



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 25 OF 2010

REPUBLICRESPONDENT

VERSUS

ANDREW NDETI KIMELEKOACCUSED

JUDGMENT

ANDREW NDETI KIMELEKO hereinafter referred to as the Accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars being that:-

“On the night of 16th and 17th of September, 2010 at [Particular withheld] Village, Kisingha location of Taita–Taveta County he murdered R M”.

The prosecution called nine (9) Witnesses to buttress their case. The matter commenced before my sister Honourable Lady Justice Nzioka who heard seven (7) Witnesses.

After compliance with Section 200 of the Criminal Procedure Code the matter proceeded from where it had reached.

The brief facts of this case are that in the morning of 17th September, 2010 **B W (PW 2)** went to his grandmothers house where he had been sent by his mother and upon arrival and calling her, got no response. He returned back and informed his mother **T W (PW 1)** who decided to go and find out what had happened. Upon arrival and opening the door she found her mother (the Deceased) lying on the floor, while half naked. The skirt and petticoat had been pulled up. Her panties had been lowered down to the knees level. There was a headscarf which had been used to gag her mouth. Upon a closer look she realized that her mother was dead. She screamed for help and members of public arrived at the scene including the Accused who was a farm hand and who was staying in a nearby house.

The matter was reported to police who arrived and took the body to the mortuary after taking photographs at the scene.

The Doctor who performed the post mortem on the body of the Deceased found that the panties and T-shirt of the Deceased were blood stained regamortis had settled. Blood was oozing from the mouth, tongue was hanging out, there were scratch marks on the lower side of the neck, there were bruises on the chest wall.

There was presence of blood in both chest cavities. There was abrasion on the left side of the vagina.

She formed the opinion that the cause of death as asphyxiation which could have been caused by strangulation or choking.

She ordered for a vaginal swab.

The investigating officer (**PW 9**) testified that the Accused was the Deceased farm hand. That he had interrogated him and he had said that he was from the shopping centre. When he heard screams from the house of the Deceased and he was the first to find the body but he did not inform the neighbours. Upon cross-examination by Counsel for the Accused Mr. Tarus, he conceded that in his statement he did not record that the Accused was the first to find the body of the Deceased. He also had not recorded that the Accused wanted to escape by riding a bicycle. That he also did not record that the Accused had informed him that the Deceased had a man in her house that night. It was his evidence that they had suspected the Accused as he was staying in the same compound with the Deceased, but samples taken were negative.

In the present case the first person to be held as a suspect was the Accused. Reasons being that he was an employee of the Deceased who was looking after her cattle and that he was the only other person staying in the compound.

What has transpired in evidence is that the Deceased was staying alone in her own house. The Accused was staying in another house. The distance from the Deceased house to that of the Accused has not been given.

This compound was not fenced. There were no dogs in the homestead.

In this case nobody saw the Accused kill the Deceased. The investigating officer did not establish any motive for the murder. The samples taken at the scene did not establish the Accused as the murderer. The Accused was arrested and charged purely on the basis of suspicion.

It is trite law that suspicion alone however, how strong cannot form the basis of a Conviction. The evidence adduced before the Court is founded on suspicion alone. The prosecution has not proved this case beyond reasonable doubt. The Accused is found not guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and is acquitted accordingly.

He is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **28th** day of **May, 2014**.

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M. MUYA

JUDGE

28TH MAY, 2014

In the presence of:-

Learned Counsel for the State Mr. Kiprof

Learned Counsel for the Defence Mr. Egunza holding brief Tarus

The Accused present

Court clerk Musundi