



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL (MURDER) CASE NO. 2 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL ANYANGO OMOYO.....ACCUSED

JUDGMENT

Introduction

1. The accused person herein, Daniel Anyango Omoto is charged with murder contrary to section 203 as read with section 204 of the penal code, the particulars being that between 1st and 6th day of January, 2010 at Ebukwala Village, Wambilishe Sub-Location, Kisa Central District in Khwisero District within Kakamega County with others not in court, murdered JUDITH EKALICHE OURE. He denied the charge when he appeared for plea on 15th March, 2012. The accused first appeared in court on 11th January, 2012

The Prosecution case

2. The prosecution called 10 witnesses from whose testimonies the following evidence flows;- On 01/01/2010 PW1 Frida Atieno Ambaisi Ikhuli left her home at about 3.00 pm for the shopping centre. On the way she met the deceased who was her sister –in-law in the company of her boyfriend by the name Steve (pw2). The deceased and Steve went away for about 10 minutes before coming back to where PW1 was and then left for the disco. The deceased and Stephen came to where PW1 was for the third time, after which the two parted company and the deceased left with one of the other boys who was in the group. That boy according to PW1 is the accused in this case. On the 02/01/2012 PW1 went to the home of the deceased to find out if she had come home and was told by the deceased’s mother that the deceased did not come back home on 01/01/2012. Then on 06/01/2012 PW1 learnt of the death of the deceased.

3. PW2, Stephen Nyangweso testified that on 01/01/2010 at about 2.pm he met the deceased outside Cosmos Bar within Wambilishe Sub-Location after being told by the accused herein. That the deceased wanted to see him (PW2). After seeing the deceased, pw2 left together with his brother –in-law for Luanda Market. On 07/01/2010, PW2 learnt that he deceased had not been seen at home since 01/01/2010. Later he went to the scene where the deceased’s body had been found and there at, he saw a jeans trouser and shoes which the accused had on on 01.01.2010. The clothes were muddy.

4. Later on the same day, PW1 went to the nearby SDA church and recovered the deceased’s ID from the church secretary. He took the ID to the police and also reported the matter to the area Assistant

Chief. The matter was also reported to the AP's and then to Khwisero Police Station. When PW2 visited the mortuary on 08/01/2010 and viewed the deceased's body one of the deceased's hands had been cut while her clothes had been pulled up. After the deceased's death, the accused disappeared from home and was not arrested until one year later. PW2 stated that he had known the accused and the deceased for 6 and 5 years respectively.

5. In cross examination PW2 testified that the accused knew that he (pw2) and the deceased were friends and that they had one child between them. He also stated that the clothes he saw at the scene had no blood on them though there was some hair at the scene.

6. Mary Nyamwala Ougo testified as PW3. She testified that the deceased left home at about 1.00pm on 01.01.2010 for Emulwanda Market. She said the deceased was also going to take some money from M-pesa. At about 7.00pm PW3 tried to reach the deceased on phone but the deceased did not answer. Then on 06/01/2010 PW3 was informed of the discovery of a woman's body. On the 07/01/2010 the police took her to the scene where she was shown some hair, a long trouser, shoes and a sweater. She also accompanied Stephen (pw2) to Mbale mortuary on 08/01/2010 and saw the deceased's body. After post mortem the body of the deceased was released to the family for burial. PW3 stated that though she did not know the accused before, he disappeared from home for about one year after the deceased died.

7. During cross examination PW3 testified that the deceased who was also known as Doro was Steven's girlfriend and that they had one child between them.

Pw4 was Morris Oyondi the village elder who testified that on 06/01/2010 he was informed by one Fanice Amboka about the presence of the body of a woman within the village. After visiting the scene where the body lay, he reported the matter to the chief and later to police who went to the scene and collected the body. PW4 also stated that a little distance from where the body lay, he saw a jeans long trouser and some shoes. He identified both the long trouser and the shoes in court. He also testified that the deceased did not have any clothes on her body and had the palm of one hand cut off. He also stated that there was no blood at the scene and that there was also no sign of struggle.

10. John Ambuka Amukoya was PW5. He recollected that as he took his cows for herding on 06.01.2010 he smelt something in the vicinity. On checking he saw the body of a woman and immediately rushed home to tell his wife Fanice about it. Fanice went and made a report to the village elder (PW4). He accompanied PW4 to the chief's office but were referred to the police who later came and took away the body. He also told the court that he saw some clothes and shoes at the scene. PW5 identified the clothes and shoes.

11. PW6 was Alfred Katechi. He is brother-in-law to Mary Nyamwala Ougo (pw3). He testified that PW3 called him on 06/01/2010 and informed him that the deceased had disappeared from home. He also identified the deceased's body at the mortuary for post mortem purposes. Deborah Mwarika Omoto was PW7. She stated that on 01/01/2010 the accused went home at about 9.00 am and prepared food for himself and for her. PW 7 also testified that on 31.12.2009 she heard that someone had been killed. PW7 told the court during cross examination that the accused was arrested one year after the incident because he had left home to look for employment. She also told the court the accused was arrested because he had disagreed with some boy who had taken firewood from the family land.

