REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

MURDER CASE 4 OF 2009

REPUBLIC …….....…… PROSECUTOR

VERSUS

SELASIO MURIITHI NJERU .....…… ACCUSED

J U D G M E N T

SELASIO MURIITHI NJERU hereinafter referred to as the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars as stated in the information are that the accused on 24th February 2009 at Kirathe village, Kithunthiri location within Mbeere District of the Eastern province, murdered Monica Wanjiru Muriithi.

The deceased was the wife of the accused herein. She was suspected of committing adultery with one called John. On 24/2/2009 P.W.1, P.W.2, the accused and deceased went to the home of Mugo to discuss these issues. They found Mrs Mugo. This matter was discussed. The accused asked the deceased if these allegations were true. She denied them. The accused attempted to beat her but he was restrained. The deceased walked away leaving them behind. That was the last time they saw her alive until 28/2/2009 when her body was found decomposing in a bush. The body had no physical injury. P.W.4 a minor was herding cows when he came across the body. The report from the Government Chemist produced by P.W.5 indicated that carboguram (Furadin) which is a carbon based pesticide was detected in the stomach of the deceased. It is poisonous and can be harmful to humans if ingested.

P.W.6 Dr. Kaniaru who did the post mortem found the deceased's neck to be abnormally loose. He formed opinion that the cause of death was cardio respiratory arrest due to strangulation. In cross examination he stated that there were no broken bones around the neck and that poisoning had to be ruled out.

P.W.8 learned of her daughter's death on 2/3/2009 when her son (P.W.7) called her. She had not been informed of her disappearance. P.W.9 was the investigating officer. He charged the accused after gathering information on the ground. He said the Post Mortem report ruled out the suicide theory. D.W.

10 examined the accused for mental fitness and confirmed that he was mentally fit to stand trial.

The accused elected to make an unsworn statement in his defence and called no witness. He stated that on 24/2/2009 him, the deceased, P.W.1 and P.W.2 went to Mama Wangari's home. Mama Wangari reported to him things she used to do in his absence. On being asked to confirm the wife did not answer. She stood and left. They then left after a while. When he reached home he did not find the deceased. His children told him she had gone to the shops. He waited for her in vain. The next day he left the children under the care of their eldest child. He went to Kibukori village and passed through his parent's home but she was not there. He had planned to go to her parent's home on Sunday but before that the police came for him, and took him to the scene where the body was lying. The DCIO did not adduce evidence showing a person had been seen chasing the deceased. Neither did he adduce evidence to show that he cultivates miraa or not.

There were no submissions.

The doctor who performed the post mortem (PW 6) was of the opinion that the cause of death was cardio respiratory arrest due to strangulation. P.W.5 had found carboguram which is a carbon based pesticide in the deceased's stomach. However P.W.6 ruled out poisoning as the cause of death.

The issue is to determine who was responsible for the death of the deceased.

There is no dispute that the deceased was the accused's wife. There is also no dispute that the deceased was suspected of committing adultery with a man called John. It is also not disputed that on 24/2/2009 there had been a meeting comprising of the deceased, accused, P.W.1 and P.W.2, the latter two being the parents of the accused. P.W.1, P.W.2 and the accused have confirmed that the meeting was at Mugo's/Mama Wangare's place. The meeting was discussing the deceased's wayward ways. When the accused asked his wife about those allegations, she never responded and walked away. P.W.1 stated that the accused attempted to beat the deceased but they stopped him. It clearly shows the accused was not happy with what was going on, between him and his wife.

This forms the basis for the suspicion that the accused killed the deceased. I say so because there is no eyewitness to what transpired between the accused and deceased. The DCIO (P.W.9) mentioned in his evidence that he had established that accused had been seen chasing the deceased into the bush on 24/2/2009. This was very crucial evidence which ought to have been brought on board. Who is this person who saw the accused chasing the deceased into the bush? Did the DCIO not consider this to be vital information in trying to put these bits and pieces of evidence together?

