



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 69 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JOHN EKULE NAKWAI.....ACCUSED

JUDGMENT

John Ekule Nakwai, the accused herein was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 30th day of September, 2010 at Murgusi Village, Ngenyilel Location in Uasin Gishu District within Rift Valley Province, jointly with others not before court murdered Sila Kipkoros Lagat.

THE EVIDENCE

I took over the conduct of the trial from the evidence of PW18 who was the last prosecution witness. The evidence of PW1 to 17 was taken by Honourable Justice Azangalala (as he then was). The summary of the evidence is as follows.

PW1, Eunice Chemeli Lagat testified that the deceased was his brother. She testified that on the 29th September, 2010, the deceased's wife called her and told her that she had quarreled with the deceased. The deceased was her brother. She stated that the accused was employed by the deceased to herd cattle. He lived in the same homestead with the deceased. It was her testimony that the deceased had earlier complained to her at one point in time that whenever he quarreled with his wife, Mercy, the accused would intervene and hold her as his wife, beat him up and for that reason he had decided to sack him (the accused from the employment). She stated that on 30/09/2010, the accused was not on duty and that when the deceased was discovered dead the accused was not present.

On 30th September, 2010 she was informed by her cousin, Julius and an in law, Prisca that the deceased could not be seen. At the deceased's house were blood stains which led to a river. They then found the body in the river. It was naked and had injuries on the legs and arms.

In cross-examination, PW1 stated that the deceased and his wife quarreled frequently and they also used to fight. She said that when the two fought, the deceased would flee to his mother's house. On 29th September, 2010, the deceased's wife spent the night at her step mother's, one Prisca following a quarrel with the deceased.

PW2, Prisca Cherotich Moigei testified that on 29th September, 2010, the deceased's wife went to her house at 7.00 a.m. and told her that she wanted to deliver a letter from the Children's Department to the

Assistant Chief. The letter contained a complaint that her husband (deceased) was giving her problems during harvest. She returned to her house at 5.00 p.m. where she spent the night. She left on 30th September, 2010 at 6.00 a.m. when she indicated that she would be escorted home by a village elder who would sought out their problems.

PW2 further testified that the deceased's wife later returned to her house and informed her that she did not find the deceased at home. She proceeded to the deceased's home where she found two elders, two administration police officers and the accused. The accused later escaped. She stated that at 1.00 p.m., they found the body at the river. It was naked and had injuries.

In cross-examination, PW2 stated that the deceased's wife told her that when she went home, she found things had been burnt at her house. She could not however state what had killed the deceased.

PW3, Julius Kiprop, a brother to the deceased testified that the deceased and his wife, Mercy often quarreled. On 27th September, 2010 he was informed that they had quarreled on 28th September, 2010. He went to their home and the deceased told him that he had been injured by the accused and that the accused wanted to get rid of him after paying him Ksh. 3,000/= that he owed him. On the same day the deceased and his wife quarreled in his presence over milk. He advised Mercy (deceased's wife) to go and sleep at her in-laws.

PW3 further stated that on 1st October, 2010 he was called on telephone by Prisca who informed her that Sila (deceased) was not at home. He joined Prisca and a village elder and they proceeded to Sila's house. They found things had been burnt outside the house. There were blood stains inside the house. He left the scene and was later informed that Sila's body had been found in the river with injuries. He reported the matter at Turbo Police Post.

PW3 identified a trouser that was partly burnt as well as a rope, a jacket and a torn T-shirt that were found at the deceased's home.

In cross-examination, PW3 stated that he did not know how and when the deceased died.

PW4, Esther Chebet Ngetich testified that sometime in August, 2010, his brother the deceased called him and informed him that the accused had befriended his wife. She confronted both the accused and the deceased's wife on the issue but both denied. The deceased later told her that whenever he quarreled with his wife, the accused would hold her as his wife. She then advised the deceased to pay the accused and send him home. The deceased indicated that he would do so after the harvest.

PW4 stated that she was called by Prisca and informed that the deceased had disappeared. When she went home, she found the body had been removed from the river and taken to the mortuary. She went to see the body on 2nd October, 2010 and confirmed that it had injuries.

PW4 identified some burnt trousers as well as a rope which were removed from the deceased's house.

In cross-examination, PW4 stated that she did not know how the deceased died.

