



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL(MURDER) CASE NO. 15 OF 2011

REPUBLICPROSECUTOR

VERSUS

NANCY LIHANDA.....ACCUSED

JUDGMENT

Introduction

1. The accused person herein Nancy Lihanda is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the night between 15th and 16th day of February, 2011 at Musembe Village, Shivakala Sub-location in Kakamega south within Kakamega County murdered Benard Kusingjiru.

Prosecution Case

2. The prosecution called a total of seven (7) witnesses. Among them was Doctor Dickson Mchana Mwaludindi who testified as PW7. Doctor Mchana is a pathologist attached at Kakamega County General Hospital. He produced for identification, a photocopy of the autopsy report of the examination he conducted on the body of Bernard Kusingjiru Alondo. He testified that he conducted the autopsy on 26.02.2011 after the body was identified to him by David Khatenjiru and pedecious Lijoodi. He observed that the body was near total decomposition. He estimated the period between the death and time of autopsy as ten(10) days. He could not ascertain the cause of death.

3. PW1 the Assistant chief of Shivagala sub-location Patrick Mamadi Salua testified that on the 16.2.2011 while in his office the accused went to him and complained that she had been beaten by the deceased who was her husband. He gave her a letter to enable her get treatment.

4. On 22.2.2011 at about 3.30pm he was called and informed that the body of the deceased was found decomposing at the cane farm belonging to Elizabeth. He called the police from Isulu who took the body. He went to the deceased's home where they saw blood on the floor and on the bed sheets. They also saw a panga near where the deceased's body had been found in the sugarcane plantation. He observed that the deceased had a cut on the ear and fingers. The bedsheet and panga were marked as PM1 and PM2. She same were never produced as exhibits.

5. On cross examination he told the court the deceased's body was recovered 7 days after the deceased disappeared. PW2 Beavily Luchiwa told the court that on 16.2.2011 at about 4 am she heard screams from the accused saying that she was being killed. She was crying while walking. The next day they went to the accused house in the morning but did not find anyone. She later saw the accused accompanied by her father and the village elder. Her father told her (PW2) that he had brought the

accused so that her husband could treat her since she had injuries. She said she advised the accused person to seek medical treatment.

6. PW2 further testified that they looked for the deceased for about a week until his body was found on 22.2.2011 in a sugar cane farm. She went to the scene and saw the body was facing downwards, fingers were cut and a panga found near the scene. She identified the panga in court.

7. PW3 Benclaus Lichodi Karoli testified that on the 15.2.2010 at about 7.00am he heard the deceased and his wife quarrelling. He said he was used to hearing the deceased and the accused quarreling all the time especially when they were drunk. At about 2.00am, he again heard the wife crying and saying that she had been beaten and killed but deceased was not talking.

8. At about 4.00am the accused left for her maternal home and at about 5.00am the deceased came out and asked why they kept quiet while his wife was killing him. The deceased then left headed to his elder brother David's home. He further testified that the deceased did not enter into David's house. Later PW3 enquired from his workers whether they had seen the deceased. They then embarked on searching for him. They found his body at a sugar plantation a week after the incident.

9. PW4 David Khatenya told the court that he got information from his wife that his brother the deceased herein had disappeared. This was on 15.02.2012. He looked for him until 22.2.2011 when his body was recovered at a sugar cane plantation.

10. PW4 claimed that the accused who is his sister in law used to always quarrel with the deceased. PW5 Vincent Musee the village elder testified that on the 16.2.2011 at about 7.00am, he saw the accused and her father. Accused was bleeding on the nose. Mzee Lihanda the accused's father told him (PW5) to go and ask the accused's husband to give him money to take accused to the hospital. He went with the accused but found no one in accused's house. He then advised accused to seek help from the chief. He saw the body of the deceased on the 22.2.2011 when it was found in the sugarcane plantation.

11. PW6 No. 214863 IP Anthony Kitavi now based at Kisumu Patrol Base testified that on 22.2.2011 at around 4pm he received information from the Assistant Chief Shivagala sub-Location that the body of Bernard Kusinjiru had been seen within a sugar plantation. Bernard Kisinjiru had gone missing since the night of 15.2.2011 after he had had a fight with his wife, the accused person herein.

12. After receiving the said information he visited the scene and found the body of the deceased lying on its face. He also recovered a sharp panga hidden in the grass. He observed some injuries on the left and the right finger. They removed the body and went to the deceased's house where they recovered a bedsheet and a pillow case with some blood stains. They also saw some blood stains on the bedroom floor. He explained that the scene where the body was found was intact. He took the bedsheet and pillow and kept them as exhibits.

13. PW6 stated that he did not know whether the exhibits were taken to the government chemist for analysis. He claimed that the panga did not have blood stains. He got information that the accused had fought with the deceased and had threatened to kill him. He added that the body they recovered was almost decomposed.

14. The items recovered were not in court and hence not produced. The prosecution closed its case after the evidence by Dr. Mchana PW7.

The Defence Case

15. At the close of the prosecution's case, the court ruled that the prosecution had proved a prima facie case against the accused person and put her on her defence. She opted to give sworn testimony. She told the court that on the 16.2.2011 she went to her house at about 5 pm and prepared dinner. After dinner her husband (deceased herein) left and went to join his friends for a drink. He came back at about 3.00 am. She opened the door for him and he immediately picked a quarrel with her.

