



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL CASE NO. 9 OF 2011.

REPUBLIC ::: PROSECUTOR.

VERSUS

ZAKAYO OPENDA MUGANDA ::: ACCUSED.

J U D G M E N T.

Zakayo Openda Muganda (herein the accused) is charged with murder, contrary to section 203 read with section 204 of the penal code, in that between the 26th December, 2010 and 14th January, 2011, at Kapsara Trans Nzoia county, jointly with others not before court murdered Bernard Kirui Chelule.

The case for the prosecution was that the deceased had gone missing on the 26th December, 2010, after having been in a bar or club with Paul Mwanza Isaac (PW5). Efforts by his family and others to look for him did not bear any fruit and a missing person report was made to the police on 3rd January, 2011.

On or about the 13th January, 2011, a brother to the deceased, **Sammy Kirui (PW1)**, was informed by a bar-maid, **Margaret Njeri Kamau (PW2)**, that the accused knew where the deceased was.

Njeri (PW2), indicated that the accused had on 31st December, 2010, told her that he was with the deceased on 31st December, 2010 when they ushered in the new year and that he knew where the deceased was. He promised to disclose more information at a later stage and cautioned Njeri not to tell anybody.

Njeri, however relayed the information to relatives of the deceased and to the police through P.C. Douglas Naibei (PW7) and when she later met the accused he declined to give further information.

The deceased's sister, **Mary Cheplemboi Chelule (PW3)**, lastly saw the deceased at 3.00 p.m. on 26th December, 2010, before his dead body was found by their brother (PW1) and others at the shores of river Nzoia on 14th January, 2011.

Paul Maina Malonza (PW4), was among those who found the body at the river before it was retrieved from therein and taken to the mortuary where a post mortem was performed by **Dr. Blastus Kakundi (PW6)**.

The doctor formed the opinion that the cause of death was cervical spine dislocation due to strangulation with deep cuts of the left wrist and left shoulder.

Ultimately, the accused was charged with the present offence.

The accused denied the offence. His case was that he was celebrating Christmas day at his home on the

25th December, 2010, when he proceeded to a local pub for entertainment with friends. He later returned to his home and slept. He proceeded to the same pub on 4th January, 2011, where he was asked by a barmaid whether he had seen or met the deceased. He answered in the negative but he was accosted and arrested by two police officers on the 13th January, 2010, on allegation that he was responsible for the death of the deceased. He denied the allegation and contended that he knew nothing about how the death occurred.

It is apparent from the foregoing evidence that the death of the deceased from strangulation was not disputed. Indeed, the deceased suddenly went missing after being seen lastly in a bar where Njeri (PW2) was a bar-maid. She said that the deceased was with the accused in the bar when she served them upto closing time. They were drinking alcohol and after closure time they went to another bar but prior to that, the deceased and another person returned to the bar with the intention of buying cigarettes which were not available.

Njeri did not know what happened to the deceased after he went to another bar with another person who was not the accused after failing to find cigarettes. She learnt of the disappearance of the deceased on 28th December, 2010, but it was on the 31st December, 2010, that the accused informed her that he was last with the deceased when they were ushering in the new year and that he knew where the deceased could be found.

Njeri passed the information to the deceased's nephew (PW5) and the police. This implied that she suspected the accused of having something to do with the disappearance of the deceased.

The deceased's nephew (PW5) implied that he was with the deceased on 26th December, 2010 in a club celebrating Christmas day when the deceased left for another club to buy cigarettes. They were to leave for home together but when the deceased went for cigarettes he (PW5) told him to follow him ahead but this did not happen. He (PW5) went home alone and on the following day went looking for the deceased whom he did not trace as he had gone missing. Later, he (PW5) was informed by Njeri (PW2) that the accused knew the whereabouts of the deceased.

The suspicion cast upon the accused was based on information from Njeri and on the supposition that he was the person lastly seen with the deceased prior to his disappearance.

However, the accused's defence was that he was at a local pub on 25th December, 2010 with friends. They were celebrating Christmas after which he went home and slept. It was on the 4th January, 2011, when he learnt of the disappearance of the deceased. He thus implied that he was not the last person to be seen with the deceased prior to his disappearance. He also implied that the deceased may not have been among the friends he was celebrating with.

Indeed, the evidence by Njeri (PW2) to the effect that the deceased was with another person when he went for cigarettes and the evidence by the deceased when he (deceased) left him and went looking for cigarettes clearly indicated that the accused may not have been the last person seen with the deceased before his disappearance.

The suspicion cast upon the accused was baseless in as much as it was unsupported by cogent evidence.

It is without doubt that the deceased was murdered but the evidence against the accused was based on mere suspicion for this court to hold beyond reasonable doubt that he was responsible for the disappearance and the death of the deceased.

Njeri (PW2) was not a reliable witness in view of the contradiction in her evidence regarding the last person seen with the deceased.

The investigating officer (PW7) talked of two people i.e. one Gloria and one Maris, who disappeared from the scene after being mentioned by the accused. These two could not be traced at all. Gloria was said to be a sister-in-law of the deceased. Her disappearance from the scene together with Maris raised

strong suspicion that they had a part to play in the disappearance and death of the deceased rather than the accused.

The discovery of the body of the deceased on the shores of the river Nzoia at the instance of the deceased's brother (PW1) was rather curious even though he alleged that he was acting on instincts to proceed to the river in search of his missing brother. His demeanor clearly suggested that he was unwilling to disclose more than what he stated herein.

All in all, the prosecution was unable to discharge its burden of proof as the circumstantial evidence availed against the accused did not irresistibly point to his guilt to the exclusion of any other person or persons.

Consequently, the accused is hereby found not guilty as charged and is acquitted accordingly.

[Delivered and signed this 22nd day of July, 2014.]

J.R. KARANJA.

JUDGE.