



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO 3 OF 2015

REPUBLIC

VERSUS

K N K

JUDGMENT

INTRODUCTION

1. The Accused person herein, K N K was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were as follows:-

“Between the night of 8th March 2015 and the morning of 9th March 2015 in Taita Taveta County, murdered E M.”

2. After the close of the Prosecution case on 24th October 2016, this court directed counsel for the State and counsel for the Accused person to file their respective Written Submissions on the question of whether or not the Accused person had a case to answer. They duly complied. The State’s Written Submissions were dated 18th October 2016 and filed on 24th October 2016 while those of the Accused person were dated 28th October 2016 and filed on 31st October 2016.

THE PROSECUTION’S CASE

3. The Prosecution summarised the evidence that was adduced by its eight (8) witnesses and submitted that it had demonstrated the following ingredients of murder:-

a. Proof of the fact and cause of death of the deceased;

b. Proof that the deceased met her death as the result of an unlawful act or omission on the part of the accused; and

c. Proof that the said unlawful act or omission was committed with malice aforethought.

4. It argued that despite the fact that there was no direct evidence showing that the Accused person killed, E M (hereinafter after referred to as “the Deceased”), this court ought to analyse and determine the case herein purely on the circumstantial evidence that had been adduced herein.

5. It submitted that it had satisfied the requirements that were set out in the case of **GMI vs Republic**

[2013] eKLR which echoed the *locus classicus* case of Republic vs Kipkering Arap Koske & Another 16 EACA 153 which were:-

- a. **That the circumstances from which an inference of guilt was sought to be drawn had been cogently and firmly established;**
- b. **That those circumstances were of a definite tendency unerringly pointing towards the guilt of the Accused person herein;**
- c. **That the circumstances taken cumulatively had formed a chain so complete that there was no escape from the conclusion that within all human probability, the crime was committed by the Accused person and no one else.**

6. It contended that the surrounding circumstances herein and the Accused person's actions were key in inferring his guilt and that he was duty bound under the provisions of Section 111 of the Evidence Act to explain to this court what transpired on the material night.

7. It urged this court to consider the following observations which directly pointed to the Accused person's guilt:-

- a. **The Accused had a tremulous relationship with the deceased;**
- b. **The Accused person was the last person to communicate with the deceased;**
- c. **The deceased's body was found only 200 metres from her house.**

8. It referred this court to the cases of Bhatt vs Republic [1957] EA 332, Republic vs Cornelius Kipkosgei Kogo [2013]eKLR and Republic vs Jagjivan M. Patel & Others 1, TLR where the common thread was that in determining whether or not the prosecution had established a *prima facie* case, all that a trial court was required to do at that stage was for it to satisfy itself whether the prosecution had set out a sufficient case against an accused person to require him to make a defence.

9. In the case of Bhatt vs Republic (Supra), it was further held that at this stage, directing its mind to the law and the evidence, a court should be satisfied that it can convict an accused person on the basis of the prosecution evidence tendered if such an accused person does not give his defence.

10. It was the Prosecution's submission that the evidence that was adduced by all its witnesses was cogent and consistent in explaining in detail what happened on the material date and consequently, circumstantial evidence irresistibly pointed to the Accused person's guilt. It therefore urged this court to place the Accused person on his defence.

THE ACCUSED PERSON'S CASE

11. The Accused person also set out the evidence that was adduced by the Prosecution's witnesses and argued that the same had not established a *prima facie* case warranting him to be placed on his defence.

12. He based his argument on the following reasons:-

- a. **The Prosecution's evidence was flawed as the deceased was married to someone else who was never called as a witness in this case hence his interest was therefore concealed;**
- b. **The deceased's family never released her for re-marriage to him and further they did not like him;**
- c. **PW 3 was the last person to go to the deceased's house the day before her murder and the first to arrive at house the following morning together with PW 2;**

d. PW 3 was the one who took the deceased's mobile phone and handed it over to the police;

e. In addition, there was contradiction on who handled the deceased's phone immediately after the death of the deceased;

f. PW 3's suddenly seemed very close to the deceased and he could not explain his conduct immediately before and after the deceased's death;

g. There was a possibility of there having been other assailants of the deceased;

h. The data to confirm communication between him and the deceased at 21.04. 56 hours was never presented to this court and analysed;

i. Finding of his document in the deceased's house did not disclose any offence;

j. The result of buccal swabs taken from him had exonerated him from being the deceased's assailant.

