



REPUBLIC OF KENYA

High Court at Meru

Criminal Case 46 of 2012

REPUBLIC.....PROSECUTOR

VERSUS

P. L.....ACCUSED

JUDGMENT

The accused person P.L is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 19th May, 2012 at Sereolipi Location in Samburu East District, within Samburu County, with others not before the court, murdered SATINA LOCHODE.

The prosecution called a total of 9 witnesses. In brief the case for the prosecution was that the accused, the deceased and other children were grazing cows on the material day, 19th May, 2012. The accused and the deceased, who come from the same area, drove their family cattle from their respective homes to graze at 7am that morning. They with their cattle were seen at the watering point where they watered the cows, at about 10am. At about 12 noon the accused and the deceased were seen together driving their cattle towards the same direction for grazing. That evening the cattle the deceased had driven away for grazing returned home on their own. The deceased was not seen again until her dead body was found in the bush on the 20th May, 2012 one day later.

The postmortem was carried out on the body of the deceased on 30th May, 2012 at Isiolo District Hospital. The results were that the deceased had been strangled and that there were compression marks with bruising and hematoma on the anterior neck region. The cause of death was asphyxia due to strangulation. A Vaginal swap was taken which returned negative results.

The accused person was placed on her defence. She gave a sworn statement and did not call any witness. The defence case was that the deceased and the accused were great friends and that their mothers were come from the same area. That as a result they ate and slept together quite often. The defence case is that on the material day, the deceased and the accused, together with many other children drove their cattle to graze from around 7 am. At around midday they drove the cattle to the watering point where the cattle took water and then left together to graze the cows some more. The accused stated

that the deceased and she dosed off early that afternoon, and that in the process the cattle each of them was herding wandered away in different directions. That when they woke up, each of them went after their cattle and that they did not meet again that day. The accused denied the offense and also stated that she does not know how the deceased met her death, neither was she present when the body was found.

The accused person was represented by Mr. Ondieki, while the State was represented by Mr. Moses Mungai, learned State Counsel. In Mr. Ondieki's submission he urged that the prosecution had not proved their case against the accused beyond reasonable doubt as required by the law. Counsel submitted that the incident took place in the wilderness. He urged that even though the deceased was last seen alive in the company of the accused person, no one witnessed the accused fight or strangling the deceased. Counsel urged that the prosecution had adduced evidence to show that the accused and the deceased were long term friends and that in most occasions took cattle together to graze. However, no ill motive, malice, or bad blood was established between the two.

Mr. Ondieki submitted that the incident took place in the wilderness. He submitted that it cannot be ruled out that the death could have been caused by some other mischievous people. Counsel urged the court to consider that the accused and the deceased were children of almost the same age and that for the accused to strangle the deceased to death with bare hands was difficult. Counsel urged that no finger nails were taken for DNA testing. Mr. Ondieki urged the court to find that the accused person was charged with the offence due to speculation and strong suspicion, but that there was no tangible evidence against her.

Mr. Mungai for the State submitted that the prosecution had proved their case to the required standard. He was relying entirely on the evidence on record and especially the evidence of the doctor and the Investigation Officer. Mr. Mungai urged that the accused was the last person seen in the company of the deceased before she was found dead, and that that was circumstantial evidence against her which was sufficient to sustain a conviction.

I have carefully considered the evidence on record together with the submission by counsel for the accused and for the state.

The accused has been charged with murder contrary to section 203 of the Penal Code. Section 203 of the Penal Code stipulates:

“any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

The prosecution has to adduce evidence to prove that the accused, through an unlawful act or omission caused the death of the deceased. The prosecution must prove that the accused was motivated by malice aforethought.

This case involved children because the deceased was aged 12 years old and according to the doctor, she was small or petite for her age. The accused on the other hand is about 14 years old and according to the witnesses who knew both of them she is a little older and bigger in stature than the deceased. The position is that both the deceased and the accused were children.

I will consider the issues that arise in this case one at a time.

The first issue is whether the prosecution has established a motive for the murder of the deceased. The accused person is facing a charge of murder. The prosecution has to establish that the deceased died due to an unlawful act or omission on the accused part, which was actuated by malice aforethought. The circumstances which constitute malice aforethought are set out under section 206 of Penal Code as follows:-

“206. 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.”

There was no eyewitness of this incident. No one saw the accused attack the deceased. Malice aforethought was not established. Motive is the other important ingredient in a charge of murder even though failure to prove motive is not necessarily fatal to the prosecution case. in REPUBLIC VS KIMAIYO ELD. HCCRC NO. 40 OF 2005 the court stated thus:

“The main ingredients in a charge of murder are that the accused must have formed the criminal intention and have had a motive to cause death or bodily harm prior to killing the deceased and that the death must have been as a result of an unlawful act or omission on the part of the accused, while the first two ingredients would be lacking in the charge of manslaughter.

