



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. 49 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MUSIENZI MMBWANGAACCUSED

JUDGMENT

Introduction

1. The accused herein has been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 75 Laws of Kenya. Particulars of the offence are that **DAVID MUSIENZI M'MBWANGA**: *On the night of 1st and 2nd November 2008 at Masinde Village, Hamuyundi sub-location in Vihiga District of Western Province jointly with others not before court murdered **TERESIA LIABULI ONYANGO***. The charge was read to the accused person herein who pleaded not guilty to the same. This case was partly heard by Justice Lenaola who recorded the evidence of five Prosecution Witnesses before he was moved on transfer and Justice Chitembwe who took evidence of one Prosecution Witness before he was transferred.

The Prosecution Case

2. The Prosecution called a total of Six (6) witnesses. In his evidence **PW1 Patrick Mudenge** the village Headman from Masinde Village told the court that on the 1/11/2008 at 7.30 p.m. the deceased Teresia Liabuli went to his home and told him that the accused had stolen her beans in a sufuria and run off and she wanted him arrested. He waited until the next day the 2/11/2008 when he told the Assistant Chief Hudson Libuywa (PW2) of the deceased's complaint and together they went to the accused's home but did not find him. Further that on the same 2/11/2008 he went to the deceased's house at about 8.00 a.m. but did not find her. At about 4p.m on the 2/11/2008 Richard Kegode (PW3) informed him that he had seen a body in a banana plantation next to the deceased's house. PW1 went to the scene and saw the body of the deceased. The body had been buried 8-10 meters away from the deceased's house. He testified that the crowd that had gathered at the deceased home was hostile to the accused's father which led him to take the accused to the police post for safety. He later went back to the scene of crime accompanied by police who took away the body which had been buried and only the top of the head could be seen. PW1 stated that there were injuries on the head but he never saw the other parts of the body. He explained that the accused was later arrested from another village. PW1 identified him in the dock.
3. On Cross examination by Mr. Kundu for the accused PW1 explained that when the deceased went to see him on the 1/11/2008 she was accompanied by a small boy whose name he did not know and whose age he estimated to be 12 years. He also stated that he was with his wife at home that night. He explained further that he went to the accused's house where he found a panga with blood stains. This was after they had found the body. He also testified that in the morning of 2/11/2008

- while they were looking for the accused, he did not enter the deceased's house. He reiterated that they went to the deceased's house but did not find her and that he never saw blood when he was told that the body was found. He also told the court that the accused's father was arrested but he did not know the reason for his arrest. That the stolen sufuria was not found and that the police arrived at the scene of crime at 10 p.m.
4. **PW2 Hudson Libuywa Muganda**, Assistant Chief Hamuyundi Sub-location told the court that on the 2/11/2004 at about 8.30 a.m. he received a report from PW1 that the accused had stolen the deceased's sufuria in which there were cooked beans. Together with PW1 they went to the accused's house but they did not find him. They did not also find the deceased. He left a message with the deceased's neighbor and went home. He testified that he later received a call from PW3 Richard Sagalla who told him that the deceased had been found in a makeshift grave about 10m from her house. He then made a report to the police at Kilingili Police Post. The Police took the body of the deceased at 10 p.m. PW2 told the court that the deceased was arrested two (2) weeks after the incident in Liadywa sub-location.
 5. On cross-examination by Mr. Kundu PW2 confirmed that the panga was recovered by PW1 who told him that he got it from the accused's house. He told the court that when they went to the accused's house in the morning they never searched it and he never saw the panga. He also testified that he never saw any blood stains.
 6. **PW3 Richard Kegode Sagalla** from Masinde Village testified that on the 2/11/2008 at 5p.m while herding his goats he saw people at the deceased's home and decided to find out what was happening. He was told that the deceased had not been seen and that they were searching for her. He then joined the search team and they found the deceased's body in a disturbed place with fresh soil and leaves. He then called PW1 and PW2 and informed them of their findings. **PW4 Christopher Luganyi** from Viyalo Village Vihiga District an employee at Molo Hospital Identified the deceased body for post mortem. PW4 was a son to the deceased.
 7. **PW5 No. 219124 C.I.P** Albert Tawanya attached to C.I.D Vihiga Division testified that he received a report on the 2/11/2008 while at Vihiga Police Station from Kilingili Police Post through CIP Karanja the O.C.S that the body of a lady who had gone missing had been found in a banana plantation next to her house. He then proceeded to the post and found C.I.P Karanja, PW2 and one Benson father of the accused who had been arrested. They then proceeded to the scene of crime where they found the body which had scars and injuries on it. They searched the area and found that there were blood stains near her house. A panga which had slight blood stains was recovered by the sub-chief and was taken to the Kilingili Police Post. He also testified that he took the panga for analysis at the Government Chemist. He produced the Panga as Pexhibit 1 and the report from the Government Chemist as Pexhibit 2. He told the court that the accused was arrested on 26/11/2008. PW5 also testified he was the one who investigated the case.
 8. On cross examination by Mr. Kundu for the accused person PW5 referring to Pexhibit 2 told the court that the deceased's blood was drawn during postmortem and that PExhibit 1 was recovered by the Assistant Chief and the Village Elder from the suspect's house where he resided with his father Benson. His investigations found that the panga belonged to the accused person. He also said that the killing took place inside the victim's house as there were blood stains from the house to where the body was found buried in the shallow grave. He added that there were three houses in the deceased's compound and the deceased's house which was open when the police officers went there had dry blood stains at the door. PW5 further stated the accused's father told him the accused person was not at home on the 1/11/2008 and 2/11/2008.
 9. The last witness to testify was PW6 Dr. Nyumbile Boniface Ndalul based at St. Mary's Hospital Mumias who presented a postmortem report done by Dr. Limo on 2/11/2008 in which Dr. Limo formed the opinion that the cause of the deceased's death was cardiopulmonary arrest due to the deep cut wound on the neck. The Postmortem Report was marked as Pexh3. PW6 also testified that the mental examination done on the accused established that he was fit to stand trial.
 10. At the close of the prosecution, this court found that a prima facie case had been established against the accused person who was put on his defence. Before the accused testified, this court complied with **section 200** of the Criminal Procedure Code following transfer of Hon. Justice Chitembwe who was hearing this case previously. The accused agreed to proceed with the case from where it had stopped.