PW5, William Pyego testified that on 30th September, 2010 at 4.00 p.m., the deceased was one of the loaders of a lorry at a quarry. He borrowed him Ksh. 50/=. On 1st October, 2010, he was informed by one of the workers that blood had been found at the deceased's home. On his way to deceased's home, he met the accused who informed him that Sila had died. The accused then told him that the deceased had been with Nyayo. PW5 went to where Nyayo was who in turn informed him that the accused had killed the deceased. He then proceeded to the deceased's house where he saw blood stains and burnt clothes. The accused could not thereafter be found.

In cross-examination, PW5 stated that Nyayo did not tell him how the deceased had been killed. He said that he went to the home of the deceased on 1st October, 2010.

PW6, Philemon Sang testified that he worked as a cattle herder for Esther Chebet Ngetich. On 1st October, 2010 at 5.00 p.m. as he went to sell milk he saw blood on the path. He followed the blood spots upto the house of Esther where he found John (accused) milking cows. On inquiring from John about the blood, he told him he knew nothing. The accused told him that Sila (deceased) was still sleeping.

PW6 stated that the accused was the deceased's worker and their relationship was not good.

In cross-examination, PW6 stated that when the accused told him that the deceased was sleeping he went up to his house where he found the door closed. He learnt that the deceased had died on 1st October, 2010. He did not however know how he died.

At this juncture, it is important to note that **PW7**, Selina Jerubet Lagat was stood down on account that she could not speak Kiswahili. Record shows that she later testified as PW13. Therefore the next witness ought to have been named PW7. In the alternative, when PW7 was recalled she should have been named as PW7 for purposes of consistency of numbering and naming of witnesses.

For purposes of this Judgment though, I will name the witnesses as they were numbered so that the numbering of the witnesses tallies with the record. Bearing this in mind, it follows that the prosecution called 17 and not 18 witnesses.

PW8, Prisca Morojo testified that she visited her sister Selina Lagat on 27th September, 2010 at 4.00 p.m. There, she found her children Mercy and Koros had quarreled. She asked Korosio to settle the matter but he told her that he did not want Mercy. On that night Mercy slept at Selina's house. On the following day, Mercy returned in the company of two people one of whom was Nyayo. She did not see Koros (deceased) on this day. She later discovered there were burnt clothes outside the deceased's house. She informed Selina and John (accused) about the burnt clothes. They then entered into the deceased's house but did not find him. A youth told them that he had seen some blood stains on the road. In the company of the deceased's wife, the accused and an elder, the stains led them to the river where the deceased's body was.

In cross-examination, PW8 stated that the deceased was at home on 28th September, 2010 and nothing happened to him on that day. He stated that on 30th September, 2010, the accused did not go to milk the cows and she had to do it herself. He however milked the cows on the following day. On the same day, he had dinner with the deceased who soon thereafter left.

PW8 stated that she saw the burnt clothes on Friday which was the 1st October, 2010.

PW9, David Masinde Simiyu testified that the deceased was his friend while the accused worked as a herder for the deceased. He stated that he last saw the deceased on 29th September, 2010 at his home. The deceased told him that he had quarreled (I opine with his wife) and his worker had intervened. He also told him that he would be held by his worker as his wife beat him. His worker would also occasionally beat him.

On 30th September, 2010 he was informed that the deceased had died.

PW9 further testified that on 29th September, 2010, the deceased told him that he had been assaulted by his worker. He had scars. He also told him that he wanted to pay his worker Ksh. 3,000/= so that he could discharge him from duty because he was having an affair with his wife. He indicated to him that the accused was a threat to him.

PW9 stated that the deceased used to take milk to their home everyday. He did not see him on Friday. When he went to his home to collect the milk he was informed by his mother and aunt that he (deceased) had not been seen. He proceeded to the deceased's home. The accused was there. Some blood led them to the river where the deceased's body was. It had bruises on the back and ribs as a sign that it had been dragged to the river. The accused could not thereafter be traced.

In cross-examination, PW9 stated that he was with the deceased on 30th September, 2010. They parted ways in the evening after taking chang'aa at Sirengo's house. Both of them were then drunk. He also met Mercy (deceased wife) with Isaac. He stated that he suspected the accused as the culprit because the deceased had complained about him a lot. The deceased had complained that the accused would beat and tie him with a rope.

PW10, Stephen Kipkolum Muigei testified that the deceased was his step brother. He stated that on 29th September, 2010 at 7.00 a.m. the deceased's wife went to his house and complained that she had quarreled with the deceased and had reported him to the Assistant Chief. She spent the night in their home. The Assistant Chief sent her an elder and she left the next morning.

On 1st October, 2010, PW10 heard screams. He went to where the screams were coming from. There were blood stains which they trailed to the river where the deceased's body was. When they inquired where his worker was, he was nowhere to be seen.