I have taken his statement into account and noted the fact that he has consumed busaa and chagaa during the material day and night. The fact that he had even engaged in a fracas with his own brother earlier that evening when both were armed with bows and arrows would convince me that he was in a state of intoxication which in my view was a condition graver and more extreme than just being mere drunk, or under the influence of drink. Such is a condition which exists “ when as a result of his consumption of intoxicating liquor (a man’s) physical or mental faculties, or his judgments, are appreciably and materially impaired in the conduct of the ordinary affairs or acts of daily life” (per Fair, J., in R. v. Ormsby, (1945) N.Z.L.R. 109.

Based on the above, I find that the elements of malice aforethought and intention are lacking. Having found that the circumstances tend to incriminate him, I do however find that the accused would qualify for a defence of intoxication, and in such case then I find him guilty of the lesser charge of manslaughter.”

In the instant case the prosecution was unable to establish any motive on the part of the accused that would have been the reason for the accused to have wanted to cause either death or grievous harm to the deceased. The prosecution evidence was that the deceased and the accused were great friends, and that they went together to graze their different herds of cattle in the wilderness which is their home area. The only person who contradicted that evidence was PW4 one D, who was a child who said that the deceased always went with him and not with the accused, to graze cows. D was a child but he did not know his age. He assessed himself as one who was old enough to go to school. I assessed his age as seven to eight years old. His evidence was that he and the deceased always went together to graze cattle and that the only day she went alone she never returned home. PW1 the mother of the deceased and PW5 one of the brothers of the deceased all considered the deceased and accused as friends. Motive was not established at all in this case.

The prosecution is relying on the evidence that the deceased was last seen alive in the company of the accused. Under the Evidence Act there is a Statutory presumption created in such circumstances which must be rebutted by the person in whose company a deceased person was last seen alive. This Statutory presumption is created under section 111(1) and section 119 of the Evidence Act which stipulates:

“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.”

“ 111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within an 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 a 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.”

The question is whether the prosecution adduced sufficient evidence to establish that indeed it was the accused who was the last person to be seen in the company of the deceased before she died. The evidence that the accused and the deceased went away to graze their cows was given by PW4 the child of tender years. After *voire dire* examination the court ruled that even though PW4 was possessed of sufficient knowledge to testify, he did not understand the meaning of an oath and therefore he could only give an unsworn statement from him. Most importantly it was established that PW4 was a child of between 7 and 8 years of age and therefore a child of tender years.

The weight which should be given to the evidence of a child of tender years was discussed in the celebrated case of **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445** where it was held:

“Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.”

What PW4 told the court was that after the children watered the cows at the communal watering point at around 10 am on the material day, the accused and the deceased drove away their cattle towards the same direction. The deceased was not seen alive again. It came out from the evidence of the witnesses, and that is also the prosecution case, that the families living in the area where the incident occurred sent their younger children to go and graze the family cows. The land where the cows are grazed is a large open wilderness with grass, shrubs and scattered trees which is communally owned by the community. It also came out from the evidence that at any one time there were many children grazing cows, sometimes together, and sometimes spread out in a wide area, a distance from each other. When PW4 said that the deceased and the accused drove the cattle towards the same direction all that it meant was that his cows did not go in the same direction as those of the accused and the deceased. That does not however mean that the direction that the accused and deceased took was taken exclusively by them.

In the accused's own defence she said that after going together with the deceased to graze cows after watering them, they were in a group of many other children. That allegation was not controverted by any witness(es). The accused's defence was that both of them dozed off and that when they woke up, they found that their cows had separated and had taken different directions to graze, and that therefore both of them had to go different ways to follow their cows. The accused put the time when they parted with the deceased as mid-day. The deceased was discovered missing at 6 pm the same evening.

In terms of the evidence PW4 was a child of tender years and he gave an unsworn statement. The law is clear that his evidence needed corroboration and the same is lacking in this case. However, the accused does not deny she was in the company of the deceased. However she qualified that and said that they were together in the company of many other children and that they parted ways at midday.

I tested the accused defence against what she told other witnesses during the time that the deceased was being looked for the day she disappeared. According to PW1, the mother of the deceased, the accused told her that they were together with the deceased but that at around midday they parted ways because the cows each was grazing wandered in different directions. According to PW5 when he asked the accused and other children where the deceased was, the other children said that the deceased had gone away with accused. PW5 said that when he confronted the accused with that information, the accused told him that the deceased had gone to Letepes to get back her necklace from one Ekiru who she claimed had taken away her necklace.

