



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 50 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JAMES LUKALE ESHIBUKULE.....ACCUSED

J U D G M E N T

Introduction

1. The accused person in this case has been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars thereof being that on the 20th December, 2010 at Emungweso Village Kisa East Location, Khwisero District within Western Province, [he] murdered Veronica Akumu.

2. On 01.02.2011 the accused person pleaded not guilty to the charge, and since 14.03.2012, the case has been ongoing. The first 6 prosecution witnesses were heard by Hon. Mr. Justice S.J. Chitembwe who was transferred before the hearing came to a conclusion.

The Prosecution Case

3. The prosecution called 9 witnesses. From the testimonies of these 9 witnesses, the prosecution case is as follows;- On 20.1.2.2010, the accused herein, the deceased together with Patrick Mangura Anyangi, PW2(Patrick), Francis Atito, PW2 Paul Mbuto Amukhuma (PW4 – though part of the record reads as PW3(Paul) Paulina Awinja Oyatsi, PW6 (Awinja) and one Floyce Sunday, were at the accused's home between 11.00am and 3.30pm taking chang'aa. According to Awinja, the accused traded in chang'aa and on the material day, he went out and bought some chang'aa and brought it home. The accused and the deceased were cohabiting as man and wife, though they had not done so for a long time. The deceased was the wife to the brother to Francis Atitio, PW3, who was since deceased.

4. At about 11.00am, on the material day Paul in the company of one Francis, Indeche (who was not called as a witness) took a bicycle to the accused's home for repairs. The accused person was a well-known bicycle repairer. Paul and his friend found the accused at home together with the deceased, Awinja and Floyce and they were all taking chang'aa. When Paul asked the accused whether he could have the bicycle repaired that day, the accused asked him to check for the bicycle the following day.

5. The whole group continued taking chang'aa until about 3.00pm when Paul left. At 3.00pm, the accused person who had left the home briefly, came back home carrying a jericane of chang'aa. At about 3.30pm, Awinja also left the accused's person's home. The accused was left at home together with the

deceased.

6. On the same day at about 7.30pm, Paul in the company of Livingstone, Atito Eshiwani (PW5) went to the accused's home. They knocked on the accused's person's door and then entered the house. They found the deceased lying on the bed while the accused was standing near her. The accused informed PW2 and PW5 that the deceased had been killed by some people. One of them telephoned the area councilor who came to the scene and after confirming that the deceased was dead the area councilor, one Francis Namoi Ashira(not called to testify) telephoned the police who came to the scene and took away the deceased's body.

7. Livingstone Atito Eshiwani PW5 stated that when he and Patrick got to the accused person's home at about 7.30 pm, the accused told them the following. "Iko Giza na watu wamemuwa bibi yangu". "There is darkness and some people have killed my wife." When the accused person's children brought a lantern from a neighbour's home, PW5 confirmed for himself that the deceased had died. There was blood. PW5 was shocked at the news and at the sight. Awinja told the court that she was the last person to leave the accused's home at about 3.30pm, leaving the accused and the deceased together at home.

8. Number 233647 Chief Inspector John Ogoti testified as PW7. He was the OCS at Khwisero Police Station when the deceased's death was reported to the police at the said police station. He testified that on 20.12.2010 at about 9.00pm, while he was at his house, he was informed of the deceased's murder. He rushed to the office where he found the reportee and later accompanied the reportee to the scene. At the scene they found the deceased's body lying on its back across the bed with the feet on the floor. There was blood both on the bed on the floor, even on the deceased's clothes.

9. On turning the body PW7 said he noticed an injury on the head. Blood was oozing from it. On examination of the bedroom, there was an iron bar which was blood stained. The same was standing against the wall next to the bed. The iron bar "Tarimbo"- had blood stains towards the sharp edge. PW7 identified the iron bar in court.

10. PW7 further testified that while he and his colleagues examined the bedroom, the accused remained seated on a sofa set in the sitting room. When PW7 eventually looked at the accused, he noticed some blood stains on his (accused person's) clothes. There was also some blood on the Khaki cap which the accused person was wearing. PW7 identified a blood stained green trouser.

11. At the scene, PW7 and his team took blood samples and pieces of clothing from the bed where the deceased was lying and thereafter the accused was arrested while the body of the deceased was removed to the mortuary. It was PW7's further testimony that during his investigations, he established that both accused and deceased were chang'aa sellers, and that on the day in question, the two had sold chang'aa to among others Awinja. After recording statements from witnesses, PW7 preferred the charge of murder against the accused person, and sent various exhibits to the Government Chemist for analysis. By the time of his testimony, PW7 had received the report from the Government Chemist. PW7 finally stated that before the deceased met her death, there had been a quarrel with the deceased over the chang'aa sales proceeds.