13. It was therefore his submission that despite relying on circumstantial evidence, the Prosecution had failed to prove that the circumstances pointed to him as the only probable perpetrator thus requiring an explanation from him. In the premises foregoing, he asked that this court to acquit him on a no case to answer under Section 210 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

LEGAL ANALYSIS

14. To answer the question as to whether or not the Prosecution had established a *prima facie* case against the Accused person herein, this court found it prudent to set out in brief the evidence that was adduced by the Prosecution witnesses.

15. J M (hereinafter referred to as "PW 1") was the deceased's uncle and guardian. He told this court that he was the one who raised her and her brother after their mother, who was his sister died in 1996. He explained that the deceased was married to a person he did not identify by name through a customary marriage and that they had one (1) child who stayed with the said husband's mother.

16. It was his testimony that after the deceased separated from the said husband, she got married to the Accused person herein also under a customary marriage but that there were no children that were born out of that union. He stated that the deceased also separated from the Accused person.

17. From his evidence, it emerged that both marriages were troubled and appeared to have broken down due to excessive drinking by both the first husband and the Accused person herein. In his Cross-examination, he stated that he had been in touch with this first husband a year before the deceased died because there was a child out of the said union.

18. J D M (hereinafter referred to as "PW 2") was a sister-in-law to the deceased. She said that the deceased's husband, one B M and her husband were brothers. She stated that the deceased had gone to eat coconut at her place on 8th March 2015 and she left at about 6.00 pm. Although she said that she was the deceased's friend as they had been married to brothers, she surprisingly contended that she did not know where the deceased worked or lived. All that she knew was that the deceased lived at a place known as Kariokor and that she had got married to the Accused person herein.

19. On being Cross-examined, she said that she did not know if the deceased was living with the Accused person at the material time. It was her evidence that when she last saw the deceased, she did not look like she had issues disturbing her. She said that she learnt of the deceased's death on the morning of 9th March 2015. She confirmed that the deceased was found dead wearing the same clothes she had when she visited her the previous day.

20. E M (hereinafter referred to as “PW 3”) was PW 2’s husband. He said that he took his phone to be charged at the deceased’s house on 8th March 2015 and that she took the phone to his house on the same day. He also stated that he heard that someone had been killed at Mwakingali on the morning of 9th March 2015. He denied having entered the deceased’s house that morning but at the same time said that he got a “Tecno” phone from her house. He said that he obtained numbers from her phone and managed to contact her cousin and informed him of her death.

21. During his Cross-examination, he admitted that he used to go to the deceased’s house frequently as she did go to his house. He denied that they were close friends. However, he said that his child used to sleep at the deceased’s house once in a while. He clarified that PW 2 is the one who gave him the deceased’s phone.

22. L A O (hereinafter referred to as “PW 4”) was the deceased’s neighbour. Their houses faced each other. She testified that on 8th March 2015 evening, the deceased had asked her to help her cook “papa” (shark) but she told her that she did not know how to cook it. The deceased told her that she would call her after she finished cooking.

23. After she finished cooking the “papa”, she called PW 4 to share the meal at about 8.00pm. They finished eating at about 10.00 pm. She also said that she learnt of the deceased’s death on the morning of 9th March 2015 after word spread round that a woman had been killed at Mwakingali.

24. In her Cross-examination, she stated that she never saw the deceased with a phone or speaking on the phone when they were together and she also never saw anyone going into her house. It was her testimony that she saw PW 2 come to the deceased’s house on the morning the deceased was found dead before the police did and saw her come out of the deceased’s house with the deceased’s phone.

25. She further stated that PW 2 suggested, to no one in particular, that they should call the deceased’s relatives to inform them of her death. She was emphatic that she never saw the Accused person at the deceased’s house on the material date and that she had never seen him previously. It was her evidence that she did not hear any commotion on the said date.

