



REPUBLIC OF KENYA

High Court at Nakuru

Murder Case 45 of 2010

REPUBLIC.....PROSECUTOR

VERSUS

PAUL THUO MAINAACCUSED

JUDGMENT

By an information dated 13/5/2010, Paul Thuo Maina, hereinafter referred to as the accused, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The allegation against the accused is that on 11/4/2010, at Oloropil Location in Narok, jointly with others not before the court, murdered Ann Wanjiku. The accused denied the offence and the case proceeded to full hearing. The prosecution called a total of 8 witnesses and when called upon to defend himself, the accused testified on oath but called no other witness. The deceased was the daughter of Luka Karugu Kimani (PW5) a former resident of Oloropil, Narok. He recalled that on 11/4/2010, he left home for Mau Narok where his wife had taken a sick child. He left behind the deceased, Wanjiku, who was 13 years old, his son James Kiiru, 9 years and their younger siblings. He returned after two days, on 14/5/2010, but did not get Wanjiku, the deceased and upon enquiry, PW2, Kiiru told him that three people, Paul Thuo, Peter and Hiram took her away on the day he left. He reported to the chief and a search was mounted for 10 days till the body was found in the bush. PW5 said that once PW2 informed him who took away the deceased, he went to Peter's house where he lived with Paul (accused) and Hiram but they all denied knowing the whereabouts of the deceased. PW5 denied having had any disagreement with the accused there before. James Kiiru (PW2), a child aged 10 years gave a sworn statement after the court conducted a *voire dire* examination and found him to understand the meaning of oath and intelligent to understand the proceedings. He testified that he was at home with Wanjiku and his other younger siblings when his father and mother had gone to hospital, they went to sleep when three people, the accused, Njau and Peter knocked at their door and called Wanjiku. They lit the tin lamp (koroboi). The accused entered the house but the other two remained outside. He knew all of them as they live in the same village and he had seen them outside their house that day. He said that accused called the deceased and they never saw her again. He told his parents what happened upon their return. He said that his father, PW5, called police. Accused and the other two were arrested, were attacked by people and Peter died but Njau ran away. His sister's body was recovered in the bush. PW3, Steven Kimani, an uncle to the deceased

identified the body to the Doctor before post mortem was done. William Mpatinga Rinka (PW4), the chief of Oloropil, Olukurto Division, recalled having received a call from a village elder, Saningu, at about 6.00 p.m. on 24/4/2010. He informed him that a decomposing body had been found in a thicket. He was informed of some suspects having been beaten and burnt up by the mob. He went to the scene the next day, saw those arrested, was shown the body of the deceased in the thicket, the police came after getting a report and photographed the body. He denied having received any report of a missing person there before.

PW6, CPL Francis Siololo, then of Oloropil Administration Police Post received a report from the Chief of the area that the body of a girl had been recovered, he went to the scene, found accused and 2 others had been beaten and burnt. Peter Obuya died, one was arrested and one escaped. He took the body to the mortuary.

PW7, Cpl Paul Kiiru of CID Narok took photographs of the scene where the body of the deceased was recovered on 25/4/2010 (PEx.5). PW8, Cpl Simon Simiyu was the Investigation Officer. He went to the scene where the body was recovered and found the accused person and 2 others already arrested and beaten up and burnt by members of the public and one escaped. It is PW2 who informed him of what had transpired when the parents were away.

In his sworn defence, the accused told the court that he had known the deceased for 6 months; the father of the deceased, (PW5) is his cousin. They lived about a kilometer apart. The accused described PW5's house as made of wood on the walls and roofed using plastic paper while the door was made of iron sheets so that if anything fell on it, people would hear and that the nearest neighbour was 10 metres away. He knew that PW5 was going to Mau where his wife had got a baby. He never heard of a missing person between 11th and 14th April and that between that time, PW2 had gone to his house to ask for sugar and salt and did not talk about his sister. He said that he worked in the garden with PW5 on 15/4/2010, and that is when PW5 informed him that the deceased had left home. He denied ever being told that the deceased was missing nor did he help in the search for the deceased. He was arrested as he came back from the Posho Mill on 24/4/2010 about 7 p.m. He found a group of people and one Baba Victor told him that people were being burnt and one Bayo said accused was one of them. People got hold of him and started to beat and burn him. By then, PW5 had also been burnt on the leg. He was released to go but due to pains he asked for a ride from a motor cycle to be taken to hospital. People followed him to his house, asked him to go and see his colleagues, was beaten up some more and he came to when in hospital. That is when he heard of the deceased's death. He denied the offence and said that PW2 lied to the court. He had no dispute with the deceased or PW5 before.

There is no doubt that the young life of Wanjiku (deceased) was taken away by the brutal acts of somebody. She was last seen alive on 11/4/2010 and her decomposed body was recovered in a thicket on 24/4/2010. PW1 (Doctor) found that the deceased's head had been decapitated by a sharp object. He found that the cause of death was dismembering of the head. The only question left is who caused the death.

