she disposed off the body onto river Thanantu. PW9 sought to produce the confession as PExh 2 which was strenuously objected to by Mr. Kijaru learned counsel for the accused. The court allowed the same to be produced and to rule on its admissibility in this ruling. PW9 also produced a report by the government analyst as Pexh 4. The prosecution then closed its case.

6. At the close of the prosecution case, this court is enjoined to rule whether or not a prima facie case has been established by the prosecution to warrant the accused being put on her defence. This ruling then is whether a prima facie case has been established. The first issue this court has to determine is the admissibility of the alleged confession (PExh 2) of the accused as the court had ruled on 31st May, 2016.

7. According to PW9 who was the investigations officer, on 18th June, 2013, the accused voluntarily went to his office accompanied by her brother in law, David Thungutha (PW6) and told him that she wished to change her statement. He then referred the two to Chief Inspector Robinson Mwangi who recorded her confession under charge and caution. That after Chief Inspector Mwangi had recorded the statement he brought it to him. That the statement contained an admission that the accused is the one who murdered the deceased on the fateful night.

8. Mr. Kijaru learned counsel for the accused objected to the production of the said confession on the basis that it was not obtained in accordance with Section 25A of the Evidence Act Cap 80 Laws of Kenya and the Evidence (Out of Court confessions) Rules, 2009. Counsel submitted that due to the dark history surrounding confessions in this country, the law on confessions was amended and rules introduced to avoid abuse of the same by the police investigators; that, a confession must be voluntary; that the confessor must be told his/her rights; must be in the language of the confessor and that the suspect must be accompanied by an independent witness. To Mr. Kijaru, all these ingredients were missing from PExh 2. Counsel relied on the decisions in **Republic .v. Peter Njuguna 2015 eKLR, Republic .v. Wanena ELD HCCR No. 28 of 2011 (UR), Kimani .v. Republic [1954] EA 316 and Onchau S/O Osigai .v. Republic 586** in support of his submission that the confession was inadmissible. Counsel

concluded that since C.I.P Robinson Mwangihad been involved in the investigations, he was an investigations officer in this case and was therefore not qualified to record the confession.

9. Mr. Ongige learned counsel for the state submitted that the confession was taken in accordance with Section 25A of the Evidence Act, that there was no evidence that C.I.P Mwangi did not understand Kitharaka language; that the confession was voluntary and that the same was given in the presence of her brother in law who is the accused's relative. That in the premises, the confession should be admitted Counsel argued that the cases relied on by the defence were not applicable in the present case.

10. Section 25A of the Evidence Act provides:-

"25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice."

11. Pursuant to Section 25A (2) of the Evidence Act, the Evidence (Out of Court Confessions) Rules, 2009 were enacted. The said Rules as far as they are relevant to the present case provide as follows:-

"4 (1) Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person-

(a) has stated his language of communication;

(b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;

(c)

(d) is informed of his right to have legal representation of his own choice;

(e)

(f)

(g)

(h)

(i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.

(3) The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session and upon the appearance of the third party, the recording officer shall record the third party's particulars and relationship to the accused person."

12. To the mind of this court, the cumulative purpose of Sections 25A and 26 of the Evidence Act and the Evidence (Out of Court Confessions) Rules, 2009 (hereinafter "*the Rules*") is to comply with the provisions of the bill of rights set out in Articles 49 and 50 of the Constitution. Under Articles 49 (1) (b), (d) and 50 (2) (a) and 4 of the Constitution, an arrested person has the right to remain silent and not to be compelled to make any confession or admission that could be used against him. On the other hand, an accused has a right to a fair trial. This includes; to be presumed innocent until proved otherwise and that the evidence obtained in a manner that violates any fundamental right or freedom, as set out in the

bill of rights, should be excluded if its admission would prejudice the fair trial or is detrimental to the administration of justice generally. Indeed, as submitted by Mr. Kijaru, the amendments to the law on confessions is as a result of the dark history in this country where confessions were extracted illegally and in utter violation of the rights of the individuals. They were from being voluntary. Accordingly, the Rules that were enacted to operationalise Section 25A of the Evidence Act should be looked at from this angle.

13. According to PW9, the confession was properly recorded by CIP Mwangi and given to him which he relied on with the other evidence collected to charge the accused. It was submitted for the state that Section 25A of the Evidence Act was complied with. According to the Rules, before a confession of a suspect is recorded, certain preliminaries **MUST** be undertaken. The suspect must be asked of his/her preferred language of communication; should be provided with an interpreter free of charge; must be informed of his/her right to have legal representation of his/her own choice and must be informed of his/her right to nominate a third party of his or her own choice. Were these complied with in the instant case? There is nothing in PExh 2 to show that any of these were observed. Since PW9 was not present and did not record the confession, he cannot vouch that any of the matters I have set out above were complied with before C.I.P Mwangi recorded to produce PExh 2. Indeed, in the absence of any direct evidence that the accused was informed of these rights before the statement was taken from her, it cannot be safely be concluded that they were. C.I.P Mwangi was the proper person to appear and explain these matters. He did not appear and the court cannot speculate on what he would have told the court. Indeed Rule 13 of the Rules provides:-

"13. The recording officer having informed himself of Section 26(of) the Act, shall be the proper prosecution witness to prove to the court beyond reasonable doubt that the Rules were complied with."

