



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL CASE NO. 65 OF 2010.

REPUBLIC:::PROSECUTOR.

VERSUS

JULIA WANGARI NDUNGU)

ABUBAKAR SUKUM MATETE) :::ACCUSED.

J U D G M E N T.

The two accused, **Julia Wangari Ndungu** and **Abubakar Sukum Matete**, are charged with murder contrary to section 203 read with section 204 of the penal code, in that on the 18th November, 2010, at Kisumu Ndogo Estate Trans Nzoia County, jointly with others not before court murdered **Francis Wanjohi Nderitu**. The case for the prosecution was that the deceased was a trader and on the 17th November, 2010, he proceeded to the M-pesa outlet operated by **Sophie Wanjiku (PW7)** where he deposited some money into his phone and sent it to a person in Nairobi. Thereafter, he left and went away. His wife (first accused) did not see him at their shop or at home on that 17th November, 2010 and even on the following 19th November, 2010. She then reported his disappearance to his father, **Nderitu Gathii Mwangi (PW1)** who commenced a search for his son but all in vain. He (father) kept in touch with the police and recorded a statement on 20th November, 2010. Later, on the 23rd November, 2010, he received information that a dead body was retrieved at Moi's bridge and taken to Kitale District Hospital mortuary. He proceeded to the said mortuary and identified the dead body to be that of his deceased son. He noted that the body had serious injuries on the neck and other parts and later identified it for post-mortem purposes.

The deceased's brother, **Samuel Mwangi Gathii (PW3)**, also identified the body for post mortem purposes while the deceased's sister, **Tabitha Wangechi Nderitu (PW2)**, came to learn of the deceased's disappearance from her sister Lucy on the 19th November, 2010 and confirmed as much from the deceased's wife (first accused). She (PW2) and others made attempts to trace the deceased until the 23rd November, 2010, when she was taken to Kitale District Hospital mortuary where she saw the dead body of her deceased's brother.

Dr. Blastus Kakundi (PW4), conducted a post mortem on the body of the deceased and completed the necessary report (P. Exh. 5) indicating that the deceased died from cervical spine injury and blunt trauma to the chest.

P.C. David Kipchumba (PW5), of the scenes of crime section, took photographs of the deceased's dead body while it was at the mortuary having been retrieved from the river Nzoia at Moi's Bridge. He noted that the body was decomposed and was tied on the hands by a telephone cable and sisal rope. He also

noted that a piece of cloth was tied on the neck. He later proceeded to the house of the deceased where he saw blood stains near a door and on some curtains, table clothes and sofa-set. He also saw blood stains on a motor vehicle belonging to the deceased. He swabbed the blood stains on the vehicle and forwarded them to the Government Analyst for necessary action. He also took several photographs at the home of the deceased.

P.C. George Amasa (PW6), investigated this case and in the process received information that blood stains had been seen in the deceased's house at Kisumu Ndogo Estate. The information was received on 29th November, 2010, and he (PW6) proceeded to the house on 30th November, 2010, where he saw a severed telephone cable and blood stains on the deceased's vehicle. Samples of the blood stains were forwarded for necessary analysis to the Government Analyst whose report (P. Exh. 10) was herein produced by **Cpl. Catherine Wamugunda (PW8)**.

The investigations officer (PW6) arrested and charged the two accused after they were mentioned as possible suspects.

The second accused was said to have been the deceased's driver cum mechanic.

Both accused denied the offence when placed on their defence.

The first accused indicated that the deceased left for work but she could not trace him through his mobile phone even after several attempts. She became concerned and reported the matter to the deceased's father and thereafter to the police. She and other relatives made attempts to trace the deceased but all in vain.

Later, they were notified by the police that a dead body had been retrieved from River Nzoia at Moi's Bridge. She proceeded to view and identify the body as that of her husband. She was summoned by the police after the burial of her husband and treated as a suspect for his (husband's) murder. She vehemently denied the charge.

The second accused stated that the deceased was one of his customers and that he took his vehicle to his (second accused) garage for repairs on the 16th November, 2010. After repairs, the deceased left the garage and went away. Three days thereafter he (second accused) learnt that the dead body of the deceased was found in a river at Moi's Bridge. He joined the deceased's family in funeral arrangements but was later summoned by the police and arrested on allegation that he murdered the deceased which he denied.

From all the foregoing evidence, the fact that the deceased was murdered was not disputed. Indeed, it would appear that the deceased met his death between the 17th November, 2010 and the 23rd November, 2010 at the hands of a person or persons who acting with malice aforethought assaulted and caused him fatal injuries prior to dumping his dead body in River Nzoia at Moi's Bridge.

The injuries occasioned to the deceased and the manner in which parts of his body were tied up with a piece of telephone cable, sisal rope and a piece of cloth was a clear demonstration that the assailants had clear intention to kill him.

The two accused were suspected of having been the assailants and charged with the present offence. And, because mere suspicion is not evidence of commission of a crime, the obligation to establish the criminal culpability of the accuseds beyond reasonable doubt lay with the prosecution and the prosecution only. The two accused were not under any obligation to prove their innocence.

Herein, none of the prosecution witnesses saw any of the accused committing the offence.

Indeed, there was no direct evidence against the two accused such that the prosecution was left to rely on circumstantial evidence when rumours started circulating after the burial of the deceased that he was killed in his own homestead. The author of the rumours was not disclosed but it would appear that they (rumours) reached the police through the deceased's sister (PW2). She said that the rumours were

spreading between people during the burial of the deceased and it was then that she rushed to the police and informed them meaning that the police had not bothered to inspect the house of the deceased after he was reported to have gone missing.

The police in answer to the rumours went in search of circumstantial evidence in the house or homestead of the deceased.

P.C. Kipchumba (PW5) and the I.O (PW6) saw blood stains inside the house of the deceased and in his vehicle. They collected the samples and forwarded them to the Government Analyst whose report (P. Ex. 10) did not link any of the accused with the murder of the deceased and indeed, added no value to the prosecution case.

A severed telephone cable allegedly resembling the telephone cable used in tying up the body of the deceased seen at the deceased's homestead by the I.O (PW6) was never examined for any worthwhile evidential comparison.

Suffice to say that there was no seriousness in the investigation of this case. The I.O went on a wild goose chase after rumours reached him that the deceased could have been killed in his own home. He then collected whatever he thought was necessary and then arrested the two accused. He did not consider the relevancy of what he collected in relation to the offence and its suspected linkage to the two accused. Ultimately, it turned out that there was no circumstantial evidence against any of the two accused but mere suspicion because the first accused was the “unaccepted” wife of the deceased and the second accused was the deceased's mechanic cum driver who allegedly was in possession of the deceased's vehicle keys.

No attempt was made by the I.O to follow the alleged possession by the second accused of the deceased's vehicle keys and how that possession could be linked to the murder of the deceased vis-a-vis the second accused.

In sum, the investigations were shoddy and did not achieve the intended objective to obtain relevant and credible circumstantial evidence against the two accused.

In the end result, the prosecution failed to discharge its burden of proof thereby paving way for a finding by this court that the two accused are not guilty as charged and are accordingly acquitted.

[Delivered and signed this 23rd day of December, 2014.]

J.R. KARANJA.

JUDGE.