



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE NO. 6 OF 2011

REPUBLICPROSECUTOR

VERSUS

WESTON WANJALA WEPUKHULUACCUSED

JUDGMENT

1. The accused, Weston Wanjala Wepukhulu was charged with the murder of Mbeto Mbwana Changoma on 3rd February, 2011. According to the information on record, the murder occurred at Soroko Village Kilelengwani Location, Tana River County. The accused denied the charge and was represented by Mr. Michira.
2. The prosecution case is as follows. The deceased, Mbeto Mbwana Changoma was employed as a farmhand by John Kamangala Mpya (PW6) on his farm at Witu Soroko. The accused and his wife (Mama Anthony) also had lived nearby as man and wife at the same village. Following disagreements, the couple had separated and Mama Anthony went to live at a farm within Soroko owned by her brother Francis Wafula Wangaya (PW3). The accused went to live at a place called Kaloleni as a guest of Chiwala Ndiro (PW1) the latter who was related by marriage to the deceased.
3. The accused however, pursued his wife by stalking her at night while armed. On at least two occasions, the matter had been reported to authorities and the accused warned to desist from the habit. That did not happen as the accused continued to prowl around the homestead of PW3 while armed. It would appear that the accused suspected his wife to be involved in an amorous relationship.
4. On 7th February, 2011 the body of the deceased which was badly decomposed was found in the maize plantation of PW3 by a farmer neighbour, Grace Wangui (PW2). Authorities were notified and the body was eventually collected by police on 8th February, 2011. Dr. Dhulkifl (PW4) who conducted the postmortem reported that the body was putrid, severely mangled and mauled. He was therefore unable to ascertain the cause of death.
5. Police also recovered a phone and its cord and t-shirt both which were identified to be the property of the accused. The phone was allegedly found at the scene of the recovery of the body, while the t-shirt was recovered from the dwelling of the accused at PW1's home. It had blood stains. The accused was placed in custody.
6. The accused elected to make a sworn defence statement. He stated that after thirteen years of marriage he was estranged from his wife who moved to live with PW3 at Witu Soroko. When he pursued her, the family warned him not to visit the homestead again. But he did visit on several

occasions and at one time was forcefully removed by the chief (PW4) and Cpl. Galana (PW7). He was placed in custody. He returned there later to collect his identification card but his wife chased him away. On 18th October, 2010 she called him to a neighbour's house to collect the identification card. He never returned to the home.

7. He stated that he had no grudge against the deceased and denied killing him. He said he did not know him to be involved in an affair with his wife. Concerning the bloodstained shirt, he said was a donation it from a neighbour after he lost his property in a house fire on 25th December, 2010. He said the phone exhibited in court was stolen from his house on 24th January, 2011 and he could not explain how it ended up at the scene of murder/recovery.

8. He stated that it was common for wild animals to prowl around in the neighbourhood at night and that between December, 2010 and January 2011 he would arm himself with a machete and spear to go out to guard crops against the marauding animals, as his host PW1 often came home late from drinking.

9. There is no dispute that during the material period the deceased lived in the same village as the accused's estranged wife who was accommodated by her brother,, PW3. It is also not disputed that the accused lived a distance away, hosted by PW1 at a place called Kaloleni. And further that on several occasions during the material period he had visited PW3's home prowling around especially at night in pursuit of his wife, despite the wife's family through PW3 throwing him out and warning him to desist from visiting. That on the 7th February, 2011 the body believed to be that of the deceased was found in the shamba of PW3. It was badly decomposed. It was not possible to ascertain the immediate cause of death.

10. The court must determine whether the accused:

- a) of malice aforethought, through unlawful act or omission
- b) caused the death of the deceased.

The prosecution's evidence is primarily circumstantial. In the past the Court of Appeal has pronounced itself on the quality of such evidence as is capable of sustaining a conviction.

11. In the case of **Kipkering Arap Koskei & Ano v R (1949) 16EACA 135** the court discussed this aspect by stating:

“.....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”

Further in **Musoke v Uganda [1958]EA** the Court stated:

“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.”

12. Applying the foregoing principles to this case, it would seem that the prosecution of the accused was based on three key strands of evidence:

1. His persistent stalking of his estranged wife at night while armed with weapons. This night prowls ended after the discovery of the body.

2. The recovery of his phone and cord at the scene where the body was found
3. The recovery of his bloodstained shirt from his residence shortly thereafter.

13. On the first aspect there is evidence from PW1, PW3, PW4 and PW7, and admitted by the accused himself that he had pursued his wife to her brother's home and continued to visit even after warnings by PW3 and arrest by PW7. Evidently, he was determined not to give up as even after release from custody at one occasion he went back allegedly to collect his identification card which fell out after he was assaulted by PW3. On such occasions the accused would be armed with offensive weapons. When PW1 questioned the accused about his nightly sojourns while armed, the accused would not answer. Stated the witness:

“(The Accused) would leave at 6.00pm and return next day at 7.00am. He never told us where he was going. He always left with a big spear and panga – very sharp. Whenever I asked him, he would not answer. He had done that for about one week prior to the death of the deceased...Following the death of the deceased the accused's night trips ceased.”

14. To this witness, several questions were put, mostly targeting the recovery of the accused's phone at the scene of death. However, it was not suggested by the defence that the accused was in fact going on night duty to guard crops at PW1's homestead from wild animals. This allegation made at the defence hearing therefore appears to be an afterthought on the part of the accused. For it is truly strange that a normal person would prowl around while armed with dangerous weapons, for no good reason.

15. The reason is supplied, through PW3, PW4 and PW8 and admitted by the accused himself. He was observing night vigils at his wife's home, and the reason is perhaps not too difficult to fathom, whether or not the accused specifically suspected the deceased to have become involved with his wife. It is unlikely, that this accused having stalked his wife, been beaten by PW3, arrested and detained, abused by his wife did not return to the homestead after 18th October, 2010. The prosecution evidence disproves such notion. In his own words the accused stated:

“On 18th October, 2010 my wife called me to a neighbour's place to collect my identification card. I went and found her and Francis (PW3). It was difficult. They gave me my identification card at 9.00pm in the presence of many people. My wife threatened to make me suffer. I went home – the last day to go there...”

16. The suggestion is that the Accused's wife could have framed him up with this murder in order to make him suffer. However, PW3 gave a vivid account of the accused's continued harassment of his wife and children even after he had been forcefully ejected by neighbours in November, 2010. PW3 stated of the particular night:-

“I told him (accused) to leave. He refused and neighbours had to eject him forcefully. I slept at the shamba that night. (PW3 usually resided in a different home) Later that night my own child woke me up and I had to get up. The child said she had seen a man in the compound. I came out with a torch and saw the accused crawling on the ground. That was in November, 2010. I subdued him with a whip. He spent the night outside my house and so did I. Next morning, an elder came and warned the accused but he did not stop coming at night. I was fearful. Since the body was found the complaints of accused coming to the shamba ceased.”

PW4 is the chief to whom reports of the accused's conduct had been made by his wife. He was present on the day the accused was arrested at PW3's home while armed with a knife.

17. Concerning the phone and cord which PW3 found close to the body of the deceased, the chief PW4 confirmed the recovery. However, PW1 the first witness to see the body and others did not

see the phone. The explanation for this could be the fact that when the body was first seen on 7th February, 2011 it appeared to have been dragged there by wild animals or the like. Later that night, it was moved again some distance. PW1, PW3 and PW4 said that the phone was recovered at the scene and eventually handed over to the investigating officer CIP Sangura (PW11) by PW3. The accused freely admitted that was his phone only explaining that it had been stolen on 24th January, 2011 from a place he had hang it. He said he could not explain how it ended up at the scene together with its strap.

18. During his evidence he stated that the phone was not brought to the police station until 15th February, 2011 yet he had been arrested two days before. He said the phone was with the chief (PW4) after recovery and police had to insist it be handed over. This in my view could explain why the process of handing over the phone from PW3 to the police officers is not very well spelt out. Be that as it may, the accused laid claim upon it as his and in cross-examination stated:

“Yes my phone was found at scene of body. I had reported loss of phone on 26th January, 2011. Phone went missing on 21st January, 2011...”

19. This alleged loss of the phone was also sprung up during the defence and had not been canvassed at the trial. Ditto the explanation for the presence of the bloody shirt in the house of the accused. He claimed his house caught fire in December, 2010 and the bloody shirt was a donation from his neighbour.

