



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE NO. 17 OF 2011

REPUBLICPROSECUTOR

VERSUS

REUBEN OLE LEGEI alias MUSAACCUSED

JUDGMENT

1. The accused Reuben Ole Legei alias Musa (Musa) was charged under Section 203 as read with Section 204 of the Penal Code with the murder of Phylis Njoki, on the night of 10th and 11th June, 2011 at Kisumu Ndogo village, Malindi. He denied the charge and was represented by Messrs Lughanje/Gekanana.
2. The prosecution case was as follows.

Selina Sidi Konde (PW3) is a landlord renting out rooms on several plots. One such plot at Kisumu Ndogo is called "Dagamura Home" (Dagamura). Her son Joseph lived at Dagamura with his family but an agent managed

the property on PW3's behalf. A few months prior to the material date, Musa had rented one of the rooms there. The room served both as a shop and residence, and was duly partitioned as is common in most neighbourhoods in Malindi and other towns.

3. Also renting a room in the same residence was one girl called Esther. She hosted Phylis Njoki (Njoki), the deceased who had seemingly fallen on hard times. Njoki was aged about 21 years and had her young child of about 5 years with her at the time. Njoki was a member of the church which another tenant of Dagamura, Jane Agusta Wambui Njoroge (PW2) attended. The rent in respect of the room occupied by Njoki and Esther was paid by a benefactor, said to be a pastor. The benefactor had ceased the support necessitating that the girls vacate the room, which they did on 8th June, 2011.
4. Although Esther left Dagamura with her goods, Njoki was stranded as she had no money. Musa offered to keep her goods for her. And so, the evening of 10th June, 2011 found Njoki still hovering in Dagamura with her child, and her goods stored in the room of Musa. The child was lying at the veranda of Musa's shop. Njoki's explanation to PW2 who inquired was that the child was unwell. That was the last that PW2 saw Njoki alive.
5. In the middle of that night (about 1.00am) PW2 was roused by the loud crying of Njoki's child. She was unable to sleep. Stepping out of her room, she traced the cries to Musa's shop. On trying the door, PW2 found it open and the child came forth. She took the child to her house for the remainder of the night. She did not see Musa. She called Njoki's phone but the calls went

unanswered. She woke up early on the next morning and went to the plot entrance. It was 6.00am. Presently she saw people running towards a spot some 50 feet away from the plot. She went to inquire.

6. The source of attraction was the body of Njoki, fully dressed but with the throat slit. Musa's shop was still unlocked but Musa himself was at large. His phone went unanswered. He was arrested several days later at a place called Gongoni, 11km from Malindi town. Meanwhile, police had the body and scene photographed. Later a postmortem examination was conducted. Death was due to disanguination secondary to the cut on the neck.

7. In his defence, Musa made an unsworn statement.

He said he operated his shop at Mbuyu wa Kusema, at PW3's plot and knew Njoki and Esther as fellow tenants who had been ordered to vacate as their host had refused to pay their rent for their room. PW3 on the evening of 8th June, 2011 threw out Njoki even though it was dark, and despite the pleas by Musa on her behalf, she locked the room. Njoki implored Musa to allow her to keep her belongings in his shop and he agreed. Later on PW3's son who also acted as caretaker allowed her to spend the night in one of the rooms. Njoki asked Musa to help her look for alternative accommodation and to continue keeping her goods. He agreed.