The Defence Case

11. The accused gave sworn testimony. He claimed that at the time of his arrest on 5/12/2008 he was living alone. He said that he was arrested as he was going to work and was not told the reason for the arrest. He claims to have been arrested by 2 A.P's who brought him to court where the charges before court were read to him. He denied any knowledge of the allegations. He claimed that he did not know the deceased and that he never killed her.
12. On Cross examination by Mr. Oroni the accused admitted that he recorded a statement with the Police but maintained that he knew neither PW3 nor the deceased. He denied the allegation that the deceased had cooked beans on the 1/11/2008 and that he was the one who stole the beans. He stated that he was arrested on the 5/12/2008 as he went to work. He admitted that PW1 was their village headman and PW2 the Assistant Chief.

Issues for Determination

13. Upon conclusion of the hearing and if the accused herein is to be found guilty of the offence of murder as set out under **Section 203** as read with **Section 204** of the Penal Code the prosecution must prove beyond reasonable doubt the following:-
 - a. The death of the deceased person and the cause of death.
 - b. That the deceased met his death as the result of an unlawful act or omission on the part of the accused.
14. To prove the above, the prosecution must place cogent evidence before the court to prove the existence of any one or more of the circumstances set out under **Section 206** of the **Penal Code** which section provides as follows:-

“206. Malice aforethought shall be deemed to be established by evidence proving any one 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 or 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.”**

The Submissions

15. It is the case of the prosecution that it is the accused person herein who killed the deceased. The prosecution relies on the evidence of PW1 the village headman and Assistant Chief respectively of Masinde village. The prosecution also relies on the evidence of PW5, Number 219124 Chief Inspector Albert Tawanya, the Investigating Officer in this case. In his testimony PW1 stated that when he and other officers went to the scene, they found blood stains near the deceased's house and further that a panga that was slightly stained with blood was recovered from the accused's house by PW2.
16. Counsel for the defence submitted that the accused has categorically denied having a hand in the murder of the deceased; and further that when PW5 interrogated the father of the accused, he told PW5 that the accused had not been in the area on 1st and 2nd November 2008 when the alleged murder is said to have taken place.
17. Counsel submitted that according to the evidence on record, PW1 is the person who saw the deceased last before his unfortunate death as the deceased had gone to PW1's home to lodge a complaint against the accused on the night of 01/11/2008 at about 7.30 p.m. It was also submitted that there is contradiction between the evidence given by PW2 and that of PW5 as to whether or not there were blood stains in the deceased's house. That according to PW2 who went into the

- deceased's house around 8.30 a.m. on 02/11/2008, there were no blood stains, yet when PW5 went to the same house around 8.00 p.m. on 02/11/2008, he saw blood stains from inside the deceased's house all the way to the place where her body was found. Counsel urged the court to make a finding that the death of the deceased must have taken place after 8.00 a.m. on 02/11/2008.
18. Counsel further submitted that the prosecution did not lead any evidence to prove that the accused person was seen around the scene of the killing at any point in time on 02/11/2008, and that this lack of mention of the accused's presence tallies with the evidence of PW5 who was told by the accused's father that the accused was not at home on 1st and 2nd November 2008. In summary, counsel submitted that the State did not lead any evidence linking the accused to the death of the deceased, and that the accused's arrest was based on mere suspicion that he may have been the one who killed the deceased due to the fact that the deceased had reported to PW2 that the accused had stolen her cooked beans together with the sufuria. Counsel submitted that suspicion no matter how strong can never form the basis for a conviction. Counsel urged the court to set the accused at liberty.