16. He had a panga which he hit her with on her right leg and mouth and he then left. She went to the village elder and reported the incident to him. The village elder took her to the Assistant Chief who advised her to go to hospital. She went to Shibwe Health Centre for treatment and then left for her maternal home. On 25.02.2011, the Assistant Chief summoned her to his office and informed her that her husband had been found dead. She was taken to Isulu Police post where she recorded her statement. She was thereafter charged with the offence. She maintains that she did not kill the deceased.

17. On cross examination, she stated that she had been married to the deceased for 3 years. She explained that her husband used to drink chang'aa daily. She denied that she used to quarrel with her husband as alleged. She explained that on that night her husband pushed her and then closed the door. He had a panga in his hand but she did not know where he had got the panga from. She raised an alarm but no one came to her rescue/aid.

18. She explained further that her maternal home and her matrimonial home were not far apart. She left the matrimonial home immediately after the quarrel but her husband left first with the panga in his hands.

Submissions

19. Submissions were made orally Mr. Anziya Advocate submitted on behalf of the accused person herein. He submitted that none of the prosecution witnesses saw the accused commit the crime. He added that the doctor who conducted the autopsy did not establish the cause of death and that there were no defined injuries.

20. He also submitted that it was confirmed by PW1 that accused went to him for help in connection with the assault she (accused) got from her husband. There was a quarrel in the accused's house on the 16.2.2011 as confirmed by the testimony of PW2. Counsel contends that the cause of death having not been determined, it is not easy to prove that the deceased was murdered. He maintained that the evidence in this case is circumstantial and the same is so weak that it cannot link the accused person to the murder of the deceased.

21. Counsel cited two cases which set out the test to be applied by courts faced with determining cases based on circumstantial evidence. One is the case of **Republic – Vrs – Peter Thuranira Murunga (2016)eKLR and the other is Abanga alias Onyango – vrs – Republic. Court of Appeal Cr. Appeal No. 32 of 1996.**

22. Counsel maintained that the evidence given by PW1 – PW6 does not satisfy the 3 conditions to warrant a finding that the prosecution has proved its case beyond any reasonable doubt against the accused person.

23. Mr. Ng'etich from the ODPP submitted that it may not be safe to convict the accused for charges of murder in the absence of conclusive medical evidence as indicated by the doctor in the post mortem report whose photocopy was only marked for identification.

Determination

24. The only issue for determination is whether the accused herein murdered her husband Bernard Kusunjiru. The evidence by the prosecution is mainly circumstantial. As was held in the case **of Abanga alias Onyango – Vrs – Rep C.A No. 32 of 1990(U.R)** the evidence must satisfy three tests.

(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 the 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.

25. The accused was the wife of the deceased. From the evidence she was the last person with the deceased. No one saw her killing her husband but all that was said is that “on the 16.2.2011, she was heard quarrelling with her husband.” PW2 told the court that on 16.2.2011 at about 4.00am. I heard screams from Nancy accused saying that she is being killed. She was crying while walking. She was saying she was being killed. She was just screaming.”

26. PW3 told the court that he heard noise from the deceased’s home. He heard the deceased and his wife (the accused) quarrelling. This was on the 15.2.2011 at about 7.00pm. At about 2 .00am, she heard the wife crying and at about 4.00am the accused left for her home and at 5.00am the deceased came and asked him (PW3) why he kept quiet while his wife was killing him.

27. It is clear from the evidence that the couple used to quarrel often after they had drunk and this was not their first time. None of the relatives went to assist in any way because, apparently, they were used to those quarrels.

28. PW1 confirmed that the deceased quarreled with his wife the accused herein. The accused went to their Assistant Chief (PW1) complaining that she had been beaten. PW1 gave her a letter to go to hospital.

29. PW5 also confirmed that the accused had a quarrel with her husband because on the 16.2.2011 the accused went to his home with his father and requested him to go to the deceased’s house and ask him for money to take accused person to hospital. They went to the deceased’s house but found no one.

30. It is thus evident that the accused was with her husband on the night of 16.2.2011 but she left her home thereafter. The deceased was thereafter seen by PW3 who told the court that the deceased went to his brothers (Pw4’s) house. The deceased body was later found decomposing after seven days. According to PW6 the investigating officer who went to the scene on the 22.2.2011, he found the body lying on its face and there was a sharp panga hidden in the grass. They removed the body. They also visited his house and found blood stains on the bedroom floor the bedsheet and pillow. However, the place where the body was found was intact meaning there was no struggle.

31. PW5 produced a copy of the post mortem report but in the report he stated that he could not ascertain the cause of death. In a murder case such as the one before this court the prosecution has a duty to prove its case beyond reasonable doubt. The death of the accused is not in dispute but the cause of his death has not been proved.

32. Section 203 provides the ingredients for the offence of murder. It states that “any person who if malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

33. The ingredients of murder are thus malice aforethought and the death and cause of such death. The standard of proof placed on the prosecution is to prove the guilt of the accused person beyond reasonable doubt. The prosecution has only proved the death of the deceased herein. They have not proved that it is the accused who caused the death through an unlawful act/omission and further the prosecution has not proved that the accused had malice afore thought. The evidence only shows that the accused was with the deceased on the 16.02.2011 and that is all. No evidence has been led to implicate the accused for the death of the deceased. There is also no conclusive medical evidence to ascertain the cause of the deceased death.

34. For the above reasons I find that the prosecution has failed to prove its case beyond reasonable doubt as required by law. Accused is therefore acquitted of the offence under Section 322(1) of the criminal Procedure Code. The accused be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 28th day of October, 2016

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Oroni (present).....for State

Mr. Munyendo (present).....for Accused

Mr. Polycarp.....Court Assistant