REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 79 OF 2010

REPUBLIC ……PROSECUTOR

VERSUS

DANIEL MUASA KAMANDE…….....……ACCUSED

R U L I N G

1. **Daniel Muasa Kamande** hereinafter ***"the accused"*** is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code.** The particulars of the offence are that on the night of 28th – 29th November, 2010 at **Kamwana** Village, **Mananja** sub-location, **Mananja** location, **Ndithini** Division within **Masaku** County murdered **Elizabeth Nzilani Kamunya** (*deceased*).

2. Facts of the case are that the deceased was married to the accused. On the 27th November, 2010 the deceased went to visit the accused where he worked and resided. On the night of 28th and 29th November, 2010 the accused rang **PW1, Anna Wayua** telling her to collect her daughter. **PW2, Nancy Mueni, Kamande** the mother of the accused received a call from him as well. He seemed to have had a disagreement with the deceased following a telephone call she had received from another man. She spoke with the deceased and promised to settle the issue the following day. On the 29th November, 2010 the body of the deceased was found in their house having been assaulted. It had deep cut wounds on the neck that caused her death.

3. Later in the evening the accused went to his parents' home alleging having been attacked by people who killed his wife and forced him to drink pesticides. They reported the matter to the Assistant Chief and later to the police.

4. At the close of the prosecution's case evidence that could point at the accused is circumstantial. It is submitted by the **State Counsel** that the deceased was married to the accused and was with him on the fateful night when a dispute arose. The deceased having been found murdered there was not any other reasonable hypothesis than the accused having murdered the deceased.

5. In the case of ***Abanga alias Onyango versus Republic - Criminal Appeal No. 30 [1990] (UR)*** the Court of Appeal stated thus:-

> "***It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-***
>
> *i.* ***The circumstances from***

which an interference 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 guilty 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."***

6. In another case of ***N versus Republic - Criminal Appeal No. 446 of 2007*** the Court of Appeal interrogated whether circumstantial evidence was sufficient to support a conviction. The appellant was charged with murder of her child aged about one year. There was no eye witness to the killing of the child; the evidence against her was circumstantial. The appellant was sentenced to death. In allowing the appeal, the Court held-

"Circumstantial evidence is often the best evidence of surrounding circumstances which by intensified examination is capable of accurately proving a proposition.

However, circumstantial evidence must always be narrowly examined. It is necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there are no other co-existing circumstances which would weaken and destroy the inference."

7. According to **PW4, Joseph Kamande Gathoki,** the accused person's father, the accused was employed by a **Mr. Kamau** as a farm labourer. It is not disclosed whether or not the accused resided at the home of his employer or not. The police in the course of investigations failed to record statements from any persons who may have witnessed the altercation, if any, that happened. The only evidence on record was that the accused disagreed with the deceased and wanted her to leave. PW4 on cross-examination stated that the accused was in a bad state having ingested some substances, alleged to be pesticide. They continued giving him milk to neutralize the effect of the drug in the stomach. His explanation was that they were attacked by people who killed his wife. Whether or not the allegation was investigated remains unexplained.

8. It is not explained what happened after the phone calls were made. What the prosecution wanted the court to believe was that after the disagreement, the only inference that can be drawn is that the accused murdered the deceased. The accused in narrating what happened claimed that the wife was murdered by some other people who had allegedly been communicating with her. The question begging, therefore is whether, the circumstantial evidence of the accused having disagreed with the deceased was so cogent such that it excluded the possibility of another person having murdered the deceased? The question ought to have been answered but the same was not.

9. In causing the accused to be charged, therefore the police acted on suspicion. It was presumed that since he was the person who had disagreed with the deceased and did not want her he was the murderer. In the case of ***Joan Chebichi Sane versus Republic- Criminal Appeal No. 2 of 2002 -****it* was held:-

"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt… suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence."

10. There is proof that the deceased was assaulted and wounded badly. She had deep cut wounds on the neck which is proof that whoever occasioned it intended to fatally wound her. The prosecution

however, failed to establish any intention on the part of the police to investigate the matter as to who indeed did the act that resulted into her death. They only acted in suspicion.

11. It was held in the case of ***Ramanlal Trambaklal Bhatt versus Republic (1957) E.A. 332*** that;-

> ***"A prima facie case must mean where a reasonable tribunal, properly directing its mind to the law and the evidence adduced could convict if no explanation is offered by the defence."***

12. The prosecution having adduced evidence amounting to strong suspicion, that the murderer was the accused without adducing cogent evidence that indeed he was the culprit, if put on his defence and he elects to remain silent no conviction can follow. In the premises, I find that no evidence has been adduced to warrant the accused person being put on his defence. He is therefore not guilty and I acquit him under **Section 306(1)** of the **Criminal Procedure Code.**

13. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **14th** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE