



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

MURDER CASE NO. 5 OF 2011

REPUBLIC.....PROSECUTION

VERSUS

ARCHANGEL MUGO NJIRU.....ACCUSED

J U D G M E N T

ARCHANGEL MUGO NJIRU hereinafter referred to as the accused stands charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars in the information sheet are as follows:-

On the 4th day of February, 2011 at Mbinguini Village, Wamumu Sub-location in Kirinyaga South District within Central Province murdered JEMIMA WAKUTHII MUGO.

The Prosecution called a total of six (6) witnesses. There is no one who saw the accused kill the deceased who was his wife. The accused and deceased lived on the same compound with their two sons (PW2 & PW4). Both of them say they were in their houses at night when they heard a noise from outside. PW2 opened his door and went out and heard screams of “thieves”. He found his father outside and he was the one who was screaming. The accused told him there were people who wanted to steal the deceased's cow and they had gone down the road. He followed them with his torch and that's when he came across the deceased. She was still breathing then but she died later. The father disappeared as screams rent the air. On further checking they found one cow to have been cut on the ear.

PW4 also a son of the deceased was resting in his house when he heard his parents quarreling loudly. His house was 20 meters from theirs. He heard the accused say he was going to slaughter a sheep. Suddenly he heard the deceased screaming in pain. He went outside and heard the accused shout “thieves”. He asked the accused what it was and he replied “its your mother's cow”. He walked away. He then found his mother's body which had blood on the clothes. They started looking for the accused. His shirt was found on the road. People came and a report was made. The accused was arrested by villagers. PW4 was sure it was the accused who killed the deceased.

PW5 was the re-arresting officer. He found the accused with a blood stained knife which was taken to the Government Chemist. PW1 found the cause of death to be multiple stab wounds with heart rupture, massive haemorrhage haemopericardium (EXB1). The accused on examination was found to be mentally fit to stand trial by Dr. Thuo (PW6). The Government Analyst (PW3) found slight blood stains on the knife. The DNA profile from the blood on the knife matched that generated from the deceased's blood. (EXB2)

In his unworn statement of defence the accused denied the charge. He said the deceased was his wife since 1970 and they have 5 adult children plus grandchildren. PW1 and PW2 live on the same compound

with him. On 4/2/2011 he spent the day well with the deceased on the farm and at home. At 5.30 p.m. he went to the nearby market to meet other elders and watch TV. He arrived home and after supper went to sleep. He heard the deceased coming to sleep after washing dishes. Later she went outside and after a while he heard her scream "oii you are not going to steal from me". He dressed up and went out. Near the cowshed he saw her struggling with people and he said "thieves". He then saw a torch flashing from Kinyua's house. Kinyua opened the door and the people took off. He followed them shouting thieves, thieves upto the road. He removed his shirt and dropped it as people were following him. He later returned home and he was beaten by villagers. They never gave him time to explain anything.

The police came for him and they spoke things that broke his heart. He was placed in a police vehicle and made to lie in his wife's blood. He was then charged. Mr. Nduku filed brief written submissions which he did not high light. And this is now the case before Court for determination.

The evidence of PW1 who did the postmortem on the deceased's body confirmed that the death occurred as a result of multiple injuries on the deceased's body plus a heart rapture. This fact of death is not disputed. Murder comprises of two ingredients

(I) The actual killing (actus reas)

(II) The malice aforethought (mens reus)

The evidence shows that none of the witnesses saw the accused kill the deceased. PW2 and PW4 who live on the same compound with the deceased heard screams. PW2 says he heard the accused scream saying "thieves" so he quickly went out. PW4 says he heard his parents quarreling loudly then he heard the accused say he was going to slaughter a sheep. Thereafter he heard his mother make a painful scream. Its not clear whom between PW2 and PW4 lived closer to the accused's house. Its however clear that each of the two sons responded to a scream. PW2 says he responded to the accused's scream while PW4 responded to the one of the deceased. Were they hearing different things or what?

When they came out they found no thieves. But of significance is the finding of the cow's ear cut. Was it the accused or somebody else who cut the cow's ear? PW4 suspected the accused because he went in a different direction when the sons went in the direction where they found the body of their mother. It is the accused's defence that they were under attack and he went to rescue the deceased. He even followed the thieves. The accused's shirt was picked on the road/path. He says he dropped it because he did not want the thieves to see him. This shirt was not said to have had any blood stains on it. In fact that must be the reason why it was not sent to the Government Chemist for analysis or produced in Court. A blood stained knife is said to have been recovered from the accused. PW2, PW4 and PW5 came to the scene and found the accused arrested by the villagers and tied up and he was holding this blood stained knife (EXB3). PW2, PW4 and PW5 did not witness the recovery of this knife. None of those who allegedly flashed out the accused from his hiding as he carried a knife ever testified to give credence to what was alleged by PW2, PW4 and PW5. Its therefore not known how this knife (EXB3) was recovered, by who and from where.

The accused person has maintained that he did not kill his wife and all he knows is that they were attacked by robbers that night. In cross examination PW4 said when he came out of the house he saw 2 shadows which must have been his parents shadows. And that the shadows were of 2 people standing. This cannot be true because in his evidence in chief he said he left his house after he heard his mother screaming painfully. And if she screamed painfully it must be the time she was injured. How could PW4 have found her standing with the accused considering the fatal injuries she suffered? PW4 could not have seen what he says he saw. His is suspicion which cannot found a conviction. In the case of ***SAWE VS REPUBLIC [2003] KLR 364*** the Court of Appeal 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.

4. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

The circumstantial evidence herein is so so weak especially when the following are looked at:-

it (I) The failure to adduce evidence on proper recovery of the blood stained knife. Was really in the accused's possession?

(II) The recovered shirt which accused wore that night. It had no blood stains.

(III) The circumstances under which the cow's ear was cut.

(IV) Failure to investigate the accused's allegations of thieves being in the home.

After analyzing the evidence on record in its totality, I do find that the Prosecution failed to prove that the accused is the person who killed the deceased. For my part I find him not guilty and acquit him under Section 322(1) of the Criminal Penal Code.

DELIVERED, SIGNED AND DATED AT EMBU THIS 1ST DAY OF AUGUST, 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Ing'ahizu for Prosecution

Mr. Githinji for Nduku for Accused

Accused

Mutero CC