I find that the accused statement to PW1 and 5, made at different times, was consistent that she had parted ways with the deceased at around midday. The only variance in her statement is what she told the two witnesses was the reason for their parting. Is that variation a contradiction on the accused part? That question will be answered when I deal with the issue of EKIRU.

The prosecution is relying on circumstantial evidence against the accused. Before I deal with that, I wish to deal with the question of what constitutes circumstantial evidence and what the prosecution needs to prove in order to support a conviction based on such evidence. In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** where the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

“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.”

I will now deal with the circumstantial evidence the prosecution relied on. The very first one was the one I dealt with earlier about the deceased having been last seen alive in the company of the accused. The prosecutions did not in my view cogently and firmly establish that as a fact; neither did the circumstantial evidence relied upon unerringly point towards guilt of the accused;and finally the same could not lead to the conclusion that within all human probability the crime was committed by the accused and none else. The reason for that conclusion is as follows. There was a long lapse of time between the time the accused and deceased were last seen together and the time the deceased was discovered missing.Secondly the accused contention that the cows she was grazing and those under the care deceased separated on their on to different directions forcing them to part ways was neither investigated nor challenged. Thirdly, the accused’s contention that the deceased expressed a desire to go to Letepes to recover her beaded necklace taken from her by one Ekiru, was not controverted in evidence, nor properly investigated.

The other circumstantial evidence the prosecution relied upon was that the accused was seen washing a piece of red cloth which belonged to the deceased. That was the evidence of PW5 who said that in the evening his sister disappeared, he found the accused washing a red piece of cloth and that the piece of cloth belonged to his sister. That cloth was P.Exh.1. PW1 the mother of the deceased also identified the piece of cloth as the one belonging to her daughter, and which she was wearing on the day she went missing. Unfortunately the evidence of PW1, among a few others, was taken by my brother Hon. Apondi J., before I took over the case under section 200 of the Criminal Procedure Code. According to her evidence she demonstrated to the court how the deceased was using the red piece of cloth. The court did not record what was demonstrated.

Regarding the cloth the accused has stated that it belonged to her and not the deceased. She also stated

that on the material day, the deceased was wearing a pink piece of cloth which she had wrapped 3 times round her waist as a skirt. I looked at the photograph taken of the body of the deceased produced by PW7 as P. exhibit 4 and 6. One of the photographs shows that the deceased had a cloth round her waist which appears to be pink in colour, going by the coloured photograph exhibited by the prosecution (exhibit 4 and 6). The accused statement that the cloth the deceased was wearing was pink in colour is corroborated by the prosecution documentary evidence through the photographs afore mentioned. The evidence that the accused was found washing the only cloth that the deceased was wearing when she disappeared just before her death is contradicted by the prosecutions own evidence through the photographs. Besides regarding the identification of the red cloth P. Exhibit 1, I find one, that there was no special marking to enable credible identification of the piece of cloth as the one the deceased was wearing before she died and two, PW1 and 5 all said that the deceased was wearing a piece of cloth that day. I find that that piece of cloth was the one found lying under her dead body when it was discovered one day after she went missing. I find that the prosecution's evidence that the red cloth exhibited in court belonged to the deceased was not proved on the required standard. Consequently, the prosecution did not cogently and firmly establish the circumstantial evidence that the accused was found with a cloth worn by the deceased before she went missing; and also that it failed to establish that the circumstantial evidence unerringly pointed towards the guilt of the accused.

The other circumstantial evidence relied upon by the prosecution was that the accused person is the one who led to the discovery of the deceased. PW 5 told the court that after the accused told him that the deceased had gone to Ekiru's place he looked for Ekiru who denied ever seeing the deceased on the material day. PW5's evidence is that he returned back to the accused the following morning and asked her to lead him and others to where she parted with the deceased the day before. PW5 testified that the accused led him to a place and that it is there where the body of the deceased was found, with her necklace lying on the ground. PW5 testified that at that point the accused ran away.

