



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CRIMINAL CASE (MURDER) NO. 1 OF 2012
REPUBLIC.....PROSECUTOR
VERSUS
KADENGE MANGI KALAMA alias KAHAWA.....ACCUSED

J U D G M E N T

1. The Accused **KADENGE MANGI KALAMA** is charged with Murder contrary to section 203 as read with section 204 of the Penal Code. The information states that on 16th August, 2011 at Lango Baya Sublocation, Malindi District within Kilifi County, he murdered **KAHASO KAZUNGU KITHI**. The accused denied the charges. During the trial, he was represented by Mr. Ogeto.
2. The prosecution called **six witnesses**. Briefly, the prosecution case was that in the material period, the deceased Kahaso Kazungu Kithi lived at Lango Baya with her husband Kombe Kazungu (PW3), and their children, including 13 year old **F.K. (PW1)**. At the same time the deceased carried on an illicit relationship with the accused who was a neighbour. Upon discovering the affair, PW3 had duly reported to a local elder **Festus Jumaa Kalume (PW4)**. The elder approached the accused demanding that in keeping with Giriama traditions, the accused pays a sum of Kshs. 20,000/- being “malu”, a traditional fine to PW3.
3. The accused admitted the breach and remitted Kshs. 1,000/- as part payment through PW4. However, he subsequently became “uncooperative” forcing PW 4 to report the matter to the area assistant chief, **Stephen Gunga (PW 5)**. PW 5 summoned the accused to attend his office on 10/8/11 but he defaulted. A further summons was issued for a future date, but before then the deceased was murdered.
4. It is the prosecution case that on evening of the date of the murder the accused had been spotted by PW 1 hiding in a hole or depressed area close to the family house. When PW1 reported to the deceased concerning the presence of the accused, the deceased warned her not to tell her father (PW3) who was at home. Later the deceased dispatched the children to buy provisions while the husband later left for work as a night guard. The mutilated body of the deceased was discovered in bushes close to the home on the next day by PW3.
5. In his unsworn defence statement the accused admitted his affair with the deceased which led to the imposition of a fine (malu) of Kshs. 20,000/- by 3 elders who visited his home on 5/7/11. He said he gave Kshs. 1,000/- on that date and was to pay the balance later. He was arrested subsequently and denied that he was involved in the murder.
6. There is no dispute that the accused and deceased were residents of Lango Baya. And that despite

the deceased being married to PW3 she carried on an illicit affair with the accused. It is not in dispute that because of this, a traditional fine of Kshs. 20,000/- had been imposed by elders on the accused and that of the said sum only Kshs. 1,000/- had been paid.

7. Finally, it is not disputed that the body of the deceased was found in bushes close to her matrimonial home on the morning of **16th August 2011**. The body bore deep multiple cuts on the neck and the head. The cause of death was exsanguinations and severe head injury resulting from assault by a sharp weapon. The injuries reflected on the post mortem form (exhibit 4) are multiple and extensive. One such injury was a cut on the right parietal region measuring 10cm and cut through the skull deep enough to expose the brain.
8. From the injuries described, it is evident that whoever inflicted the injuries on the deceased had a singular aim: to kill her. The question for this court to determine is the identity of the attacker. The prosecution evidence through PW1 and in part PW3 and PW4 and PW5 was that the accused murdered the deceased, apparently to escape the pressure to pay “malu” in respect of his affair with her.
9. For the most part, the prosecution evidence linking the accused to the murder is circumstantial. With regard to PW1, her evidence was that on the date of the murder, she and her mother returned home from fetching firewood on the afternoon in question.
10. Each of them had a load of firewood. While the deceased deposited her load in front of the house, PW1 dropped hers at the back of the house. It was while she did so that she spotted the accused whom she knew to be her mother’s paramour hiding in a hole on depressed ground at the back of the house. When PW1 informed her mother she warned her not to inform PW3, and later sent her out on an errand. Meanwhile, PW3 left his wife at home to go for night duties. At 7.00pm when PW1 returned she could not trace her mother. She spent the night at her grandparents’ home.
11. On the next day the deceased was found murdered. Her body lay in bushes within the vicinity of her home. It is PW3 who found the body after returning home from duty to find nobody home. Although PW1 is a minor aged 13 years, she seemed to have a good recollection of the events of the material period and was clearly aware of the illicit affair between her mother and the accused. She was familiar with the accused as a neighbour and regular visitor to the home.
12. PW1 was confident that she saw the accused early in the evening before she was sent out to buy flour, returning at 7.00pm. PW1 said she met her father going away to work and recalled that prior to sending her on the errand, the deceased had declared that she would be proceeding to the river. When PW1 returned home from shopping she called out to her mother who did not respond so she and her sibling feared to enter the house and instead went to spend the night at her grandparents.
13. This conduct to my mind seems to suggest that the witness was probably roped in by her mother as a witting or unwitting accomplice to the romantic activities of the two paramours. Certainly she knew more than was healthy for her age concerning the goings on in the love triangle as her answers during cross-examination clearly show. She told the court that she was aware of the demand and non-payment of “malu” by the accused in spite of which the accused continued to visit their home.
14. There was no possibility of mistaken identity as PW1 knew the accused well, and she saw him during day time. She referred to his local nickname “Kahawa”. It did not seem to me that her evidence was coached as suggested by the defence. Her evidence is by far the most direct evidence linking the accused to the murder by placing him at the scene of murder on the material date. The question this court has grappled with is whether there was need for evidence to materially corroborate her testimony in light of section 124 of the Evidence Act which states:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory

Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

- 15.Regarding this requirement the Court of Appeal stated in **Agnes Kasyoka Ibrahim -Versus- Republic (2012) eKLR** where a conviction was partly based on the sworn evidence of two minors aged 12 and 14 years:-

“We disagree with counsel for the appellant that the evidence of the two children requires corroboration. The evidence that requires corroboration is according to section 19 of the oaths and statutory Declaration Act, ... that of children of tender years who do not understand the nature of an oath. In any case a child of tender years is defined by section of the children Act as one below the age of then years.”