In cross-examination, PW10 stated that the deceased and his wife used to have frequent quarrels.

PW11, Moses Naibei Misoi testified that on 29th September, 2010, the deceased's wife, Mercy had reported to him that she had had conflicts with the deceased. He suggested that the matter be resolved on the following Friday which was 1st October, 2010. On 1st October, 2010 he went to the deceased's home where he met his mother who informed him that the deceased had burnt his wives clothes as he was drunk. They later saw some blood stains which led them to the river where the deceased was found dead. The suspect, who was the deceased's worker had fled.

PW12, Esther Rono testified that on 1st October, 2010 his worker Sang informed him that he had seen blood stains at Sila's house. She proceeded there where she met John (accused), Salina and Priscila. She also saw burnt clothes. She identified the burnt clothes in court. The blood stains led them to the river where the body of the deceased was.

PW12 returned to the deceased's house where he found the deceased's blankets, mattress and clothes in the accused's house. There was also a wet rope in the house. He identified the rope, blue jacket, red torn T-shirt, blue striped shirt, grey trouser and black trouser as the items he saw in the accused's house. He stated that the deceased suspected that the accused had a love affair with his wife.

In cross-examination, PW12 stated that he was a step mother of the deceased. She said she did not know who killed the deceased.

PW13, Selina Jerubet Lagat testified that she was informed that the deceased's clothes had been burnt. Together with other persons, they went to the deceased's house. There, they found blood stains which led them to where the body of the deceased was in the river. The accused then pretended to go to look for cows and he disappeared.

PW13 stated that the accused fled after the deceased's clothes were found in his house. He stated that the accused always intervened when the deceased fought with his wife.

In cross-examination, PW13 indicated that he did not witness the killing of the deceased. He however stated that although the deceased's wife did not kill the deceased, it is her who hired the killers. He stated that the deceased's wife used to threaten to kill him.

PW14, Joseph Kipkotorch Sang stated that he did not recall anything concerning the case.

PW15, Earnest Muhanji testified that on 1st October, 2010 one Murgus Ngenyilel, a village elder informed him that he was taking the deceased's wife home. He later told him that the clothes of the deceased's wife had been burnt. He informed administration police officers. They then received information from a youth that some blood had been spotted. They followed it to the river. He was later informed that the deceased's body had been found in the river.

In cross-examination, PW14 stated that he did not know when the deceased died. He also stated that he did not know how the deceased related with his wife.

PW16, No. 52565 Police Constable Mwachiro Lalo then stationed at Turbo Police Post testified that on 1st October, 2010 at about 3.10 p.m. two men reported to him that a body of a male had been found floating in Sosian River in Tapsagoi Location. The deceased was named as Sila Koros Lagat. The men had reported of seeing blood stains inside and outside the deceased's home which led them to the river.

PW16, together with colleagues proceeded to the scene. The body had been removed from the river. There were many people there. It had cut wounds on the head and bruises all over. The scene of crime officer took necessary photographs and they took the body to the Moi Teaching & Referral Hospital mortuary.

Investigations revealed that on 29th September, 2010 the deceased had quarreled with his wife Mercy Wanjiru. The deceased's worker also went underground as soon as the body was found in the river.

PW16 also attended the post mortem exercise.

PW16 further testified that he recovered two long trousers, a shirt, a T-shirt, a jacket and a wet nylon rope in the accused's house which were identified as belonging to the deceased. He produced them as exhibits. He also produced as exhibit a burnt female skirt which was found outside the deceased's house.

On 26th October, 2010, PW16 was informed that the accused had been arrested at Ziwa area by members of the public and taken to Moiben Police Station. He re-arrested him and charged him.

In cross-examination, PW16 stated that he was not the investigating officer. He said that he first visited the scene on 8th October, 2010. He indicated that the accused fled after the body was found in the river. He stated that the deceased's wife was released on instructions of the officer in-charge of the police post, Senior Seargent Kiprugut.

PW17, Senior Seargent Kiprugut then of Turbo Police Post testified that on 1st October, 2010 he received information from PW16, PC Lalo that a body had been found in Kipkaren river. They arrested the deceased's wife and one David Masinde who was last with the deceased. He took the deceased wife's mobile phone to Safaricom for investigations but it revealed nothing of use to the investigations.