12. During cross examination, PW7 stated that none of the more than 30 people he found at the accused's home implicated the accused in the death of the deceased because they were not present when the deceased died.

13. PW8 was Dr. Francis Odira Ouko, a consultant Surgeon at Avenue Nursing Home, Kisumu. He carried out the post mortem examination on the body of the deceased on 22.12.2010 at Vihiga District Hospital. According to his testimony, the deceased who was aged about 36 years had been dead for 2 days. Externally there was a lacerated wound on the scalp on the right parietal (Side) of the head measuring 2X3 cm, there was a right parietal fracture of the scalp with injury to the brain tissue.

14. In Dr. Ouko's opinion, the cause of death was severe head injury secondary to blunt trauma. Dr. Ouko also opined that the type of object used to inflict the injury was blunt. The post mortem report was

produced as Pexhibit1.

15. The last witness, PW9 for the state was Moses Mutie Mwaura, a senior Government Analyst. He testified that 7 items were forwarded to the Government Chemist on 06.11.2011 for analysis and comparison. These were;-

- C1 being dry blood stains on a jogoo paper
- C2 piece of cloth
- C3 blood of deceased, Veronica Akumu
- C4 metal iron bar
- C5 green cap of the suspect, James Lukale Eshibukule
- C6 green long rouser of suspect
- C7 blood sample of suspect.

16. From an analyses of the various items, PW9 gave his findings as follows;-

1. Blood stains on items C2, c4, and C5 were of human blood group B
2. Blood stains on items C1 and C6 were of human blood group O
3. Blood sample of deceased blood C3 was blood group B
4. Blood sample of suspect, C7 was found to be blood group O.

17. PW9 concluded that the blood stains on items C2, C4 and C5 matched in group with blood sample of the deceased, and that the blood could have originated from the deceased after an injury. PW7 produced as Exhibit 2, the Government Chemist analyst report. The prosecution then closed its case.

The Defence Case

18. In his sworn evidence, the accused person testified that the deceased was his wife of about 1 ½ years, but the two had no children between them. He had inherited her from one Aggrey Atito Amukoya. He recollected that on 19.12.2010 he woke up the deceased around 6.00am to give him some food to eat before he could go out to look for chang'aa. Though the deceased told the accused person that she was not feeling well, she nonetheless got up and prepared some food for him. This was around 6.00am. Thereafter, he took some chang'aa for sale and returned home at about 10.00am and both continued with the business of selling chang'aa.

19. The accused further testified that from about 2.00pm on the material day, he again went out to look for more chang'aa for sale. By the time he went out, there were about 10 people in the home, and he confirmed most of them testified against him. He said that when he eventually discovered that the deceased had died, he informed Patrick Mangula PW2 and Livingstone Atito, PW5, and that it was PW2 who assisted him in informing the police about the deceased's death. At about 10.00pm on the material day, the police came to his home.

20. The accused also testified that when he returned home on 19.12.2010 at about 5.15pm, he found the doors and windows to the family house locked. He said he was quite drunk by that time and that at 7.15 pm one of his children came home and entered the house through one of the windows and opened the door. He found his wife lying on the bed, but when he tried to wake her up, she did not respond. He went on to testify that when his child lit the lantern, he told him that the deceased had a swollen head and

was dead. That was the time he realized that the deceased was dead. After this discovery, the accused said he went into the sitting room and slept on the sofa until the police later came at about 10.00pm and arrested him as they took the deceased's body to the mortuary. The accused denied killing the deceased. He stated that if he had killed the deceased, he would not have waited at home to be arrested by police.

21. During cross examination, the accused stated that when his children opened the house at about 7.15pm, it was dark inside and further that when the children lit the lantern he was lying on the same bed with the deceased. The accused denied a suggestion by prosecution counsel that during the day he had sent his children to their maternal home.

22. He also testified that he returned home at 7.15pm although in his examination in chief, he had said he came back home at 5.15pm. He also testified that even after discovering that his wife had died, he did not send his children to call neighbours. He denied hitting the deceased with the metal bar. Regarding the blood found on his clothes and cap, he explained that it was because he lay on the same bed where the deceased was lying. The accused then closed his case.