20. Could it be sheer coincidence that the accused's recently lost phone was found at the scene of murder and that a bloody piece of clothing identified to be his was in his house a few days later. That the murder by coincidence occurred in the homestead he had previously stalked in the night while armed with offensive weapons. Not in my considered opinion. I do not view these strands of evidence separately. Viewed together in the context of the circumstances of this case, these pieces of evidence, as counterpoised with the accused's last minute explanations, consist of a formidable case. The accused person clearly lied concerning the alleged loss of his phone and the bloody shirt- having come from an unidentified neighbor as the evidence of PW1 clearly shows.

21. These made up explanations are evidence of a guilty conscience. The phone and bloody shirt in my considered view place the accused at the scene of the murder. While none of the witnesses clearly identified the deceased as the reason why the accused was keeping a vigil at his wife's home, the accused's conduct itself suggests that he was keeping more than a keen eye on her movements, or nightly activities at the home. The proximity of the body of the deceased to that home is equally significant.

22. Turning to the question of the cause of death of the deceased, it is true the body was too mangled, mauled and decayed for the doctor to make a conclusive determination. There are wild animals in the locality. But the presence of the accused's phone at the scene of the body, appears to exclude the possibility that the deceased died of an attack by wild animals. Unless, it is believed that by some coincidence the man who stole the accused's phone from his house located 25km away happened to be the deceased who was coincidentally killed on PW3's farm by wild animals. That to my mind appears rather far fetched.

23. The presence of the accused's phone separate from its strap at the scene of the body is suggestive of an engagement between the said deceased and the accused the admitted owner of the phone. It was not a peaceful but violent engagement as proved by the blood splatters on the surrounding crops as per PW1 and the blood on the shirt of the accused, for which no good explanation is forthcoming.

24. Such violence is consistent with the accused's previous conduct in prowling around the home of PW3 while armed, breaking into the house, attempting to strangle his son and the fact that he had previously inflicted a cut on the head of his wife. The accused, from the prosecution evidence was prone to violence and was determined to use force in a bid to force his wife and family submit to him. The deceased was an unmarried man. The presence of his body at PW3's farm suggests he

likely strayed into that home for whatever reason and met his death there. It was a case of being at the wrong place and at the wrong time.

25. I think that viewed wholistically the prosecution evidence though circumstantial is overwhelming against the accused, and that his denials are not tenable. I find that in whatsoever manner, but most likely using his usual assortment of sharpened weapons, the accused did attack the deceased at the homestead of PW3. And that the deceased was mortally wounded by the accused as was clearly the intention of his nightly prowls: to cause grave harm to any one whom he suspected to be paying undue attention towards his estranged wife. Or indeed eventually the wife if she continued to reject his advances.

There can be no other reasonable explanation for his armed nightly vigils at his wife's home. He is a man who refused to accept to release his wife after estrangement and appeared intent to make her life and that of her family miserable.

26. I am satisfied that the prosecution has proved its case against the accused beyond any reasonable doubt. His defence which is mostly made up of afterthoughts cannot withstand the prosecution evidence and his protestation of innocence are not believable. He is convicted as charged.

Delivered and signed at Malindi this **15th** day of **November, 2013** in the presence of Mr. Nyongesa for the State, Court clerk – Samwel.

C. W. Meoli

JUDGE

MR. NYONGESA – I have no records. Treat as first offender.

C. W. Meoli

JUDGE

MR. MICHIRA- Accused is a father of seven children. He is apologetic for what happened. He seeks leniency and asks for non-custodial sentence. He has been in custody.

C. W. Meoli

JUDGE

NOTES ON SENTENCE

The accused has been treated as a first offender and is said to be remorseful. The accused appears to have been obsessed with the idea of forcing himself on his wife to the point of violence. Even though he has been in custody, the court has no discretion on sentence following the recent decision of the Court of Appeal **Criminal Appeal No. 5 of 2008 Joseph Njuguna Mwaura & 2 others vs R** dated 18th October, 2013 .

C. W. Meoli

JUDGE

SENTENCE

The accused to suffer death in the manner authorized by law.

Right of appeal 14 days.

C. W. Meoli

JUDGE

MR. MICHIRA – We apply for proceedings and judgment.

C. W. Meoli

JUDGE

COURT – To be supplied as requested.

C. W. Meoli

JUDGE