26. No 61751 Sergeant David Chege (hereinafter referred to as “PW 5”) was the Scene of Crime officer who took pictures where the deceased was found. He testified that they found the deceased in clothes that were soaked in blood with her panty rolled down to her thighs which he opined pointed to an attempted rape.

27. He also stated that he recovered a red slipper from the scene which he swabbed and it took for forensic examination at Moi Hospital, Voi to be compared with the mucous swab that had been taken from the Accused person. During his Cross-examination, he said that he could recall having seen a mobile phone in the deceased’s house when they visited it on the morning the deceased was found dead.

28. No 44341 PC Stanley Kirui (hereinafter referred to as “PW 6”) was one of the officers who went to the scene of crime. He testified that they found deceased with her hands at the back with a cut wound on her neck. She was outside a classroom at [particulars withheld] Primary School. He confirmed PW 5’s evidence regarding the finding of the slippers but clarified that it was a pair of red slippers which were separate but not far from each other.

29. He referred to a “Tecno” mobile phone which he said he was given by Inspector Kiriungi who had accompanied him to the deceased’s house. He said that he could not remember who gave them the directions to the deceased’s house.

30. Dr Walid Marei (hereinafter referred to as “PW 7”) tendered in evidence the Postmortem Report that showed that the cause of the deceased’s death was cardio-respiratory arrest secondary to shock as a result of a deep cut wound at the suprasternal notch. In his Cross-examination, he stated that although he could not say whether there was any other cause that could have caused the deceased’s death, he was certain

that the said stab wound was sufficient to have caused her death.

31. No 91745 PC Samuel Ngunjiri (hereinafter referred to as “PW 8”) was the Investigating Officer in this matter. He confirmed having visited the scene of crime in the company of other police officers from Voi Police Station where they found the deceased’s body and a pair of slippers.

32. He stated that from the data that had been collected, they had discovered a lot of communication between the deceased and the Accused person from 6th – 8th March 2015 whereupon they traced the Accused person to where he lived. He said that a search of the Accused person’s house revealed a letter from Alternative Dispute Resolution Mwangea Centre, Voi dated 1st December 2014 addressed to him and a copy of the deceased’s Identity Card, which he tendered in evidence as proof that the deceased had stayed in the Accused person’s house.

33. He also tendered in evidence Exhibit Memo and Request for DNA samples in respect of buccal swabs that had been taken from the Accused person that had been forwarded to the Government Analyst Mombasa. He confirmed that the DNA samples generated from the blood samples on the slippers did not match the DNA samples that had been generated from the Accused person.

34. He pointed out that the Forensics experts could not carry out an investigation of the telephone data as they never obtained the Accused person’s Pin Number. He also produced the “Tecno” mobile phone as an exhibit in the case.

35. It was his testimony that he charged the Accused person with the murder of the deceased because they had found the said documents in his house and there was communication between him and the deceased from 6th March 2015 to 8th March 2015.

36. During his Cross-examination, he admitted that the fact that someone’s documents were found in another’s house did not mean that that person lived there but was categorical that data showed that there was communication between the deceased and the Accused person at 21.04.56 hours, which he said was not strange, as estranged couples could still communicate.

37. It was evident that no one saw the Accused person at the deceased’s house on the material date. There also was no evidence of data linking the Accused person to the deceased. Indeed, this court gave the Prosecution an opportunity to tender this evidence before it could close its case. However, when the matter came up for the taking of the evidence of the Safaricom Liaison Officer and the Forensic Investigator and Examiner on 19th September 2016, the Prosecution indicated that it had consulted with one PC Merita and opted to close the Prosecution’s case without calling the two (2) persons as witnesses in this matter.

38. Notably, PW 3 had testified that she was in the deceased’s company until 10.00 pm and that she never saw her with a mobile phone or speak on her mobile phone. It was therefore incumbent upon the Prosecution to have adduced evidence to support PW 8’s assertions that there had been communication between the deceased and the Accused person for about forty five (45) seconds on 8th March 2015.

