



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Case 41 of 2010

REPUBLIC.....PROSECUTOR

VERSUS

MUSILI TULO.....ACCUSED

JUDGMENT

Musilli Tulo stands accused of the offence of murder contrary to section 203 as read with 204 of the Penal Code. It is claimed that on 30th June, 2010 at Mwingi Central Location, Mwingi Central District, within the Eastern Province he murdered **Scollah Kalunda Mwenga**. The accused denied the information.

The facts of the case as presented by the prosecution are in brief as follows:-

According to **Viata Samson Mwenga** (PW1), the mother to the deceased, on 30th June, 2010, the deceased left for Mwingi Market in the morning. However, she never made it back. The witness thought that she had gone to her matrimonial home. The accused was her husband. She had come home following domestic problems with the accused over the deceased step daughter whom she had sired outside wedlock before marrying the accused. The accused was bent on having sex with the said daughter. When the deceased came by the information she and the daughter fled to her parent's home. After the deceased failed to return from the market, the family gathered on 1st July, 2010 to deliberate on what action to take. It was then that they received a phone call from the accused's brother who informed them that the deceased was dead. That she had been killed by the accused who had thereafter fled to Narok. The following day, they informed the local chief who accompanied them to where they had been informed that they would find the body of the deceased. They were also accompanied to the scene by police officers. However, they did not come across the body at the site. The deceased's brother, **Muema** then gave the police the accused's tell phone number. When called, the accused claimed to be in Garissa. Nonetheless he informed them where they could find the body of the deceased. They proceeded to a cave where indeed they came across the body of the deceased. The body had certain parts missing such as eyes, ears and the tongue. The flesh on the left has been skinned. She had a rope around her neck and waist which was tied to a tree. The body was retrieved by the police and taken to hospital mortuary.

Cross-examined by **Mr Mutie**, learned counsel for the accused, she stated that the accused was her son in law. At the time of their marriage, the deceased had only one daughter outside wedlock. This is the girl the accused had attempted to have sex with. The deceased did not report the incident to the police though. Neither did she report herself. The deceased had stayed with her for 3 months before her disappearance and subsequent death. During the 3 months, attempts at reconciliation were made but all in vain. The last time she saw the accused in her home was on 29th June, 2010 but the deceased disappeared

the following day. She was not worried when the deceased went missing as she assumed that she was with the accused.

Samuel Kilonzo Mwenda (PW2) is a brother to the deceased. On 3rd July, 2010, he came down from Nairobi. When he got home, he did not find his wife. He received information that she had gone looking for her sister in law, who had not returned from the market the previous day. He soon thereafter joined the search team at Kasina Primary School. He was informed by his uncle that it appeared that the deceased had been killed by her husband and her body dumped in a cave in a nearby bush. The witness advised the crowd to seek the permission of the chief to search for her body in the nearby bush since the land did not belong to them. He proceeded to Mwingi Police Station for assistance. On his way back, he heard people shout that the body of the deceased had been discovered. He accompanied the police to where the body was said to be. The body was under a tree. Her tongue had been cut and eyes gouged out. At the scene there was a hat that was blood stained. That hat belonged to the accused according to the witness. Her left leg was also injured. Her shopping was lying there as well. The body was subsequently retrieved and taken to the mortuary by the police. Before the incident, the relationship between the deceased and accused was not cordial. It was strained. They had domestic problems. Indeed by the time the deceased passed on, she was staying in their home.

Cross-examined, he stated that the deceased was his younger sister. He had known the accused for well over 10 years. His cell phone number was known to people at home. There were no homesteads where the body was discovered nor wild animals. He had first seen the accused wearing the hat in January, 2010. He was certain that the hat recovered at the scene belonged to the accused because it had 2 colours which were peculiar. In the inside it was blue while on the outside it was white.

Joseph Githurai Kawalo (PW3) is uncle to the deceased. On 30th June, 2010, he received information that the accused had left with the deceased for the market. However, the deceased never made it back. The following day at about 2pm, they began searching for the deceased. They were unsuccessful. On the 2nd day, they found the body in a cave in a forest. The body was lying on the back with a hat on her chest. The legs were injured and an ear cut. It also appeared as though the deceased had been strangled with a rope. The body was then collected by the police and taken to the mortuary. He had seen the hat recovered at the scene with the accused severally when he frequented the home in search of his wife, the deceased.

Cross – examined, he responded that he had received a report that the deceased had come for his wife and they had proceeded to Mwingi Market. He was among the first people to find the body. He maintained that the hat found at the scene belonged to the accused.

P.C. Nathan Wasihua (PW4) was among the police officers who came to the scene and evacuated the body of the deceased to Mwingi District Hospital Mortuary.

Agnes Mutei Samuel (PW5) on 2nd July, 2010 received a call from her sister, **Kasyoka** who is married to the brother to the accused. She wanted her to go and inform the sister to the deceased, **Patricia Ngute** that she had passed on. She did so and together with the said **Patricia Ngute**, left for home to inform the family.