Analysis and Findings

19. I shall first deal with the twin issues that fall for determination. The first issue is whether the prosecution has proved beyond reasonable doubt that indeed the deceased died and what the cause of her death was. On this issue there is no doubt. The body of the deceased was identified by her son Christopher Luganyi during post mortem examination conducted by Dr. Limo on 07/11/2008. According to the post mortem report, PExhibit 3, the cause of the deceased's death was said to be cardio respiratory arrest due to excessive bleeding from a deep cut wound on the anterior aspect of the neck.
20. Other witnesses who testified about the deceased's death were PW1, PW2, PW3 and PW5. PW1 stated that when he saw the deceased's body, it had injuries on the head. PW2 testified that he saw the body of the deceased which had been buried in the banana plantation about 8-10 metres from her house. PW3 is the one who removed the leaves covering some fresh soil over the deceased's shallow grave. There is therefore no doubt that the deceased died and that she died from excessive bleeding due to a deep cut wound on her neck which had interfered with the main blood veins.
21. I now turn to the second and more difficult issue of whether the deceased met her death as the result of an unlawful act or omission on the part of the accused. This issue is based on circumstantial evidence, and though it is accepted that circumstantial evidence is as capable of proving a charge against an accused person as direct evidence would, it is not lost to this court that for circumstantial evidence to meet the threshold of proof required in criminal cases, there must be an unbroken chain of evidence from beginning to end establishing a nexus between the death of the deceased and the acts of the accused person.
22. In the instant case, the circumstantial evidence is that at about 7.30 p.m. on 01/11/2008 the deceased went to the home of PW1 and informed him that the accused had stolen her beans together with her sufuria and that she wanted the accused arrested. PW1 also testified that on the 02/11/2008, he recovered a blood stained panga from the accused's house. The panga, together with blood samples from the deceased (marked B) and from one Benson Ebwanga (not accused) marked A were taken to the Government Chemist for analysis. From the report of the Government Chemist, PExhibit 2, the results of the analysis were as follows:
1. The blood sample of the suspect (item A) was found to be of group AB.
 2. Blood sample of the deceased (item B) was found to be of group A.
 3. The panga (item C) was lightly stained with human blood of group A.
23. The summary of the Government Analyst opinion is that the blood stains on the panga (item C) matched in group the blood sample of the deceased, and that the blood stains, could have come from the deceased after injury.
24. According to the evidence of PW1 and PW5, the panga was found in the accused's house. PW5 stated that the accused and his father Benson lived in the same house where the panga that had the blood stains with same blood group as deceased's blood was found. PW5 also told the court that

- during his investigations he established that the panga belonged to the accused.
25. In this case, and although there was no dusting for accused's finger prints on the panga, I am satisfied that the panga belonged to the accused person together with his father Benson who was nearly lynched when he went to the deceased's home on the morning the deceased's body was found in a shallow grave in her banana plantation. I am also satisfied that the accused had a good motivation to kill the deceased whose beans he had stolen. The deceased had wanted the accused arrested in connection with the theft. It is my view that this is not a case of mere suspicion. There is a chain that leads directly to the accused's house where the murder weapon was found. The contention by Mr. Kundu who appears for the accused that the deceased must have been killed after 8.00 a.m. on 02/11/2008 does not in my humble view, have a basis.
26. Further the fact that PW1 may not have observed blood stains at the scene is not fatal to the prosecution case. PW5, a trained police investigator could see some things which an ordinary person like PW1, a village elder, and PW2, an Assistant Chief, could not see.
27. I also find that the State proved malice aforethought under **Section 206 (a) and (b)**. By cutting the deceased on the neck where vital blood veins were, the accused knew that such act would result in the death of the deceased or cause grievous harm to her.
28. I have carefully considered the defence of alibi given by the accused, but I find that the same has been fully displaced by the evidence adduced by the prosecution. I also find the accused's denial of knowledge of his own father to be a strange thing. Although the accused does not have to prove his innocence, I find his evidence in chief and his evidence on cross-examination contradictory. In one and the same breath, he said he was arrested on 05/12/2008 and again on 02/11/2008 as he made his way to work. Such evidence seems to suggest that the accused person is not to be trusted with his words. I also watched the accused as he testified. I was not impressed by his demeanor.

Conclusion

29. Upon consideration of all the evidence, the submissions and the law, I am satisfied that the prosecution has proved beyond reasonable doubt that the accused person herein, David Musienzi MMbwanga, jointly with others not before court murdered Teresa Liabuli Onyango. I therefore find him guilty as charged and convict him accordingly under **Section 322 (1)** of the Criminal Procedure Code.
30. Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 19th day of February 2015

RUTH N. SITATI

JUDGE

In the presence of

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

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

Mr. F. JumaCourt Assistant