Analysis and Determination

23. After carefully analyzing all the evidence above, both for the state and the accused person, the issues that arise for determination are:-

-whether the deceased died and what the cause of the deceased's death was

-Whether the deceased's death arose from the unlawful act or omissions of the accused person herein and

-Whether it is clear from the evidence that the accused had the necessary malice aforethought when, if it is so proved, he killed the deceased.

24. The answers to the above questions revolve around the provisions of Sections 203 and 206 of the Penal Code, Cap 63 of the laws of Kenya which define the offence of murder and the principle of malice aforethought respectively. Section 203 states that "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder" On the other hand, Section 206 provides that "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

25. Thus once the prosecution proves that the death of the deceased was caused by the accused person through an unlawful act or omission on his part, the next burden for the prosecution to discharge is to show that the accused did so under any of the circumstances set out in Section 206.

26. Before determining the above stated issues, it is worth noting that in this case, there was no eye witnesses to the incident. The available evidence is therefore circumstantial evidence. That circumstantial evidence can be gleaned from the testimonies PW2, PW3, PW5 and PW6. In the case of

Karanja – Vrs – Republic [1983] KLR 501 the Court of Appeal sitting at Kisumu (Hancox J.A Chesoni and Platt Ag JJA) considered the issue of circumstantial evidence and how a court faced with the issue should proceed before convicting on such evidence. In the above case, the appellant was charged, convicted and sentenced for murder contrary to section 203 as read with Section 204 of the Penal Code. The appellant’s contention on appeal was that the evidence on record did not point at his guilt; that the direction on circumstantial evidence had been such that the burden of proof was thrust upon the appellant and that the prosecution and defence cases had been treated in isolation. The court held *inter alia* that:-

“1. The word “alibi” is a Latin verb meaning “elsewhere” or at another place” therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant’s story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged.

2. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that he defence was an afterthought.

3. It is improper for the court to treat the prosecution and defence cases in isolation. The judge in this case did not commit this impropriety as he properly summarized the prosecution’s case in great detail.

4. The burden of proving the falsity of the defence was wholly on the prosecution and the judge did not misdirect himself on this when he stated that. “the rule about circumstantial evidence is that it must be such as to be explainable only upon the hypothesis of the accused’s guilt and incompatible with any other innocent explanation.”

26. In the other case of **James Mwangi – vrs Republic [1983]KLR 327** the appellant was one of four accused person tried, found guilty and convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The case against the appellant and his co-accused depended entirely on circumstantial evidence as none of the accused persons was identified by anyone at the scene of crime. The court of Appeal, sitting at Nakuru as the second appellate court held as follows:-

“1. In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.

2. In order to draw the inference of the accused’s guilt from circumstantial evidence, there must be no other coexisting circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused.

3. It was wrong to shift the burden of proving innocent possession of the allegedly stolen money onto the first appellant. There was nothing wrong with him having a large sum of money and he did not have to explain how he had come to be in possession of it as the High Court judge had observed.

4. The prosecution had failed to establish the circumstances from which the conclusion of guilt could be drawn and in the absence of establishing such facts, there could not be any hypothesis of the guilt of the first appellant.”

27. Having established the applicable principles in this matter, I now proceed to determine the issues in

controversy.

Whether the deceased died and what caused her death

There is no doubt in this case that the deceased died. Both the prosecution and the defence testified of that fact. PW8, Dr. Francis Odira Ouko testified that on 22.12.2010, he conducted a post mortem examination on the body of Veronica Akumu, a female adult aged 36 years old. The body was identified to him by Francis Amakuba and Joseph Wangila. Dr. Ouko stated that the deceased suffered injuries on the right parietal side of the head and there was also a fracture of the right parietal skull. There was also an injury to the brain tissue. As a result of the examination, Dr. Ouko formed the opinion that the cause of death was severe head injury secondary to blunt trauma. The post mortem report was produced in evidence as Pexhibit 1. I am therefore fully satisfied that the deceased died and that she died as a result of severe head injury secondary to blunt trauma.

Whether the death of the deceased is attributable to unlawful acts or omissions on the part of the accused person.

28. As earlier pointed out, the case against the accused person resolves around circumstantial evidence, because none of the witnesses for the prosecution said that they saw the accused person assaulting the deceased. Nonetheless from the totality of the evidence on record, the accused person is placed squarely at the scene of crime. According to PW6, Paulina Awinja Oyatsi, she was the last person to leave the accused person's home at about 3.30pm. She left the accused and the deceased together. Paul Mbuto Amukhuma, PW4 (although erroneously recorded as pw3) was also at the accused person's home in the afternoon of the fateful day taking chang'aa with other revelers. He left the accused person's home a little earlier than Awinja and during cross examination PW4 stated;-

“My home is about 1Km from the home of the deceased. I left the people, I have mentioned at the accused's home. No one came to the accused's home between 11.00am and 3.00pm.”