39. If data had confirmed this call between the deceased and the Accused person herein, nothing would have been easier than for the Prosecution to have presented the same before this court for analysis. Failure to adduce this evidence when they had full opportunity to do so only led this court to draw a negative inference on this piece of evidence.

40. In other words, this court had to ask itself if the result of the data analysis had shown that there was indeed no calls between the deceased and the Accused person herein which would then have exonerated him from having caused the deceased’s death.

41. As was rightly submitted by the Accused person’s counsel, the fact that the aforesaid letter and a copy of the deceased’s Identity Card were found in the Accused person’s house was not proof that he was the

person who caused her death. As no one saw him enter the deceased's house on that material date, reliance on this letter that was dated about three (3) months preceding the deceased's death and addressed to the Accused person and a copy of the deceased's Identity Card were not sufficient evidence to have linked him to the deceased on that material date.

42. In fact, charging the Accused person because the said letter and the said copy of Identity Card were found in his house had no legal basis because the last person known to have been with the deceased was PW 4 with whom she had shared a meal of "papa." If PW 8 did not find it fit to charge PW 4 merely for having been with the deceased before she was found dead the following morning, then it was logical to conclude that unless there was any strong and credible evidence, he could also not charge the Accused person herein merely because a letter and a copy of the deceased's Identity Card were found in his house.

43. In addition, this court found that the evidence by PW 2 and PW 3 not to have been cogent and consistent at all. PW 2 had stated that the deceased was her friend, a fact that was confirmed by PW 3, yet she purported to say that she never knew where she worked or stayed. It was inconceivable that PW 2 would not have known where the deceased stayed if as PW 3 testified, his child used to sleep over at the deceased's place once in a while.

44. It was thus strange that on the morning when the deceased was found dead, the police found them already at the deceased's house yet they had purported to portray themselves as having not been close to the deceased. PW 2's evidence was silent as to how she managed to trace the deceased's house as she never knew where she stayed. However, this court would not take it against her as PW 3 who knew the house very well was with her.

45. It is worthy of note that in her evidence, PW 2 denied having looked at the deceased's property. This contradicted PW 3's evidence that she was the one who gave him the "Tecno" phone. As can be seen hereinabove, PW 4 testified that she saw PW 2 come out with a phone from the deceased's house.

46. It was also not lost to this court that PW 2's evidence on why the deceased had gone to their house differed with that of PW 3. She has contended that the deceased went to her place to eat coconut. On his part, PW 3 stated that the deceased had gone to take his phone that he had left charging at her house. This was a very material contradiction as to how the deceased found herself at PW 2's and PW 3's house.

47. Having said so, this court was unable to comprehend why PW 3 had taken his phone to the deceased's house to be charged. There was nothing in his evidence to suggest that his house did not have any source of power from where he could have charged his phone or that he had no alternative place to charge his phone within the neighbourhood.

48. Appreciably, PW 3 appeared shifty regarding his relationship with the deceased. During his Examination-in-chief, he testified that he had told his brother, the deceased's husband, not to go to the deceased's house. During his Cross-examination, he was categorical that he was not a close friend to the deceased.

49. If that were so, the question that came in the mind of this court was why then was he a frequent visitor to the deceased's house with his last visit at her place to charge his phone being on 8th March 2015 at 1.00 pm? Why did his child used to sleep over at the deceased's place if they were not close, something PW 2 did not allude to? It would be extremely unusual for a parent to allow his or her child to sleep overnight in another person's if they did not have confidence in them.

50. It was also not clear how PW 3 who had contended was not close to the deceased would have known identified the deceased's relatives amongst the many numbers in her phone so as to inform them of her death. Indeed, in his Examination-in-chief, he testified that he called her cousin but the network was poor. Later, he called her brother-in-law, J and another relative in Nairobi.

51. This court was also baffled by PW 3's evidence that it was the deceased who took his phone to his house. Why did he not come to collect the same from her house? Having carefully analysed PW 2's and

PW 3's evidence, this court formed the opinion that they were both not credible witnesses. They appeared to have withheld very crucial and critical information as was evidenced from their sketchy evidence.