There was no explanation why C.I.P Mwangi was not called to testify and produce PExh 2.

14. The other issue that arise is whether C.I.P Mwangi was competent to record the statement. PW9 admitted that C.I.P Mwangi had been involved in the investigations of the case. To my mind, having taken part in the investigations, C.I.P Mwangi must have made certain observations in the process that would not allow him to be independent minded when recording the statement. The fact that the Rules exclude the investigations officer from recording the statement is in itself enough to exclude all those involved with the investigations of the case, C.I.P Mwangi included.

15 The other issue is that of David Muchiemi Thungutha. Can he be said to be the third party envisaged under Rule 4 (3) of the Rules? I doubt it. Firstly, nowhere in PExh 2 is it shown that the accused had nominated him to be the third party. PW9 testified that the accused came to the station accompanied by the said person. He is the brother to the deceased and the accused's brother in law. Where would his allegiance lie more? Will it be in ensuring justice is done or avenging his brother's death? He was the prosecution witness number 6 (PW6). He also acted as the interpreter from Kitharaka to English (between the accused and the recording officer) as can be seen from Pexh 2. To my mind, in the absence of any independent firm evidence that the accused properly nominated Mr. David Thungutha to be her third party, I will hesitate to hold so. A third party in Rule 4 (3) of the Rules presupposes a person to whom the accused has confidence in not necessarily a relative. There may be relatives who are hostile and may not be the proper third party under that sub-rule.

15. For the for the foregoing reasons, I rule that the alleged confession of the accused produced as PEx 2 is in admissible and is hereby rejected.

16. Has the prosecution established a prima facie case ?The onus is always on the prosecution to prove its case beyond any reasonable doubt and a prima facie case is established where a reasonable tribunal, properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence (See **Ramnlal T. Bhatt.v. R [1957] EA 332**).

17. Out of the nine (9) prosecution witnesses who testified for the prosecution, none told the court that he saw or suspected the accused of having killed the deceased. The last time the deceased was seen or heard

alive, he was leaving the premises of Naomi Mwendwa Rwanda (PW3). It was at night, he was drunk and those who heard him state that he was singing in Kitharaka. PW1 told the court that he heard the deceased singing from his (own) boma heading towards the homestead of his (PW1's) grandmother. Samuel Mutegi (PW2) went to sleep and left the deceased drinking with Naomi Rwanda (PW3) and others. PW3 did not know whether or not after leaving her house, the deceased reached his home. Her testimony was that he was only swearing while drinking that he will divorce the accused.

18. Esther Kagendi Njagi (PW4) was a neighbour to and knew the deceased well. On the material night, at about 11.30 pm she and her husband heard the deceased swearing at the accused. She did not hear the accused respond but the deceased went silent all of a sudden. She and her husband then heard voices of two (2) male persons talking within the compound of the deceased. She thought that it was the deceased's brother David Muchiemi who had come to cool down the deceased. She only learnt on the following monday that the deceased had been killed. Lucy Kaburi David (PW5) heard the deceased shout from the road all the way to his compound about his dislike of the accused. At about 11.30 p.m, the shouting stopped and she went to sleep. She only came to learn the following day in the evening that the deceased's body had been found floating on river Thanantu.

19. The foregoing is the only evidence on record against the accused. PW9 told the court that he collected from the deceased's compound and the scene, among other exhibits, grass, twigs with green leaves and pangas. He forwarded them to the government chemist for analysis. According to the report dated 10th December, 2015 produced as PExh 4, although the twigs and grass were moderately stained with blood, they did not generate any DNA profile. Further, none of the pangas was found to be stained with blood. There was therefore no conclusion whether the blood stains present in the grass and the twig leaves was that of the deceased.

20. From the evidence, it is unclear where and how the deceased met his death. The evidence of PW1 was that he heard the deceased sing towards his (PW1's) grandmother's home when he suddenly fell silent. PW4 heard voices of two (2) men from the compound of the deceased when he suddenly stopped singing. Who were these men? What were they doing in the deceased's compound at the material time? Is there a possibility that they had something to do with the demise of the deceased? The evidence on record does not answer these questions amongst many others. To this court's mind, the evidence adduced does not warrant the need to call upon the accused to defend herself.

21. Accordingly, I find that the prosecution has failed to establish a prima facie case. I hereby dismiss the case, find the accused not guilty under section 306 of the Criminal Procedure Code and acquit her of the offence of murder under Section 210 of the C.P.C. She is to be set free forthwith.

DATED and Delivered at Chuka this 21st day of July, 2016.

A.MABEYA

JUDGE

Ruling read and delivered in open court in the presence of all parties.

A.MABEYA

JUDGE

25/6/2016