



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 35 OF 2014

REPUBLICPETITIONER

VERSUS

WESLEY KIPROTICH KIBOREACCUSED

JUDGMENT

The accused herein was charged with the offence of **Murder contrary to section 203 as read with Section 204 of the Penal Code**. The particulars of the offence was that **on the 16th day of July 2014 at Cheptendan 'A' farm within Trans Nzoia County Murdered Joyce Chesang Ngerich**. The accused denied the offence and the prosecution called 6 witnesses whose evidence can be summarised as hereunder:

PW1 Hezra Kimtai Kibore the accused brother told the court that the deceased who was his mother had taken the cows to graze. He decided to relief her so that she could go home and prepare lunch. While grazing the cows he saw the accused pass by while carrying a jembe and the accused wife had just passed by carrying a sack of potatoes. Both were from the farm. Suddenly he heard screams emanating from the direction of their home.

He saw people rushing there and he also went to check what was taking place. He found the deceased on the ground bleeding and appeared unconscious.

The deceased had injuries on the head. She was taken to Endebess District Hospital, later to Kitale and Eldoret hospitals but unfortunately passed on at Meadhill hospital Eldoret while undergoing treatment. He said that the jembe was found next to the deceased body. It was the same jembe that he had seen accused with. He picked the jembe and gave it to the police. He said that there was misunderstanding between the deceased and the accused, the latter having problems with the accused wife who was a form 3 dropout and she wanted her to go back to school.

On cross-examination he denied that the accused intended to kill anybody. Neither did he hear any quarrel before the screams. The accused was not at the scene.

PW2 Stanley Naseti said that on the material day at around 1.30 pm he heard screams emanating from the neighbours home. He rushed to the scene and found the deceased on the ground bleeding from the head. He said that before the screams he heard the accused saying,

“what did you tell my wife.”

He knew the voice of the accused as they were neighbours and he had known him for along time. He said he was about 100 metres from the scene. The deceased was then taken to hospital but later died. He

arrested the accused thereafter. He also said that he found the jembe next to the deceased and handed it over to the police.

On cross-examination he said that the deceased was standing some distance away. He said that he did not witness the attack.

PW3 Everlyne Chebokony Kibore testified that on the material day she was at home when she heard screams and rushed to the scene. She found the deceased on the ground bandaged with a lesso. They took her to Endebess hospital but later transferred to Kitale and Eldoret hospitals but she passed away.

On cross-examination she said that she did not find the accused at the scene.

PW4 Philip Kibet Kirui said that the deceased was his step mother. He identified the body at the mortuary during the postmortem exercise.

PW5 Karen Chebet Kibore was aged 14 years old and the sister to the accused. He said that she had come home for school fees when she met PW1 who was going to relief the deceased who was grazing the cows so that she could come home and prepare lunch. As she started going to school she heard some scream emanating from home. She rushed back and found the deceased lying on the ground and bleeding from her head. The deceased told her that she had been assaulted by the accused. There was also blood stained jembe in the house of the accused although the accused was not at the scene. The deceased was then taken to hospital and she remained at home. She further testified that on 16/7/2014 she saw the accused running away from his house when she heard screams.

PW6 CPL John Kimani rearrested the accused when he was brought by the Kenya Police Reservists (PW2). There was also a jembe which was allegedly used to attack the deceased. He carried out his investigation and recorded statements from the witnesses. He produced the jembe as well as the postmortem report which showed that the deceased had died out of severe bleeding secondary to head injury.

According to him the accused assaulted the mother out of domestic dispute. He admitted on cross examination that none of the witness saw the accused assault the deceased.

When put on his defence the accused in his unsworn statement stated that on the material day he went to Kisawai to purchase some farm inputs, namely fertilizer among others. He stayed there till late afternoon. Earlier he was with his wife Judy who had harvested potatoes and while heading home they met PW1 who was grazing the animals. At the market he met this cousin one Kemei who informed him of the fight between his wife and the deceased.

The deceased had been taken to hospitals but his wife disappeared. He was arrested the following day when he took his phone for charging.

Analysis And Determination

That was the summary of the evidence so far presented.

It appears from the same that none of the witnesses actually saw the accused assault the deceased. PW1 saw the accused following his wife while carrying the jembe. Thereafter he heard screams emanating from home. PW2 heard scream and he recognised the voice of the accused while quarreling with someone.

Perhaps the closest person who allegedly saw the accused running away was Pw5 who testified that;

“On 16/7/2014 saw the accused running away from his house when I heard and found my injured mother on the ground. I just saw the accused running away from the house and disappeared.”

The totality of the evidence presented by the prosecution was circumstantial in nature.

The principles guiding circumstantial evidence were well settled in *GMI Vs Republic (2013) eKLR* following the decision in the now famous case of *R V Kipkering Arap Koske & Another, 16 EACA 135* where the court held that the following requirements ought to be established:

“ (i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

In the instant case the accused was seen following his wife by PW1 allegedly heading towards home. It is thereafter that he heard screams emanating from home. He said that he heard children screaming .

All the prosecution witnesses told the court that there were many people who had gathered including the neighbours.

If this is true why were there no eye witnesses? If there were children screaming, or other persons, surely one must have seen the accused assault his mother. Of great significance from the evidence of Pw1 is how sure was he that the accused went home ?

The other issue which I find disturbing is the possession of the weapon used, namely the jembe. PW1 Stated that the jembe was next to where the deceased was lying. PW5 on the other hand said that the jembe was inside the accused house. Which is which ?

If the jembe was inside the house who then removed it and placed it close to the deceased while lying on the ground?

The other unclear evidence is whether the accused was at the scene. PW1 saw him walk towards the direction of the home. PW5 said that he saw him running away.

The rest of the witnesses said that they did not see the accused at the scene except PW2 who said on cross-examination that

“No I did not find the accused next to the deceased but he was standing some distance away. Yes, my statement say the accused was not at the scene. The current position is that the accused was not at the scene.”

The above contradiction lence credence to the unsworn evidence by the accused that he was not at the scene. If indeed he was at the scene then there would not be such contradictory evidence by the prosecution witnesses. In any case from the evidence of the said witnesses it appears that there were other people who arrived at the scene prior to them. Where are these people? Where was the accused wife for example? If there was some differences between the deceased and the accused wife, why wasn't she called to testify . In any case PW1 had seen her carrying a sack of potatoes on her way home.

Consequently in light of the above discrepancies I find that the circumstantial evidence as provided by the prosecution is too weak to convict the accused. The chain is weak in my view. The same is not complete as expected.

There is no evidence to place the accused at the scene and the attempt by PW5 to do so is contradicted by the other witnesses.

In any case by the time she returned home there were other people who were already attempting to rescue the deceased. Those person in my view should have been the first ones to see if the accused was at the scene.

Consequently in light of the above observations I find that the prosecution did not proof its case beyond reasonable doubt. I shall acquit the accused under the provisions of Section 215 of the Criminal Procedure Code unless lawfully held.

Orders accordingly.

Delivered tis 31st day of October 2016.

H.K. CHEMITEI

JUDGE

In the presence of;

Kakoi for prosecution

Bororio holding brief for Arunga for the accused

Accused present

Kirong – Court Assistant