52. Bearing in mind that they both had close interaction with the deceased a day before she was found dead and PW 8 did not find it fit to charge them with the deceased's death, this court was similarly not satisfied that the Accused herein should have been charged merely because a copy of a reconciliation letter was found in the deceased's house.

53. Going further, the Government Analyst Report by George L Oguda Principal Analyst dated 9th June 2015, without any doubt, exonerated the Accused person from the deceased's death. This is because the DNA generated from the blood stains obtained from red slippers found at the scene of crime did not match the DNA profile generated from the buccal swabs and blood samples that had been taken from the Accused person.

54. In deciding that a *prima facie* case has been established by the prosecution, the threshold is that a trial court must be satisfied that based on the evidence that has been adduced by prosecution witnesses until the close of the prosecution case, it could confidently and safely convict an accused person if a defence was not tendered.

55. In such a case, a trial court ought to find that a *prima facie* case has been established against an accused person. It will then be required to put such accused person on his defence to give his side of the story before it can make a final determination on the matter.

56. If on the other hand inference of an accused person's guilt cannot be remotely inferred at the close of the prosecution's case, a trial court must find that a *prima facie* case has not been established against him and terminate the case at that stage. Such accused person must not be put on his defence because the threshold of finding he has a case to answer has not been met.

57. As can be seen hereinabove, the Prosecution relied on circumstantial evidence to connect the Accused person to the deceased's death. Where a case is based on circumstantial evidence, the chain of events must be so connected that an accused person would find it difficult, if not impossible, to extricate himself or herself from the unlawful act he is being accused of. In other words, circumstantial evidence will only be persuasive if an accused person's guilt can be inferred based on the evidence adduced by the prosecution.

58. Accordingly, having carefully considered the evidence by the Prosecution witnesses and the Written Submissions by both the counsel for the State and the Accused person and the case law, the court came to the firm conclusion that no *prima facie* case had been established to warrant the Accused person to be put on his defence in line with the holding in the cases of **Musoke vs Republic [1958] EA 715** and **Teper vs Republic [1952] AL 480**.

59. It was evident that the Prosecution witnesses did not adduce any evidence to connect the Accused person to the deceased's death. In fact, there was no scintilla of circumstantial evidence to connect him whatsoever as had been contended by the Prosecution. As there was no such evidence, the Prosecution did not remotely demonstrate that there was malice aforethought on the part of the Accused person, a critical ingredient for proof of the offence of murder as defined in Section 206 of the Penal Code.

60. It would be prejudicial to put the Accused person on his defence based on speculative evidence or unproven facts. Putting him on his defence to fill the gaps of the Prosecution case or as the Prosecution opined so that he can tell the court what exactly happened would be shifting the burden on him to show that he did not cause the death of the Deceased. This would be against the tenets of rules of natural justice that a person is presumed innocent until proven guilty based on evidence that has been presented before a court by a prosecutor.

61. Section 111 of the Evidence Act Cap 80 (Laws of Kenya) that the Prosecution relied upon to shift the burden to the Accused person would not be applicable herein for the reason that it failed to demonstrate

that there was *actus rea* and *mens rea* on the part of the Accused person.

62. It is unfortunate that the deceased and her loved ones will not get justice because, from the way evidence was presented in this case, it was difficult to know exactly what happened to the deceased from about 10.00 pm until the following morning when her body was discovered at Mwakingali Primary School. The investigations were shoddy and the case as presented by the Prosecutor was not believable. In a nutshell, this was not a cogent case.

DISPOSITION

63. For the foregoing reasons, the upshot of this court's decision was that there was no sufficient evidence that was adduced by the Prosecution to persuade it to find that a *prima facie* case had been established against the Accused person to warrant him being put on his defence. In the circumstances foregoing, the Accused person is hereby acquitted under Section 210 of the Criminal Procedure Code.

64. The Surety in this case is hereby discharged from any further obligations to this court in respect of the Accused person herein.

65. It is so ordered.

DATED and DELIVERED at VOI this 28TH day of NOVEMBER 2016

J. KAMAU

JUDGE

In the presence of:-

Miss Anyumba.....for State

Langalanga h/b for Mrs Isika.....for Accused person

Josephat Mavu– Court Clerk