12. Number 231505 Inspector Jackson Matheke testified as PW8 he stated that while he was on duty at Khwisero police station at about 1.00pm on 06.01.2012 two people went to the station with a report of the death of the deceased. He proceeded to the scene after booking the report, took the body to Mbale Hospital Mortuary and thereafter commenced investigations which included tracing the deceased's movements prior to her death. He stated that according to the investigations the deceased was last seen at Emulwanda in the company of the accused. He also stated that some clothes and the deceased's ID were found and handed over to him by the area Assistant Chief.

13. During cross examination PW8 stated that he did not see any clothes at the scene when he went there the first time. He also testified that the deceased wore only a bra and a piece of cloth on the lower

part of the body. According to PW8, Steve was the first suspect in this case but he released him after Steve had recorded a statement. PW8 produced the long trouser as P exhibit 1 while the shoes were produced as P. Exhibit 2.

14. The next prosecution witness was Dr. Masika Collins who testified as PW9. He is the one who conducted the post mortem examination on the body of the deceased on 11.01.2010. According to PW9, the deceased was 23 years old. The body had a visible cut wound on the right thigh. The right hand was cut off and there were bruises on the neck and private parts were mutilated. Internally, the genital system had mutilation and the private parts and cervical system also had injuries. In the doctor's opinion the cause of death was respiratory arrest secondary to strangulation. Dr Masika produced the post mortem report as P- Exhibit 3

15. PW10 was Augustine Ndakala Alutei the area Assistant Chief of Mushangu Sub-Location but acting Chief as at 06.01.2010. On the material day he received a telephone call from Morris Oyundi PW4 informing him of the discovery of the body of the deceased. He advised the reportees to make a report at Khwisero police station.

16. PW10 also stated that on 07/01/2010 the deceased's Id card was taken to his office and same was later identified by the deceased's mother, PW3 . PW10 also took PW3 to the scene on that 07.01.2010 and they found some clothes pair of jeans and some open shoes. The clothes were identified by PW2 as belonging to the accused. PW10 also stated that though he used to see the accused person he did not know his names. The prosecution then closed its case.

The defence case

17. At the close of the prosecution case, the accused was found to have a case to answer and was put on his defence. The accused elected to give sworn evidence but did not call any witnesses. He testified that on 01/01/2010, he was at home where he was building his house and also preparing the shamba for planting of maize. He stated that after he had planted his maize, he left for Nairobi until 2012 when his mother called him to go home and build his house. He travelled from Nairobi and on the evening of 08.01.2012 he was arrested. He denied ever knowing the deceased or of her death. He also denied running away to Nairobi after the deceased died. He also testified that the clothes that were produced as exhibits did not belong to him. He however conceded that he knew Steven, PW2, since the two of them are neighbours and that it was PW2 who did not want him (accused) to build a house.

18. During cross examination, the accused admitted and at the same time denied knowing PW1. He also denied being with the deceased when he spoke to Steven at 3.00pm on 01/01/2010. When asked by the court to explain the relationship between him and Steven the accused stated that Steven's father was the father to her immediate older sister and also told the court that the two families had a dispute over land. The defence then closed its case.

Submissions

19. At the close of the hearing Mr. Osando counsel for the accused person submitted that the state had not proved the allegations for murder against the accused person for reasons that there was no eye witness who saw accused commit the offence. He further submitted that the evidence of PW2 which suggested that some clothes belonging to the accused were found at the scene of crime was contradicted by the testimony of PW8 who testified that no such clothes were at the scene on 06/01/2010. Counsel also submitted that no proper investigations were carried out in the murder of the deceased especially when no photographs of the scene were taken by the police. It was counsel's final submission that PW2 Steven should have been charged together with the accused person in this case. He urged the court to make a finding that the accused person is not guilty of the offence of murder.

20. Mr. Oroni, prosecution counsel, submitted that the evidence on record and especially the evidence of PW1 which is corroborated by the evidence of PW2 clearly proves that the accused person who was the last person to be seen with the deceased before her decomposing body was discovered on 06/01/2010

is the one who murdered the deceased.

The Law

21. Section 203 of the Penal Code provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder". The punishment for such an offence is prescribed under section 204 of the Penal Code. In essence therefore the prosecution must prove the fact of death and also the fact that the person who caused the death of the deceased had malice aforethought.

22. Section 206 of the Penal Code defines malice forethought in terms of any one of the following circumstances on the part of the accused;-

- 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.

23. It is to be noted that once the prosecution proves one or a combination of the above circumstances, malice aforethought, will be deemed to have been established; and in such a situation, there would be no escape route for the accused person.

Analysis and Findings.

24. In light of the above provisions of the law, the issues for determination are the following.

- i. Whether the prosecution has proved, whether directly, or indirectly that it is the accused person who caused the death of the deceased through an unlawful act or omission; and
- ii. Whether the accused person, in doing so had the requisite malice aforethought.