8. On the material evening, Njoki came to Musa's shop but he already knew from PW2 that she had identified a cheaper house than the one Musa got so he did not tell Njoki about the latter. Soon PW2 came and informed Njoki who replied, allegedly, that she did not have money, and was planning on spending the night in one of the rooms.
9. Musa invited Njoki into his house because it was getting dark and they remained there until 9.00pm. It is then that Musa told Njoki to go out and look for PW3's son to allow her into one of the rooms. However, he allowed the child to sleep in the room. Njoki never returned even though Musa waited long. He then locked his house. Early on the next day, he rose up at 4.00am to go to the road to receive provisions for his shop leaving the door unlocked. He saw PW2 call out Njoki's child from his house. Having gotten his provisions he returned to his shop only to learn at 7.00am that a body had been spotted at the road nearby.
10. Closing his shop, he went out to the spot where the body of Njoki lay. Presently he overheard some of those gathered discuss that Njoki had been at Musa's house and he should be killed. He escaped on a *boda boda* taxi to Gongoni as the crowd charged towards his shop. Eventually, he gave himself up to police at Gongoni. He denied murdering Njoki.
11. Certain key facts are not in dispute. These include the fact that prior to her death Njoki had lived in Dagamura where Musa lived and operated a shop, and that on 8th June, 2011 the landlord (PW3) evicted Njoki and her host, one Esther as the pastor hitherto paying their rent had withdrawn her support.
12. Njoki was rendered homeless, and having nowhere to go, hang around the Dagamura seeking refuge for her goods in the shop of Musa. While it is unclear where she spent the night of 9th and 10th June, 2011, she was back at the Dagamura plot on the evening of 10th June, 2011. Musa invited her with her child into his shop. But by day break the next day, her child was in PW2's house while her lifeless body was on a nearby road, with the throat slit.
13. Musa's shop was open. There is some dispute as regards his exact whereabouts before the discovery of the body, but thereafter he escaped to Gongoni, where he was arrested several days later, and arraigned before court on 1st July, 2011.
14. The court must determine whether the prosecution has proved the charge beyond any reasonable doubt. There is no eye witness to the murder and the prosecution evidence is primarily circumstantial. On the evening of 10th June, 2011 Njoki and her child were at Dagamura, two

days after she had been evicted by PW3. Her child lay at the veranda of the shop of Musa. Thereafter Njoki and her child were invited into the shop by Musa.

15. In the middle of night, at about 1.00am PW2 was woken up by the loud crying of a child. Unable to sleep, PW2 decided to inquire. She traced the crying to Musa's shop. She tried the door; the shop was unlocked. Njoki's child came to her and she took the child away. She did not see anybody else even though she did not enter the shop which was partitioned. During cross-examination PW2 admitted that she could not tell whether Musa or Njoki were in the room at the time.
16. In his defence, Musa was to assert that in fact PW2 picked the child from his unlocked room after 4.00am while he was at the roadside receiving provisions. The time difference is three hours. In cross-examination Musa did not suggest to PW2 that the hour of the retrieval of the child was other than she stated in her evidence in chief. At any rate, if PW2 was visible to Musa at the hour he asserts, PW2 ought to have seen him too. Because when PW2 got out of her house, she went all the way to the gate before discerning that the crying was emanating from Musa's shop. Again Musa did not ask PW2 whether she saw him at that time.
17. PW2 was a neighbour to Musa. Other than belonging to the same congregation as Njoki, she said she was not close to Njoki who had been living at Dagamura for a month at the material time. Besides, if she was close to her, she would probably have assisted her when she was thrown out of her room and became desperate. Thus PW2 was an independent person in the whole transaction who was moved by the distressed cries of a child to go out, enquire and rescue the child. She said she also called Njoki's phone on the said night. It was not answered.
18. PW2 told the court that Njoki while stranded at Dagamura was looking for a house. It was alleged by Musa in his defence that the witness was actively looking for a house for Njoki, as he was. That by the material evening he already had identified a house for Njoki, which, on exchanging notes with PW2 on the evening of 10-6-11, he thought was too dear. That at any rate when Njoki returned at 5.00pm to Dagamura PW2 reported to her that she had identified a house for rent at Kshs. 500/-. Njoki allegedly said at that point that she had no money and would await PW3's Joseph to come and let her into one of the rooms.
19. Obviously, having been evicted, Njoki had to look for a place to live and it is plausible that she was looking for a house. What I find striking is that the accused appeared to be at pains to draw PW2 into the house search and a conversation regarding the same; two conversations in fact. That firstly, before Njoki returned at 5.00pm, Musa and PW2 allegedly discussed the houses they had identified for her and the respective rents. And secondly, upon the arrival of Njoki, that PW2 reported to her that she had found a shs. 500/- rent house. To which Njoki replied that she had no money and would convince PW3's son to accommodate her in one of his mother's rooms for the night.
20. It is telling that the assertion that PW2 was involved in searching for and discussing an alternative room for Njoki was not put to PW2 during cross-examination. This despite the evidence of PW2 that on the material evening she saw Njoki's child lying at the veranda of Musa and questioned Njoki, who said the child was ill. It was suggested by Musa in his defence that these alleged conversations closed with Njoki's alleged decision to wait for PW3's son Joseph to help her.
21. The defence did not put this alleged decision to PW2 in cross-examination yet PW2 had pointedly denied therein that Njoki spent the previous night in a room given to her by Joseph. This is surprising given that waiting for Joseph is the "reason" why the accused invited Njoki into his shop, in his words, "because it was dark". The suggestion is that the invitation was temporary, itself challenged by the presence of her young child in Musa's room at 1.00am.
22. PW2's son Joseph was not called as a witness but that does not detract from the evidence by his mother the landlord that he did not keep keys to her premises and the fact the last person to be