On 10th October, 2010, he visited the home of the deceased in the company of PC Lalo. There were blood stains on the wall and bed. Outside the house were a burnt box and clothes. They saw blood stains which led to the river. They suspected the accused because he fled after the body of the deceased was found in the river and also because the deceased was not in good relationship with the deceased. The accused was later arrested in Moiben area.

PW17 stated that they recovered a paper bag from the house of the accused which had the deceased's clothes – that is two (2) long trousers, a red T-shirt, a white stripped shirt and a wet white rope. He identified the said items in court.

In cross-examination, PW17 indicated that he could not quite recall when he visited the deceased's home. He said that the deceased's wife and Masinde were released because there was no evidence to link them to the offence.

PW18, Doctor Walter Naliana a pathologist at Moi Teaching & Referral Hospital conducted the post mortem on the body of the deceased. It was identified to him by Esther Ngetich and Justus Bwalei. He observed leakage around the neck with a mark of elevation on the right side. There was leakage around both wrist points. It had multiple bruises over both upper limbs. There was heamatoma on the neck, lungs and left side of the brain. He formed the opinion that the cause of death was strangulation.

In his sworn defence the accused denied killing the deceased. He stated that he was employed as a

herder by the deceased's mother, PW13. He indicated that there was a land dispute between the deceased and his brothers and wife. PW13 had asked him to intervene but he had declined because it was a family dispute. PW13 then asked him to go back to his home because he had declined to intervene in the dispute. Although PW10, PW13's son as well wanted him to leave employment but PW13 asked him to stay on.

On 30th September, 2010, he reported on duty at 8.30 a.m. Mercy (I opine the deceased's wife) ran to where he was and told him that PW13 did not like her. In a short while he heard PW13 screaming and shouting that Mercy had slapped her. PW13 (Mama Salina) asked her to leave but he declined indicating that it was only the deceased who could ask him to leave. He had not seen the deceased on this day. The accused went on to state that on the following day he heard from neighbours that Sila had been killed. Mama Salina then told her not to step into her compound. He fled to Esther's home where he stayed for five (5) days.

The accused stated that he related well with the deceased but not his wife. He stated that Mercy was unwanted in the family because she was a Kikuyu by tribe. He said that she used to quarrel a lot with her deceased husband. He denied he used to protect Mercy when she quarreled with her husband. He denied he and Mercy were involved in the death of the deceased. He also denied that he fled after the death of the deceased. He also stated that he was not aware that the deceased's body was found near the river.

According to the accused, the deceased must have been killed on 30th September, 2010 because he was with him on 29th September, 2010.

EVALUATION OF EVIDENCE

It is clear that none of the seventeen (17) prosecution witnesses saw the accused killing the deceased, or do an act that may have led to the death of the deceased. He was arrested and charged based on circumstantial evidence. This evidence related to the fact that he fled as soon as the body of the deceased was found in the river. The deceased's clothes were also found in his house under circumstances that were suspicious. There were also rumours that he had a love affair with the deceased's wife whom he used to shield whenever she quarreled with the deceased. He was said not to be in good terms with the deceased who had asked him to leave employment.

The law on the principles that guide the court when considering circumstantial evidence was spelt out in the case of **R -VS- KIPKERING ARAP KOSKEI AND ANOTHER (1949) 16 EACA, 135** in which it was observed that:-

“That in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecutions and never shifts to the accused.”

This principle was later in the case of Simon Musoke vs. R. Criminal Appeal No. 188 of 1956 given more explanation when the court added that at the same time there must not be any co-existing facts in or circumstances which may weaken or destroy that inference of the guilt of the accused person”.

In Peter Mote Obero & Another V Republic [2011] eKLR Court of Appeal at Kisumu, Criminal Appeal No. 177 OF 2008 the learned judges Omolo, Waki & Nyamu, JJA reiterated as follows;

“It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V R [1952] AC 480. With those safeguards in place, circumstantial

evidence is as good as any direct evidence which is tendered and accepted to prove a fact. In R V. TAYLOR, WEAVER AND DONOVAN [1928] 21 Cr. App. 20 CA, the court stated:-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

In the case of Alex Miseki Wambua vs. Republic [2008]eKLR, the Court of Appeal observed as follows;

“The same Court expanded the principle in Simoni Musoke V. R. [1958] EA 715, which cited with approval the following passage from the Privy Council decision in Teper V. R. [1952] AC 480 at P. 489;

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.

