



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 71 OF 2010

LESIIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

MICHAEL MURIUKI MUNYURI.....ACCUSED.

JUDGEMENT

1. The Accused MICHAEL MURIUKI M'MUNYORI is charged with murder contrary to section 203 of the Penal Code. It is alleged that on the night of the 21st and 22nd of November 2010 at Sirimon Village, Sirimon Sub location Ontulili Location Buuri District, within Eastern Province murdered Lucy Kagendo Muriuki.
2. The Prosecution called five witnesses. The facts of the prosecution case were that the accused was the husband of the deceased. The facts are that on the material evening the couple went to sleep. Later that night, the accused was heard asking the deceased for her phone. Screams were then heard followed by silence.
3. The Following morning the deceased was found dead in the couple's bed having fresh injuries. The accused was busy organizing his younger children to go to school while maintaining that his wife was asleep in bed. The post mortem examination revealed a penetrating head injury and compound fracture of the right temporal bone consistent with trauma by a sharp object was the cause of death.
4. The accused in his sworn defence put forward an alibi as his defence. He stated that he left his home on the morning of 21st November 2013 to proceed to Timau to sell cabbages. He stated that he did not return to his home until the next morning. She said that he found a large crowd at his home. He stated that when he entered his house to check, he found his wife dead.
5. The accused is facing a charge of murder contrary to section 203 of the Penal Code. The offence is committed when a person causes the death of another by some unlawful act or omission. The prosecution has to show that at the time the act or omission was committed the accused was motivated by malice aforethought.
6. What constitutes malice aforethought has been set out under section 206 of the Penal Code as follows;

“Malice aforethought shall be deemed to be established by evidence proving any one or more 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;**
- 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.**

7. The prosecution must prove its case against the accused on the standard of proof beyond any reasonable doubt. The prosecution must prove that the accused caused the penetrating wound on the deceased and that it was that injury which led to the deceased death. The prosecution must prove that at the time the accused caused the penetrating wound on the deceased he had formed the necessary motive to cause death or grievous harm to the deceased.
8. There was no eye witness to this offence. The prosecution is relying on circumstantial evidence. What constitutes circumstantial evidence has been the subject of judicial consideration in several cases.
9. In **CHOGE -V- REP 1985 KRL** 1 and observed as follows:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See CHOGE –V- R [1985] KLR 1.”

10. In **SAWE –V- REP [2003] KLR 364** the Court of Appeal held.

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. **Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
3. **The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**
4. ...
5. ...
6. ..
7. **Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”**

11. In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“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 inference 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 guilt 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.”