seen with Njoki alive is the accused in his house. In his explanation Musa stated:

“we stayed until 9.00pm. I told her to go out and look for the man (PW3's son). But her child appeared sleepy and the deceased took her mattress and lay her child in my house. She left and never returned. I waited for long. I locked my house. I took a mosquito net and covered the child...”

- 23.If this evidence is believed, it suggests that Musa's behavior was nothing but erratic on that night. First he invited Njoki in “*because it was dark*”. He then decided to throw out Njoki at 9.00pm to go in the night alone in search of PW3's elusive son. Yet PW3 adamantly denied that her son had any keys or authority to give out her rooms. There is evidence by PW2 and PW3 that both Njoki and the accused had a mobile phone. And so did Joseph, PW3's son. What could have been easier than to place a call to Joseph rather than send Njoki venturing into the night in search of him while keeping her child. At any rate the said Joseph also lived with his family at Dagamura according to PW3 and did not hold any keys or authority for giving out her rooms as she had an agent.
- 24.The accused's explanation does not make sense except that it is offered as an explanation of the surprising disappearance of Njoki from his room only for her dead body to be found 50 metres away with the throat slit. It is also an attempt to explain the presence of Njoki's crying child later in his room in the material night and the unlocked door of the shop. Something happened in the said night, causing the child to wake, and the accused was not in the room. Could it be that he took out Njoki, whether dead or alive from the room at that hour? The absence of blood stains at the house and the signs of struggle and the pool of blood at the scene of the body, as described by Pc. Kiplagat (PW7) who took scene photographs suggested that Njoki may have been killed at that spot, rather than at the house.
- 26.In my considered view, there is every reason to believe PW2. She struck me as a mature truthful and consciousness person with no axe to grind. Unlike others, she even refused to speculate as to whether Musa and Njoki were lovers. I accept as truth her evidence regarding the time (1.00am) when she retrieved the child from Musa's unlocked shop. If Musa was present, he would have come to the door or confronted PW2 for butting into his room at the ungodly hour of 1.00am, or at least explain the crying child.
- 27.Besides, he said he had locked his room before he slept. So how was the door open and why was he not roused by the child crying in his room while PW2 heard the crying from several rooms away? His evidence raises other questions as to how having been the early bird outside Dagamura, he failed to see the body which was 50 metres away until 7.00am. PW2 said that by 6.00am a crowd had gathered after the body was seen. It is surprising that Musa who on his evidence was back at his shop before 6.00am never got to hear about the discovery until 7.00am.
- 27.According to PW2 however, the accused was nowhere to be seen at 6.00am or even later. The accused alleged quite surprisingly that when he was at the scene of the body he heard spectators mention his name as a suspect and he fled as the crowd charged for his shop. Does that suggest the people did not see or know him even though he was close enough to hear what they said? This piece of evidence was on the face of it tendered to explain his disappearance for several days subsequent to the murder of Njoki and the abandonment of his shop with stock.
- 28.He was hiding, on his own admission in (Gongoni). He did not even contact his landlord PW3. This is hardly the behavior of an innocent man, who in his own words had valuable stock in his shop and had committed no offence beyond offering temporary refuge to Njoki. It is the conduct of a person laboring under a guilty conscience. His entire explanation to this court is in my view a continuation of this attempt to hide his guilt.