None of the others who were with PW5 at the time the accused took PW5 to the scene were called as witnesses. The accused on her part admitted taking PW5 to the place where she parted with the deceased, however she denied seeing the body of the deceased or her necklace at that scene. The accused stated that she did not run away but that she drove away the family cows to graze after showing PW5 the scene as he had requested. She said she was driving the family cows to graze at the time she led PW5 to the place she parted the deceased. The issue whether the scene the accused led PW5 and others to was the same spot the body of the deceased was found; and the allegation the accused ran away as a result of the deceased body being found at that scene, is the word of PW5 against that of the accused. It is therefore, controversial whether or not the accused led to the recovery of the body of the deceased and also whether she ran away as PW5 put it. The burden lay on the prosecution to prove that fact beyond any reasonable doubt. I make an adverse inference against the prosecution and I find that why the others who were with PW5 were not called as witnesses was because their evidence, had it been adduced in evidence, would have been adverse to the ir case. That being the case I find the prosecution did not prove that the accused led to the discovery of the body and secondly that she ran away after the body was discovered.

The other issue is whether the prosecution proved its case against the accused person beyond any reasonable doubt. The investigating officer was PW8 CPL Obiero. He said that he investigated the case from the 20th May, 2012 one day after the deceased disappeared on the same day that her body was discovered. He went to the scene with P C Muleka, PW7 who he directed to take photos of the scene and the body with his mobile phone. PW8 testified that he was following some leads. He said that because he saw some discharge, he requested for some vaginal swab from the doctor who performed the post mortem. He said that he sent the swab to the Government Chemist. He testified that he arrested the accused person for fear of her safety before the results were released from the Government Chemist. According to CPL Obiero, in line with the request for Government Chemist report he also investigated one Ekiru who was implicated by the accused as the one the deceased went to see the day she disappeared. He testified that after interrogating Ekiru, he was satisfied with his explanation that he did not see the deceased on the date in question. With due respect to CPL Obier, Ekiru should have been made a witness if at all he was implicated as the person the deceased went to see after parting company with the accused.

The other thing is the fact that the photograph taken by PC Muleka PW7, shows that a beaded necklace said to belong to the deceased was found 25 meters from where the body of the deceased was lying. According to PW5 the accused had said that the deceased was going to Letepes where Ekiru comes from, so as to get her bead and necklace from Ekiru. The mother of the deceased who testified before my predecessor identified the bead Exhibit 2 as her daughter's (deceased). However the evidence is silent on whether she was wearing that neckless on the day she disappeared. If it is true that the deceased went to see Ekiru in order to get her necklace back, the photograph by the police officer shows that the necklace was thrown a few meters from where the body was. That was a very important piece of evidence which the investigation officer failed to capture. CPL Obiero did not investigate whether the deceased was wearing her neckless that day. The fact the neckless was intact a few meters from her body gives credence to the accused statement to PW5 that the deceased had gone after it. Why else would it be on the ground intact and not on her neck. Fact it was intact, and fact it was not on deceased neck may suggest that she may not have been wearing it that day. The accused statement that the deceased went for a necklace and then the necklace was found lying near her body creates a possibility that indeed the deceased went in search of her necklace and that it was by getting it back which is likely to have led to her death. As much as CPL. Obiero was trying to save the accused by hurriedly arraigning her before court for this serious offence before the family of the deceased harmed her, he did not pursue that important link implicating Ekiru to the deceased death.

CPL. Obiero said that the other link he was following was the red piece of cloth which PC. Muleka recovered from the accused home. I have already dwelt with that point and have come to the conclusion since the prosecution case was that the deceased had only one piece of cloth then the same is the one that was found under her body on the day her body was discovered in the bush.

The issue of the finger nails for DNA testing which was raised by the defence because of the doctor's finding that the deceased had been strangled, and that there was bruising of the neck area. CPL. Obiero did not take any finger nails from the accused.

That leads to the other issue whether the accused could have been able to carry out the murder. The prosecution has not adduced any evidence of motive or intention to commit the offence on the part of the accused person. The evidence before the court is that there was no ill motive, or any quarrel or misunderstanding between the accused and the deceased and their families. There was also no evidence of an intention to cause death or grievous harm to the deceased. The only conclusion I can make is that there was no evidence of strong suspicion against the accused person.

The evidence shows that the accused continued to behave normally, and even when told to go and show where she last parted company with the deceased, she did so and then continued grazing the family cows as she normally did. Her demenour when she gave her defence in court impressed me as that of a forthright, confident, open, and honest person. She gave her evidence in a consistent manner very clearly and without any hesitation. I was impressed that she was telling the truth.

Having carefully considered the entire evidence adduced both by the prosecution and the defence, I have come to the conclusion that for all the reasons I have given in this judgment, the prosecution has failed to prove its case against the accused beyond any reasonable doubt. Having come to that conclusion, I find that that the charge against the accused, of murder contrary to section 203 of the Penal Code, has not been proved on the required standard. Consequently, I give the accused the benefit of doubt and acquit her of the offence charged accordingly.

SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF MARCH, 2013.

LESIIT, J.

JUDGE