29. I have carefully considered the evidence by the accused person and find that the same does not add up. First of all, he said he went away at 2.00pm and returned home at 5.15pm though he also says he returned home at 7.15pm and found the house locked with no one to answer his pleas for the deceased to open the door for him. He also says that when his child came home, he found him lying on the bed where the deceased was lying yet in the same breath he says it was his child who told him the deceased was dead.

30. In my considered view, the defence by the accused person is so feeble and so contradictory that it cannot displace the strong evidence adduced against him by the prosecution. I have no reason to doubt the evidence of the prosecution witnesses. There were no questions put to any of the said witnesses to suggest that either some or all of them were bent on fixing the accused person. In essence, the accused defence is one of alibi but again that defence was not raised early enough during the trial. He only mentioned it in passing when he was put on his defence. In my view, that defence was an afterthought and according to the Court of Appeal in the **Karanja case (above)** the appellant's story about what time he was or was not at home when the deceased was killed does not amount to an alibi or in other words that story does not show that he was in a place other than his home when the deceased, who was his wife of 1 ½ years met her death. The accused person was under a duty to protect the deceased and not to kill her, and he had no lawful reason to kill the deceased.

31. From the testimony of PW9 – Moses Muhu Mwaura, he analyzed various items forwarded to the Government Chemist by No. 88499 PC Allan Njagi and from his analysis, which include a metal bar that was found beside the bed where the deceased was found lying and soaked in a pool of blood, a green cap and green long trouser both belonging to the accused person as well as blood samples from both the accused and the deceased, he reached the conclusion that the blood stains found on items C2 which was a piece of the deceased's clothing, item C4 which was the metal bar and item C5 which was the green cap belonging to the accused person matched in group with blood samples from the deceased. The report containing these results was produced as Pexhibit 2.

32. In his testimony, the accused person testified that the blood on his cap was there because he lay down on the same bed where deceased lay, and that he did so, because he was drunk. That theory by the accused is rejected by this court.

33. There is also the evidence of number 233647 Chief Inspector John Ogoti who testified as PW7. He is the one who received the report of the death of deceased. He also visited the scene. He stated that when he and his officers examined the bed room where the deceased's body lay, they found the iron bar which was blood stained. The iron bar was lying against the wall next to the bed. PW7 testified that PW6, Paulina Awinja told him that she had left the accused and the deceased together when she went away around 4.00pm. Thus, Awinja's evidence, that of PW7 and the fact that the blood on the iron bar and on the accused's cap matched the blood of the deceased is sufficient in my considered view to link the accused person to the scene of crime and to the unlawful killing of the deceased by the accused person.

Whether it is clear from the evidence that the accused had the necessary malice aforethought in killing the deceased.

34. In this regard, the prosecution is required to prove only one of the circumstances enumerated under Section 206 of the Penal Code (Supra). There is evidence that the iron bar had blood that matched the blood group of the deceased. There is also medical evidence showing that the injuries sustained by the deceased were caused by a blunt object. The injuries were a lacerated scalp wound on the right parietal area measuring 2X3 cm. There was also fracture of the right parietal skull as well as brain injury. Such injuries were, by any standard, very grievous indeed. There is no doubt in the mind of this court that by inflicting such serious injuries on the deceased's head, and using such an object as an iron bar, the accused intended to cause the death of the deceased or to do grievous harm to her. Even if the accused person had been provoked, which is not the case here as such defence has not been raised by the accused person, such force as applied by the accused would clearly have been excessive in the circumstances. The prosecution has thus proved that in killing the deceased the accused person had the necessary malice aforethought.

Conclusion.

35 . Having made the above findings and after careful analysis of the submissions made on behalf of the accused person by his counsel, I am satisfied that the prosecution has proved its case against the accused person beyond any reasonable doubt. Accordingly, I find the accused person herein, James Lukale Eshibukule, guilty of the murder of Veronica Akumu on the 20.12.2010 and convict him accordingly under Section 322(2) of the Criminal Procedure Code.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 22nd day of DECEMBER 2016

RUTH N. SITATI

JUDGE

In the presence of:-

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

Mr. Aburili (present).....for the Accused

Mr. Polycap.....Court Assistant