



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 5 OF 2010

REPUBLIC.....RESPONDENT

VERSUS

DANIEL O. NGOKA.....ACCUSED

JUDGMENT

The accused **DANIEL OKOTH NGOKA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 14th day of February, 2010 at Mwandoni area in Mombasa District within Coast Province murdered one LILIAN alias LILIAN ATIENO.”

The accused entered a plea of ‘*Not Guilty*’ to the charge. His trial commenced before me on 9th February, 2011. The prosecution led by learned state counsel **MR. ONSERIO** called a total of five (5) witnesses in support of their case. **MR. OJODE** Advocate represented the accused.

PW1 ERIC MILTON LANA told the court that he knew the accused as his neighbour in Mwandoni Mombasa. **PW1** told the court that the accused lived with his wife called Lilian Atieno [the deceased]. On 14th February, 2010 **PW1** narrated that he came home at 8.00 p.m. and entered his house. At about 8.30 p.m. accused came to the house of **PW 1** and alerted him that he had seen shoes resembling those of his (accused’s) wife outside the bathroom. **PW1** accompanied the accused to check what was amiss. They found the body of a female adult lying in a space next to the bathroom. They turned the body over and realized that it was the wife of the accused who was lying there dead. **PW1** then accompanied the accused to go and report the incident to the village chairman. **PW2 MOHAMED SALIM BILALI** the village chairman confirmed that the report was made to him. He went to the scene and saw the body of a female adult lying there. He then called in police who arrested accused and removed the body to the mortuary. Upon completion of police investigations the accused was arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied the charge of murder.

The offence of murder is defined by section 203 of the Penal code thus:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission shall be guilty of murder.”

Thus the offence of murder is established by proof of the following three ingredients:

1. Proof of the death and cause of death of the deceased.
2. Proof that the death of the deceased resulted from an unlawful act or omission on the part of the accused; and finally
3. Proof that said unlawful act or omission was committed with malice aforethought.

In this case **PW1** told the court that upon being alerted by accused he went to the bathroom where he found the body of a dead woman lying on the ground. **PW1** identifies the deceased as 'Lilian' the wife of the accused. In his defence accused claims not to have known the dead woman at all and he further denies that she was his wife. There is absolutely no logical reason why **PW1** would insist that the deceased was the wife of the accused if it were not true. **PW1** told the court that he had been a neighbour to the accused for three months and that the accused and this Lilian shared a house. I am not persuaded that the accused did not know the deceased. At no time did this issue arise in cross-examination of **PW1** by defence counsel. It is clearly an afterthought and an attempt by the accused to put as much distance as possible between himself and the dead body. Aside from **PW1** there is evidence by **PW2** the village chairman of the existence of the dead body.

Evidence on the cause of death is adduced by **PW3 DR. K. N. MANDALYA** the pathologist who performed the autopsy examination on the body of the deceased. He noted a fracture of the cervical spine. In the opinion of **PW3** the cause of death was "*cervical spine fracture due to pressure on neck.*" He filled and signed the post-mortem report which is produced as an exhibit **Pexb1**. The evidence of this witness was uncontested. As such I find that the deceased met her death due to strangulation.

Having sufficiently proved the fact as well as the cause of death of the deceased, the prosecution must adduce evidence to prove that it was the accused who strangled the deceased and thus caused her death. There was no eye-witness to the incident. **PW1** and **PW2** only saw the body after the deceased had been killed. There is no witness who saw the accused strangle the deceased. There was the suggestion that the accused and the deceased had quarreled. **PW1** under cross-examination states:

"Neighbouring women told me that accused and his wife had quarreled most of the day. I do not know if police interviewed those ladies."

This therefore amounts to hearsay evidence which cannot form the basis for a conviction. Further, the mere fact that accused and the deceased quarreled (as couples are often wont to do) does not amount to proof that he killed her.

PW5 CORPORAL JOHN MUMBO who was the investigating officer stated that:

"Neighbours informed us that at 8.00 a.m. the deceased and accused fought. A neighbour heard sounds of beating."

PW5 goes on to state:

"I recorded statements of eye-witnesses whom we have failed to trace up to now."

Thus the prosecution was unable to avail a single eye-witness to back the allegation that the accused had beaten the deceased and/or fought with her. Mr. Onserio the state counsel in closing his case told the court:

"The witness Fatma Kassim cannot be traced at all. She has changed her residence. We are unable to avail her despite numerous attempts to trace her....."

Thus the witness whose name was given as **Fatma Kassim** could not be traced. Without her evidence the prosecution case is reduced to mere suspicion. It has long been held that suspicion no matter how strong cannot form the basis for a conviction. I find that the prosecution have failed to prove beyond a

reasonable doubt that it was the accused who killed the deceased by strangling. The '*actus reus*' of the offence of murder has not been proved. As such I enter a verdict of '*Not Guilty*' and I acquit the accused of this charge. Accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered in Mombasa this 27th day of August, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Dzomu for State

Mr. Wameyo h/b Mr. Ojode for Accused

Court Clerk Mutisya