REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE 73 OF 2007

REPUBLIC.....PROSE CUTION

VERSUS

JOHN MICHENI M'AKEA.....ACCUSED

J U D G M E N T

The accused JOHN MICHENI M'AKEA is charged with murder contrary to s.203 as read with s.204 of the Penal Code.

The particulars of the charge are that the accused on 28th October, 2007 at Agoi Village, Kianjogu location in Meru Central District within Eastern Province murdered LUCIANO WANJA M'ARITHI.

The brief facts of the prosecution case are that the deceased was going home from the market in the company of her grandson, PW2 and a friend Tirindi PW3 about 5.30p.m. They met the accused who used to be the deceased customer for illicit brew. The accused and deceased started talking. PW3 walked away leaving them talking. After beckoning to the deceased to join her in vain, PW3 decided to go home alone. PW2 the grandson of the deceased was told by the accused to run home promising he would escort her grandmother home later. The deceased was found dead the next day. Her body, at postmortem was found to have deep cuts on the fore-head, crushed tracheal rings and laryngeal cartilage, fracture of vertebra bones at the 2nd and 3rd levels with damage of the spinal cord at same level. The cause of death was cardio-respiratory arrest secondary to head and cervical spine injuries. The post mortem form was P. Exhbit.1.

The accused gave a sworn statement in his defence. He stated that he left home on 28th October, 2007 for Merutere Market when he met PW2, PW3 and the deceased at about 5p.m. The accused stated that he greeted the two women and the boy and then left them. He said he had no quarrel, disagreement or grudge with the deceased.

The burden lies with the prosecution to prove its case against the accused beyond any reasonable doubt. The prosecution has to adduce evidence to establish that the death of the deceased was caused by an act done by the accused. The prosecution must establish that the accused action causing death was motivated by malice aforethought. S.203 of the Penal Code defines the offence of murder as follows:

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

The circumstances that constitute malice aforethought are set out under section 206 stipulates as follows:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

In this case there is no dispute that the accused met the deceased in the company of PW2 and PW3 at between 5 to 6p.m on 28th October, 2007.

PW2 was a child of tender years and was about 8years when he testified in court. The incident had taken place 4 years earlier. It means PW2 was 4 years at the time of incident. The evidence of PW2 needed corroboration. The accused in his sworn statement admitted finding the deceased and PW2 together. That aspect of the evidence of PW2 needs no corroboration. The evidence which needed corroboration is where PW2 testified that the accused told him to run home and to leave his grandmother (deceased) with the accused.

PW3 left accused, deceased and PW2 together. The part of PW2's testimony that the accused was left alone with the deceased did not receive any corroboration, the accused having challenged it by contradicting that statement. The evidence that the accused was left with the deceased remained the word of PW2 as against that of the accused.

The prosecution was relying on other evidence from PW2 and PW3. PW2 stated that his grandmother was carrying sugar and other stuff when he left her with the accused. PW3's testimony was that the deceased bought sugar and other items from PW5's shop in her company. However, PW3 said she could only re-call what the deceased bought except the sugar. PW3 identified some sugar in court, Exh.3 as similar to what the deceased bought. The issue is whether that was sufficient identification of the sugar as the exact item the deceased bought.

PW5 was the owner and seller at the shop where the items were bought. PW5 testified that she sold 4Kgs of sugar, 2kg of Juggury (sukari-Kuru), and 500gms of yeast from her at her shop on 28th October, 2007. PW5 identified sugar Exhibit 3, Juggury Exhibit 4 and yeast Exhibit 5 as items similar to what was bought by the deceased from her on the material day. Being ordinary consumption items, it was not proved that the items exhibited in court were the actual ones brought by the deceased from PW5.

The Evidence Act creates a statutory obligation on a person last seen in the company of a deceased before the death of the deceased person. This burden is to explain either how the deceased met his or her death or explain how they parted ways. S.119 as read together with S.111 (1) of the Evidence Act provides:-

"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

" 111.(1) ***When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within an 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 a 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."

It is clear that the two sections under the Evidence Act create a rebuttal presumption that the person in whose company a deceased person was last seen with must explain either how death was caused or how they parted as aforementioned. In this case the evidence that the deceased was last seen alive with the accused was the evidence of a child of the tender age of 4 years. Section 124 of the Evidence Act regarding the evidence of children provides as follows:

"s.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."

The evidence of a child needed to be corroborated on material particulars implicating the accused in order to found a conviction, unless the child is a complainant in a sexual offence. The evidence of PW2 required corroboration. I have sought for the corroboration in the entire evidence adduced by the prosecution and I found none.

The evidence of PW6, the area Assistant Chief at the time of incident, Andrew Gitonga revealed that the body of the deceased was retrieved from a river on the morning of 29th October, 2007 at 9.00 a.m. The evidence of PW4 the Investigating Officer revealed other important facts. He drew a sketch plan of where the body was recovered. That sketch plan revealed that from the River Iraru where the body was retrieved, to a spot near the home of the deceased was 50 meters. From the river to the home of accused was 550 meters. Significantly there was a trail of blood from deceased home. The trail of blood was of a stretch, probably 50metres if one deducts from the other measurements given, as PW4 did not measure from spot where the blood started opposite the house of the deceased to the river where the body was retrieved. That finding is proof that the injuries inflicted on the deceased were by a third party therefore ruling out a possibility they may have been caused as a result of a fall in the river.

I find that even though it is clear that the deceased was murdered, there is no evidence to connect the accused with the murder. There was no cogent proof that the deceased was last seen alive with the accused. There is no proof beyond a reasonable doubt that the sugar Exhibit 3, Jugury, Exhibit 4 and yeast, Exhibit 5 found in accused house were the very same items the deceased bought from the accused the night before she died.

I find that the prosecution failed to establish on the required standard of proof beyond a reasonable doubt that the accused caused or inflicted the injuries on the deceased with caused her death. There is no circumstantial evidence proved i**nesistibly*** pointing to the accused as the only person, in the exclusion of all others, who could have committed this offence. In the circumstances I find that a reasonable doubt exists as to accused fault. I give the accused the benefit of doubt and consequently acquit him of the offence charged under S.306 of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF AUGUST, 2012.

J. LESIIT
JUDGE