Nobody saw who dismembered the deceased's head. The only available evidence that connects the accused to the offence is that of PW2, James Kiiru, a boy aged 10 years. After a *voire dire* examination, the court was satisfied that he understood the meaning of oath, was intelligent, and he was allowed to testify on oath. PW2 told the court that it is the accused and two others who called the deceased out of the house on the same night that PW5 left home. The accused is not a stranger to PW2. It is not disputed that the accused was related to the deceased and therefore to PW5 and PW2. They had not had any dispute there before. PW2 said he had seen the accused and the two others, Peter and Hiram earlier in the day. PW5 told the court that infact the three of them lived in the same house. PW5 also told the court that the deceased had visited the accused's house there before. PW2's evidence was not shaken as to who he saw on the night of 11/4/2010. The house is one roomed and therefore they were in close proximity of each other. He said that accused talked to him on the said night and that he had lit the lamp (koroboi) and that accused entered the house.

Though PW2 was a child of tender age, his evidence was not shaken on cross examination. The only discrepancy was at what time the accused called the deceased out. At first PW2 said it was 10.00 p.m., then he changed and said it was 11.00 p.m. There is no evidence that PW2 had a watch or clock or that he looked at it to ascertain the exact time of the incident. It is unlikely that PW2 would have checked the time anyway because what happened thereafter was unexpected. In his testimony, the accused also confirmed that his cousin's (PW5) children including PW2 knew him very well. There is no allegation

that PW5 had any grudge with the accused and there is no reason why PW2, a child of 10 years, would have made such a serious allegation against the accused. I have no reason to doubt that PW2 saw the accused with Hiram and Peter on the night they took away the deceased. The other reason that the defence urged the court not to disbelieve the prosecution case is because it took about 10 days before it was reported that the child was missing. PW2 told the court that once PW5 returned home, he informed him that it is accused who took Wanjiku away. PW5 admitted that indeed PW2 informed him that Wanjiku had left with the accused when he returned on 14/4/2010. The accused admitted that on 15/4/2010, PW5 told him that the deceased was not at home. It was therefore untrue for the accused to claim that he had not heard that the deceased was missing. He was aware of it as early as 15th April 2010, as soon as PW5 returned to Oloropil. The chief, PW4 and PW6 denied that there had been any report of any missing person before the 24/4/2010. Since PW5 knew that the deceased was missing by 15th April 2010, it was upon PW5 to report to the authorities. In my view, it seems it is PW5 who did not set out to look for the deceased or report to the police or Chief. The Investigation Officer, PW8, said that PW5 is a drunkard and had neglected his family and that may explain why he delayed in making a report of the missing child. Having informed his father of what happened to the deceased, PW2 could not have taken up the issue with the police considering his age. PW2's evidence cannot be faulted merely because PW5 failed to report the incident right away, on 15/4/2010 after he received information from PW2. I am satisfied that PW2 saw and identified the accused on the night he took away the deceased.

The court appreciates that PW2 was a minor but his evidence was taken on oath. His evidence would only require corroboration if it was unsworn. The accused was the last person to interact with the deceased and under **Section 111** of the **Evidence Act**, he was under an obligation to explain what happened to the deceased. Whereas the law is clear that the burden is always on the prosecution to prove a criminal case beyond any reasonable doubt, and the accused has no duty or burden establishing his own innocence, there are times when the law places a duty on the accused to explain certain facts particularly those peculiarly within his own knowledge. **Section 111** of the **Evidence Act Cap 80 Laws of Kenya** which casts that burden on the accused provides as follows:-

“S.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.”

Failure by the accused to offer a reasonable explanation as to what happened to the deceased raises a rebuttable presumption of fact under **Section 119** of the **Evidence Act**, that the accused committed the offence. **Section 119** of the **Evidence Act** reads:-

‘S. 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.’

In my view, the accused has not bothered to explain what happened to the deceased after he took her away and it can only be presumed that he committed the murder.

In his defence, the accused alleged that some crucial witnesses did not testify. For example he said that one Bayo who alleged that he was one of the people who committed the offence before the crowd descended on him and started beating him was not called as a witness. In **Bukenya & Others v Uganda [1972] EA 549, pg 550**, the court stated as follows in regard to how many witnesses can be called:-

“With respect, that is not quite correct. It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has

not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case (Trial on Indictments Decree, s.37). Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

In this case, the evidence of Bayo who allegedly said that the accused was involved in the murder and one Baba Victor whom the accused asked what was happening before the mob descended on him and assaulted him, are not material witnesses because there was no suggestion that they knew what occurred between 11th and 15th April 2010. These people met the accused on the date he was arrested. They would not have added any valuable evidence to this case.

As observed earlier, there was no eye witness to the murder. What we have is circumstantial evidence. In **Sawe v Rep [2003] KLR 364**, the Court held as follows:-

“(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.”

In the instant case, the accused person called the deceased from her house on the night of 11/4/2010. The deceased was not seen again till her mutilated, decomposed body was found in a thicket about 10 days later. From the position of the body, it seemed she had been defiled before her head was slashed off. As found earlier, the accused had a duty to explain but instead his defence is a mere denial of the offence. The manner in which the body was found is in itself demonstration of malice aforethought. The head was severed off the deceased’s body, evidence that whoever committed the act wanted her dead. I am satisfied that it is the accused with others not before the court who committed the act. I find the accused guilty of the offence of murder as charged and convict him accordingly.

DATED and DELIVERED this 14th day of January, 2013.

**R.P.V. WENDOH
JUDGE**

PRESENT:

Mr. Odhiambo holding brief for the accused

Accused - present
Mr. Idagwa or the State
Kennedy – Court Clerk