12. The very witnesses in this case were the niece and son of the accused and deceased. PW1 the niece told the court that she went home early and made food for herself, her child and her cousins including PW4. She had given the deceased her child to hold for her as she prepared supper. She said that the deceased appeared drunk as she was staggering as she walked.
13. PW1 stated that she later gave her cousins the food she had cooked. PW1 said that the cousin's, two brothers who included PW4, slept at her place. It is as they were preparing to sleep that PW1 heard the accused asking the deceased whether she had seen his phone. She did not hear anything else that night.
14. When asked, PW1 said that the accused asked the deceased for his phone with a quiet voice but added that the accused had a naturally loud voice and it was the one she heard him use that night.
15. PW4 son of the deceased and the accused testified that on the material day he went home at 2 pm. PW4 testified that he left and returned at 6 pm or 7 pm. He ate at his mother's place then went to his cousin, PW1's place 20 meters away to sleep.
16. PW4 testified that at about 1 am he heard his father asking his mother where his phone was PW4 said he heard his mother saying that she had not seen it. He said he continued sleeping then heard screams. PW4 stated that he woke up his younger brother and asked him whether he heard the screams and that the brother told him he had heard nothing.
17. PW4 testified that he continued sleeping for a bit, then decided to go out to listen. He heard nothing. PW4 stated he could not sleep immediately, and that on the next morning he went to check on his mother and found her covered with a blanket. PW4 also found his father making tea.
18. From the evidence of PW1 and 4, it is clear that the accused spent the night at his house with his wife the deceased on the day in question. From the evidence of the two witnesses the accused and deceased had an altercation that night.
19. The other evidence was that of PW2, the friend of the accused. His evidence was that he had agreed with the accused to meet at a shop early on 22nd morning. PW2 testified that when he realized that the accused had delayed coming he decided to proceed to the accused home to find out what was happening.
20. PW2 testified that he found the accused at his home having tea with his younger children. PW2 testified that when he asked the accused why he delayed coming, the accused told him that he had bought a phone and that he could not find it. PW2 said he asked accused where his children's mother was, and that the accused told him that his wife was inside the house excessively drunk.
21. PW2 testified that he was not satisfied with accused explanation. He therefore waited until the accused went away briefly. PW2 then sneaked into accused bed room where he found the deceased in bed covered with a blanket. He uncovered her and noted she was lying on her left side. He touched her and felt her hand and face were very cold. He concluded she was dead.
22. PW2 testified that he told what he found inside accused bed to one Gitobu whom he met on the way. It was Gitobu who after confirming that the deceased was dead reported the matter to the Sub-Area. It was later that both of them called in the police.
23. The evidence of PW2 gives support to that of PW1 and 4 that accused had lost a phone. The evidence that both PW1 and 2 heard the accused asking for his phone from his wife was therefore not farfetched.
24. The Prosecution has adduced evidence to show that the accused spent the night with his wife and that at 1 am they were heard exchanging words over a missing phone. PW4 their son testified that after the exchange he heard screams then quietness.
25. In the morning of the night in question the prosecution has adduced evidence to show that, PW2 found the deceased dead in accused bed. The same witness has established in evidence that the accused was indifferent to the deceased fate and that he insisted that his wife was merely drunk with alcohol.
26. The post mortem findings were that the cause of deceased death was a penetrating wound to the head with a sharp object. I find that the fact accused and the deceased were heard talking on the material night inside their house and fact that she was found dead in their bed the next day,

conclusive proof that the deceased suffered the injuries while inside their home. PW4 also heard screams followed by quietness. I find the screams conclusive proof that the deceased was injured while in her bed with the accused.

27. The evidence adduced by the prosecution establishes without doubt that the deceased had an exchange of words before screams were heard by PW4. The accused and deceased were together alone in their bedroom.

28. Under SS.111 (1) and 119 of the Evidence Act a statutory rebuttable presumption exists. In this case it exists against the accused person. The two sections stipulate as follows.

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

29. The accused had a rebuttable burden to explain either how the deceased died or met her death; or, how the accused parted with the deceased.

30. The accused did not give any explanation of how deceased died. Neither has he claimed that he left her alive after he was heard having all altercation with her.

31. What the accused did was to deny that he spent the night with his wife that night. PW1 and 4, both his immediate family members have proved beyond a doubt that both accused and deceased retired to bed together on the material night.

32. PW2, accused friend has also proved that the accused was at his house at 7.30 am the morning after the night in question.

33. I am satisfied that the accused person lied in his defence that he spent the night of the incident in Nanyuki. Having considered the evidence of PW1, 2 and 4. I have no doubt that the deceased and the accused spent the night in question and that the accused did not discharge the statutory burden created under SS 111(1) and 119 of Evidence Act.

34. In the Court of Appeal case of ERNEST ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR), supra, the Court of Appeal observed:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

35. The accused in this case attempted to explain facts which he was reasonably expected to be able and interested to explain. However, the explanation he gave was obviously false. He gave obvious falsehood that he did not spend the night at his house and that he therefore did not know how his wife met her death. That was an obvious lie. I find that the same becomes of substantive

inculpatory effect.

36. The accused was with his wife in their home that night. He knows how she met his death. I find that all the circumstantial evidence adduced in this case points irresistibly to the accused guilt. I find that the circumstantial evidence adduced in this case points investibly to the accused guilt. I find that the circumstances of this case taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability the offence was committed by the accused and none else.
37. In conclusion I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I reject the accused defence, find accused guilty of murder contrary to section 203 of Penal Code- and convict him accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 25th DAY OF SEPTEMBER, 2014.

LESIIT J.

JUDGE