29. The law governing the treatment of a circumstantial evidence is settled since the case of **Kipekring Arap Koskei v R (1949)16 EACA, 135** where the court stated that

“.....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 hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused”

These principles were later modified by the Court of Appeal in Simoni Musoke v R (1958) EA 715 wherein the court held that:

“In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

Citing the decision of the Privy Council in Teper v R [1952] 2 ALL E.R. 447; [1952] A.C. 480 the court stated:

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

30. In a recent decision Dorcas Jebet Ketter & Another v R (2013) eKLR the Court of Appeal restated the above principles. In that case, there was evidence, as herein, that the accused were the last persons to be seen with the deceased alive. Although the accused had been seen beating the deceased prior to his disappearance, his body was not found as it was apparently burned to ashes. The court found as a fact that the appellants were the people last seen with the deceased alive.

The court stated:

“In our minds, the facts of the case point to none other than the two appellants either alone or jointly with others as the people responsible for the death of the deceased. In any event, under the provisions of Section 111 of the Evidence Act,...they had to explain what happened to the deceased who was last seen with them and...in their custody...”

31. As in this case, not only was Njoki in the room of the deceased early on the material night, but her property and child were there. Inexplicably her child was abandoned in the dead of the night thus cried out in distress. The accused also abandoned his stocked shop and was not seen since the evening he invited Njoki into his room. PW3's attempt to get him on the phone also drew a blank.

32. Section 111 of the Evidence Act states:

- 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.

(2) Nothing in this section shall:-

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or”

33. With regard to the appellants in **Dorcas Jebet** **Ketter & Another vs R**, the court said that:

“...the burden of showing what happened to him (deceased) was on the appellants which burden is only confined to some explanation not amounting to proof beyond reasonable doubt.”

Similarly, in the case before us, the burden is on Musa to explain what happened after he took Njoki into his house on the night of 10th June, 2011. The explanation he has given does not add up and is at any rate ousted by the prosecution evidence, especially by PW2 and PW3 and by his own conduct. Dead women tell no tales and we will never know what happened between the accused and Njoki and her child on the night in question, leading to her murder.

34. That the postmortem form stated there was “no evidence of rape” matters little and does not exclude the possibility that Musa had an eye on young Njoki and his 'hospitality' was not out of pure motives. There is no requirement on the part of the prosecution to prove the motive of the murder. The cut on Njoki's throat was so severe that it was intended to snuff out her life (see Section 208 of the Penal code).

35. Whether or not she had a love relationship with the accused prior to this day was merely unconfirmed speculation. Musa, a healthy male adult apparently lived alone and, of all the residents of Dagamura offered Njoki a place of refuge. On the next day she was dead, her body resting 50 metres from his shop. He fled Dagamura and has subsequently given an unconvincing and obviously contrived account of what happened.

35. I find that this is a proper case for drawing the inference prescribed in **Kipkering Arap Koskei vs R and Musoke v. R**. The accused's attempt point to circumstances tending to weaken or destroy the inference (that Njoki left at 9.00pm to look for PW3's son, and therefore possibly murdered by others) was totally rebutted by PW2 and PW3. I am satisfied that the prosecution has proved its case beyond any reasonable doubt and will convict the accused accordingly.

Delivered and signed at Malindi this **23rd** day of **October, 2013** in the presence of the Accused, Mr. Gekanana for him, Mr. Nyongesa for him.

Court clerk - Samwel

C. W. Meoli

JUDGE

MR. GEKANANA – Accused is a first offender, married with four children in school in Laikipia. He pleads for leniency.

C. W. Meoli

JUDGE

NOTES ON SENTENCE

Accused treated as first offender. The motivation for the cruel murder of the victim may never be known but the deceased was a young girl and mother to a five-year old child. The accused invited her into his home for whatever reason and eventually murdered her and thereafter has continued to throw a smokescreen on his guilt.

C. W. Meoli

JUDGE

SENTENCE

Accused to suffer death in the manner authorized by law.

Right of Appeal 14 days.

C. W. Meoli

JUDGE