- 16.In an almost similar case, **Bernard Kungu Kariuki -Versus-Republic (2014) eKLR** the court said of the unsworn testimony by minors:-

“The fact that the evidence of the three children was unsworn does not in our mind render it valueless. The said evidence was admissible and credible....it is a settled principle of law that where a child of tender years gives unsworn testimony then that evidence ought to be corroborated before the trial court can rely on it to sustain a conviction”.

(See also John Otieno Oloo -versus- Republic (2009)eKLR.

- 17.In the present case, PW1 at 13 years of age was strictly not a child of tender years but she gave unsworn evidence during the trial and therefore her evidence therefore requires corroboration. This court has searched for corroboration of her evidence in the prosecution evidence. **(See Mohamed –Versus- Republic (2005) 2 KLR 138.)**

- 18.Evidence lending credence to the testimony of PW1 was given by her father, PW3 and third parties including the village elder and assistant chief (PW 5). It is to the effect that the accused was the deceased’s paramour and had been caught by PW3. Further when confronted by PW4 the accused had admitted to the offence and paid part of the traditional fine imposed. It is therefore believable that the accused was on the material date lying in wait at the home of his lover as described by PW1, and waiting for an opportunity once PW3 left the home. Clearly, as a villager, he knew that PW3 worked as a night watchman. There is no doubt that the accused was under pressure to pay out the traditional fine most of which was unpaid at the time of the murder.

- 19.The defence suggested that only the husband of the deceased (PW 3) could have had the motive to murder her. PW3 stated during cross-examination that although he was hurt by the deceased’s affair with the accused he chose to engage the elders. He further said that even though he was pained he would never have killed his wife. The fact that he was hurt and that he was the last witness to see the deceased alive cannot necessarily mean he had a stronger motive than the accused, to murder her. His conduct upon discovery of the illicit affair appears to confirm PW3’s statements.

- 20.He sought the help of PW4 first and later of PW5 when the accused failed to honour the promise to pay. As PW 3 said in cross-examination, if he had so desired he **“would have killed (her) a long time ago”**. His open conduct in dealing with the illicit lovers is to my mind inconsistent with a murder motive. Secondly, there is no evidence that PW3 created the opportunity to remain alone with the deceased on the material evening before going to work. PW1 said that it is the deceased who sent her and her siblings out to go buy flour most probably to create a chance to meet with the accused whom she had been informed was lurking in the compound.

21. PW3 said he left the deceased at home, a fact he communicated to PW1 when he met her on the way to his duty. It seems the deceased left the house soon after PW3's departure because on arrival at 7.00pm, PW1 did not find her. Her body was found in a bush close to the home by PW3 on the next day. That he is the person who found the body of the person he saw last was a matter of natural coincidence arising from their relationship; they lived in the same home as man and wife. Their children were at their grandfather's where they had spent the night. He broke the news of the death to them in that home.

22. PW 5 confirmed that the body was in a bush some 50 metres away and that there was a half eaten roast maize cob close to the body. The body had several deep cuts. If the deceased was killed by the husband, it would most likely have been in the house. There is no evidence of blood traces in the house or compound outside the scene of murder. Besides, it would have been a foolish thing for PW3 to tell PW1 as he proceeded to work that her mother was home when he knew he had already killed her, because the child would have likely found the body, exposing him.

23. It seems to me that the accused lured the accused out on the pretext of their usual rendezvous in order to get an opportunity to murder her. He had the motive. Motive is indeed a source of strong corroboration in this case. It was stated concerning motive in the case of: **Libambula -Versus- Republic (2003) KRL 683:-**

“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain of presumptive proof especially where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”

24. The circumstantial evidence in this case points irresistibly at the accused and there can be no other explanation for his presence at the home on the material evening, in the circumstances in this case other than to eliminate the deceased and escape the obligation to pay “malu” to her husband. And he hoped that the circumstances were such that PW3 would be the natural suspect. However, such a conclusion is not consistent with the evidence of the conduct of PW3 who in my view was a candid and sincere witness. The proven incriminating facts are inconsistent with the innocence of the accused or the guilt of any other person.

25. The evidence in this case therefore meets the standard set out in **Republic –versus- Kipkering Arap Koske (1949) 16 EACA 135** and **Simoni Musoke -versus- Uganda (1958) EA 715** as follows:-

“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

And as stated in **Mwangi –versus- Republic (1983) KLR 327:**

“in order to draw the inference of the accused's guilt from the circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference.”

26. The accused denied murdering the deceased but dispute admitting his love relationship with her did not expressly deny or explain his presence at the home on the material date of the murder. His defence in my view is displaced by the evidence of PW1 in part and also other prosecution

evidence. I dismiss his defence. By waylaying and luring the deceased and killing her in her own home, the accused hoped to set up her husband PW3 as her killer. He must have believed that by so doing he would rid himself of the pressure of the “malu” debt. I find him guilty as charged and convict him accordingly.

Written and signed at **Naivasha** this **16th day of January 2015**.

C.W. MEOLI

JUDGE

Delivered and signed at Malindi this 9th day of March, 2015

SAID J. CHITEMBWE

JUDGE