Another issue that came up is that the accused did not report the disappearance of the deceased to the relevant authorities. P.W.1 in cross examination stated that when she did not see the deceased she was not surprised because the deceased used to disappear for days and leave her with the children and come back. This was not the first such disappearance.

The accused has denied the charges. He has explained his last moments with the deceased upto the time he was arrested. After they parted from Mama Wangari's alias Mrs Mugo place he never saw her again.

Besides the abnormally lose neck with no broken bones there was no physical injury noted on the deceased's body.

There being no eye witness to the killing or to anything leading to her death I do find that what is before me is circumstantial evidence.

Circumstantial evidence is distinguishable from direct evidence. It should be carefully analysed because to find a conviction on it, the circumstances must point to none other than the accused as the culprit. The Court of Appeal in the cases of;

1. ***MKENDESHWO –VS- REPUBLIC [2005], KLR 461***

2. ***SAWE –VS- REPUBLIC [2005] KLR 364***

3. ***NZIVO –VS- REPUBLIC [2005]1 KLR 699***

held as follows;

1. In order to justify a conviction based wholly on circumstantial evidence, the inculpatory facts must not only be incompatible with the innocence of the accused, and be incapable of explanation upon any other reasonable hypothesis than that of his guilt, but also that the serif facts must exclude co-existing circumstances which may tend to weaken or destroy the inference of guilt.

2. 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.

P.W.6 ruled out the issue of poisoning. But P.W.5 indicated the presence of a pesticide in the deceased's stomach. She further stated that this substance is poisonous and can be harmful to humans if ingested. This finding was made after the post mortem had been done by P.W.6.

There remains a question mark as to the cause of death. Was it strangulation or poisoning?

It has also come out clearly that there was a strained relationship between the deceased and the accused because of the allegations of adultery against her. After the meeting at Mugo's place she left home. Infact the accused and deceased never met at home.

The suspicion is that the accused is the one that killed her. This is suspicion because no one has said he/she saw them together. Even the theory of the accused chasing the deceased has not been established. It is hearsay. The DCIO (P.W.8) ought to have availed his informant because this was very crucial evidence. This was not done.

The accused in his defence stated that he was planning to inform the deceased's parents about her disappearance on Sunday. Before he did so he was arrested. The court was told by P.W.1 that the deceased's disappearance was not a surprise to her, as she used to disappear for days and then come back. P.W.1 would be left with the children. Would their lack of reporting her disappearance raise a rebuttable presumption that he knew where she was?

In the case of ***MKENDESHOW –VS- REPUBLIC SUPRA*** it was held;

"It was never suggested that the deceased sometimes in the past failed to return home for several days. That the Appellant was not disturbed by her disappearance for such a long time raised a rebuttable presumption that he knew where she was".

In the present case there was a suggestion that the deceased used to disappear for days. This was not rebutted by the prosecution. So it remains the position. And if that be so then the accused may not in the absence of any other evidence be found guilty just because he did not report her disappearance. In the case of ***SAWE –VS- REPUBLIC SUPRA*** the Court of Appeal held that;

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

The evidence before this court is full of suspicion because of the allegations raised against the deceased on 24/2/2009. No one saw the deceased and accused together after the said meeting.

In Criminal cases it is always the duty of the prosecution to establish the accused person's guilt

beyond reasonable doubt. The accused never assumes that burden. It was the duty of the prosecution to prove the facts justifying the drawing of an inference of guilt from the circumstantial evidence adduced herein. I do find that it could be the accused or somebody else responsible for this death. In other words there is a doubt as to the accused person's guilt.

For my part I find that the accused has to benefit from that doubt. I find him not guilty of murder and acquit him under section 322 (1) Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT EMBU THIS 15TH DAY OF MAY 2012.

H.I. ONG'UDI
J U D G E
In the presence of:
M/s Matiru for State

Mr. Mugambi for Githinji for Ken for accused

Njue – c/c
Accused