25. From the record there is no direct evidence in this case regarding the actual event that led to the death of the deceased. There is only circumstantial evidence. Does the said circumstantial evidence form an unbroken chain with no possibility that the culprit could be someone other than the accused? When the circumstantial evidence is good, it is often the best evidence. In the case of **Ndurya – Vrs – Republic (2008) KLR 135**, it was held inter alia, "that circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary before drawing the inference of the accused's person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not disclose a lingering possibility that the offence may have been committed by a person other than the appellant".

26. In the case of **Mwathi – vrs Republic (2007) 2 E.A 334**, the Court held, inter alia that "in the absence of eye witnesses, the court must consider whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt (**Rex- Vrs – Kipkering Arap Koske 16 EACA 135 and Teper – R (1952) A.C 480** followed.)

27. Regarding motive, it was held in the same Mwathi case (above) that “generally speaking, motive is not an essential element to prove a crime. (**Libambula – Vrs – Republic**) (2003) KLR 683 followed).”

28. Further in the case of **Mwendwa – vrs – Republic (2006) 1KLR 133** the Court held, inter alia, that “to prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. Secondly as is now settled law, the chain must never be broken at any stage”.

29. In the instant case, both PW1 and PW2 stated that they saw the deceased in the company of the accused between 3.00 pm and 6.00 p.m. on 01.01.2010. PW1 in part of her evidence in chief stated “on 01/01/2010 I left home at 3.00pm heading to the shopping centre. My sister in law came with another boy. We talked and left. After 10 minutes they came back and left heading to disco. The two came for a third time. My sister in law was Judith Achieng. On the 3rd time, she stepped aside and started talking to her boyfriend of the name Steven. The two parted and the deceased left with the boy she was with earlier that day, I did not see my sister-in-law again----- The accused is the boy who was with the deceased that evening. I saw him, for the first time that evening “

30. Pw2, Stephen Nyangweso on his part stated in part; “on 1/1/2010 at about 2.00pm I was at my place of work. Daniel Omotto came and told me that there was a visitor calling me. I went to Cosmos Bar and saw the deceased outside the bar. Daniel Omotto is the accused. He didn’t reveal the name of my visitor. The deceased was called Jacqueline Ekaliche..... My brother in law had a car. I left with my brother in law for Luanda. I left the deceased with the accused. I came back and went on with my business. I didn’t see the two again.”

31. What the above evidence shows is that the deceased was in the company of the accused in the afternoon of 01.01.2010 and the deceased was not heard of again until her body was discovered in a thicket on 06/01/2010. From 01/01/2010 at about 3.00pm until he was arrested on 08/01/2012, the accused was never seen in the area. It is my considered view that the accused person is the only one who knows what happened to the deceased between the time he was with her on 01/01/2010 until her body was discovered on 06/01/2010 in a semi-decomposed state.

32. Pw8 stated that from his investigations he established that the deceased was last seen with the accused during the cultural festivities at Mulwanda trading centre. All the above circumstances have satisfied me that the accused is the only person who knows what happened to the deceased on the fateful day. This is regardless of whether the accused persons clothes were found at the scene or not.

33. I have also carefully considered the accused person’s alibi defence, and his allegation that he and PW2 had a dispute over land and that PW2 did not want him to build a house. In my considered view this alibi defence is an afterthought as are his allegations of the existence of a land dispute between himself and PW2. If indeed such a dispute existed between the accused and PW2 it is not clear why the accused person failed to give his counsel instructions on the same for the purposes of cross-examination. The prosecution evidence on who was with the deceased during the final daylight hours on 01.01.2010 has not been shaken at all and I accept as the truth the prosecution’s version of the evidence. I am thus satisfied the deceased died as a result of the unlawful act of strangulation by the accused.

34. The next issue for determination is whether malice aforethought was proved by the prosecution. From the evidence of Dr. Masika, PW9, who did the post mortem examination on the body of the deceased, the deceased’s clothing comprised of a torn underpant and dress and the body had a visible cut wound on the right thigh, the right hand was cut off, there were bruises on the neck and the private parts were mutilated. There is no doubt in my mind that anyone inflicting such serious injuries on intended either to kill or to cause grievous harm to the deceased. In this case the deceased died after her right hand was chopped off, part of her right thigh inflicted with a wound and finally strangled. The accused must also have known that what he did to the deceased would probably cause the death of the deceased or cause grievous harm to her, although such knowledge may have been accompanied by indifference whether death or grievous bodily harm would result.

Conclusion

35. In conclusion, I find and hold that the prosecution has proved its case against the accused person herein beyond any reasonable doubt and I find him guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. I accordingly convict him under section 322(1) of the criminal procedure code.

Orders accordingly.

Judgment delivered dated and signed in open court at Kakamega this 29th day of September 2015

RUTH N. SITATI

JUDGE

In the presence of

Mr. Omweng for State

Mr. Ondieki for Onsando for Accused

Mr. Lagat - Court Assistant