In the case of Republic vs. Lchokitan Leswakeri [2006]eKLR, the learned Judge Kimaru J. observed as follows;

“After stabbing the deceased, the accused disappeared from the scene. In the circumstances of this case this court can infer that the act of the accused in disappearing from the scene was an indication that the accused knew that he had fatally stabbed the deceased. As was held by Etyang J. in Republic –vs- Ernest Gathecha Kariuki Nairobi HC Criminal Case No. 64 of 1997 (unreported) at page 19 of the judgment;

“In the case of Malowa –vs- Republic [1980]KLR 110 where the appellant had disappeared from his home for six months after committing an offence, the court of appeal held that the appellant’s conduct, his disappearance from his home and remaining absent from home for six months, was a piece of circumstantial evidence which sufficiently corroborated the deceased’s dying declaration.”

In the present case, the accused disappeared from his home at the manyatta immediately after stabbing the deceased and went to a different manyatta some distance from his home. He was arrested at the said manyatta when the police received information that he was hiding in the said manyatta”. (See Kimaru J. *ibid*)

In Prosecutor V John Ndungu Njoki & Another[2012]Eklr High Court At Nakuru murder Case 112 Of 2007, the learned judge R.P.V Wendoh J. stated as follows;

“The Court of Appeal has re-affirmed the above position in the recent case of Peter Moate Obero & Gideon Kamau Mburu v Republic, Criminal Appeal No.177 of 2008 (Mombasa), when the court said:-

“It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused’s guilt for circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference...with those safeguards in place circumstantial evidence is as good as any direct evidence which is tendered and accepted as to prove a fact.”

In the case of Republic V Boniface Gathege Wacheke [2010] eKLR In The High Court Of Kenyaat Nyericriminal Case 19 of 2008 The Learned judge Makhandia J. noted as follows;

“As was held in the case of Malowa V Republic (1980) KLR 110 when an accused person disappears after an offence has been committed, the fact of his disappearance can lead the court to an inference that the accused disappeared to escape being arrested for committing the offence. I would hold the same of the accused in the circumstances of this case. He knew that he was being accused of killing the deceased going by the screams of the lady at the gate. Instead of going to nearest police station to try and set the record straight he disappeared to Molo, very far away from the scene of crime”.

The facts of this case are that key witnesses indicated that the deceased had complained that whenever he quarreled with his wife, the accused would hold him as his wife beat him. He would also shield his wife from the deceased whenever they fought or quarreled. Indeed, the accused could also occasionally beat the deceased.

In the period just preceding the deceased's disappearance, he had quarreled with his wife. The latter had even sought refuge in a neighbouring home. At the same time, the deceased had asked the accused to leave employment because he suspected he had a love relationship with his wife. This then explains that there existed a grudge between the two – that is the accused and the deceased. Immediately the deceased was killed, a rope was found in the accused's house alongside some deceased's clothing. Although it is not clear what was used to strangle the deceased, it is worthwhile to note that the rope was recovered when it was wet. The deceased's body was recovered in the river. Hence, the inference that this rope was either used to strangle the deceased or drag the deceased's body to the river cannot be far-fetched.

To cap it all, the accused went underground as soon as the deceased's body was found in the river. According to him, he had no grudge with the deceased. So, why did he flee at a time when the deceased's family needed him most? I only conclude that he fled because he knew what had killed the deceased. And he did not only know what had killed him, but the guilty conscience in him compelled him to flee as he feared he could be arrested. If he was innocent, he ought to have remained behind and helped the police with investigations. Instead, he fled far from home to Moiben and was to be arrested close to a month later by the members of the public.

In my view, although there was no eye witness, the accused's behaviour after the deceased's death leaves no doubt in my mind that he had a hand in the death of the deceased. He cannot therefore claim innocence as he did in his defence. He was a friend turn foul, and must embrace the consequences of his action.

I need not say more about the motive that precipitated the accused to kill the deceased. I have already indicated the genesis of the grudge between the two which ultimately drove him into crafting the death of the death. So as to conceal the death, the accused threw the body into the river. Unfortunately the same was recovered in a matter of hours.

As to the cause of the death of the deceased, the same was confirmed by PW18 who did the post mortem. He found the cause of the death to be strangulation which was an indication of a human factor. And as I said earlier, the accused is the culprit. I find his defence as lacking in merit and amounting to a mere denial. I dismiss it accordingly.

In the end, I find that the prosecutor has proved beyond all reasonable doubt that it is the accused who killed the deceased and that the death was actuated by malice aforethought. I find him guilty of the offence of murder under Section 203 of the Penal Code and I convict him accordingly.

DATED and DELIVERED at ELDORET this 24th day of October, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Mitey holding brief for Miyenda for the Accused

Mr. Mulati for the State