Christopher Mwenga Mwenzi (PW6) is also a brother of the deceased. On 3rd July, 2010 at about 4pm during a family meeting they received a phone call from **Ngute Musili** asking the whereabouts of the deceased. They already had information that the accused had been seen in a fight with the deceased. They started searching for the deceased. They also made a report to the police at Mwingi to whom he also gave the accused's cell phone number. **P.C Ogutu** called the number and the accused gave directions as to whereabouts of the deceased's body. They proceeded there and found the body. At the scene he saw a rope and a hat. He was certain that the hat belonged to the accused as he was familiar with it. The eyes were gouged out, one ear had been cut and the face as well as legs were injured. He confirmed that the accused and deceased used to quarrel a lot. He had last seen the deceased a week prior to her death.

Cross-examined, he stated that the deceased and accused had been seen fighting by a person who called. When he saw the accused last, he had on the hat. He never used to leave the hat. Though he was aware that there were many similar hats, he was nonetheless certain that the hat recovered at the scene belonged to the accused.

Sgt Alex Ogutu (PW7) is the police officer who contacted the accused on his cell phone number. That was on 3rd July, 2010 at around noon. He was given 3 numbers allegedly belonging to the accused by PW6. These were 0727418570, 0729786284 and 0711950385. The latter went through and he was able to talk to the accused. Having introduced himself to him as a place officer seeking his assistance to locate the body of the deceased, the accused directed him to Kasina Primary School opposite Yaa Forest. With this information the body was duly discovered. On observation, he discovered that the tongue of the deceased had been chopped off, eyes gouged out, face skinned as well as the right leg. He removed the body to Mwingi District Hospital Mortuary pending post mortem examination. At the scene, he noticed that it had been disturbed. It was as though there had been a struggle. After the post mortem on 13th July, 2010 which he witnessed, he was given the report which he tendered in evidence. He also recovered at the scene a white hat which was said to belong to the accused. Subsequently, the accused was arrested by Narok Police Station and escorted to Mwingi Police Station. Following completion of the investigations, he preferred the murder charge against the accused.

Cross-examined, he stated that he had heard rumours that the deceased had been killed by her husband. He investigated the case and confirmed that there had been several incidents of domestic violence against the deceased by the accused. On 30th June, 2010, the deceased had been sighted in Mwingi town with the accused. He had been given 3 cell phone numbers belonging to the accused by **Ngute Musili** and **Christopher Mwenga**. The number given to him by **Mwenga** is the one which went through. The information he received was that the hat belonged to the accused.

C.I Jonathan Wafula recorded the charge and caution statement of the accused on 14th July, 2010 at about 4pm. Following the charge and caution, the accused elected to state as follows in Kiswahili-

“nilimpiga kwa shauri ya pesa ya biashara shilingi elefu kumi na nane. Nilimua na kuacha mwili wake kwa kichaka.”

The witness signed the statement and the accused too signed. However, he did not translate the same in Kiswahili. When he recorded the statement, he did not threaten or intimidate the accused. He tendered in evidence the statement.

Cross-examined he stated that the accused was brought to his office by an officer from the report office. The accused was not threatened so as to record the statement. The accused signed the statement voluntarily. Asked by the court to translate the statement into English, the witness stated that in English, the accused meant:-

“I assaulted her because of the business money of Kshs. 18,000/=. I killed her and left her body in the bush.”

I.P. Harrison Kombo (PW8) took the accused's statement under inquiry. He did not intimidate him into making the statement nor did he coerce him. He did so voluntarily and without duress. The accused thereafter signed the statement. The same was tendered in evidence.

Cross-examined, the witness stated that the accused was brought to him after 4pm. There was no other person in the office. He bought the accused a soda as a way of welcoming him. It was not an inducement for him to own up to the crime. He denied that the statement was pre-recorded and the accused forced to sign. With this the prosecution closed its case.

Having found that the accused had a case to answer, the accused elected to give a sworn statement and called no witnesses. He stated that on 30th March, 2010, 3 ladies came and took away his wife, the

deceased having been sent by his father in law. The following day he visited his in laws and was told to avail 2 heads of cattle as dowry. He told them that he did not have the cows then. However, he was told categorically that if he wished to have his wife back he should pay the 2 heads of cattle. He went back home and left for Narok on 18th April, 2010 where he remained until July 2010 when 2 police officers arrested him from a construction site in Narok and took him to Narok Police Station. He was later transferred to Mwingi Police Station and subsequently charged. He denied having signed any statement. On 30th June, 2010, he was in Narok. The hat tendered in evidence did not belong to him. He also did not have a mobile phone then as the one he had was stolen in February, 2010. He had a dispute with his brother, Mutua over land. His brother wants him jailed so that he can take the entire land. He therefore set him up with the case. He was also aware of his problem with the deceased. Otherwise, he did not commit the crime.

Cross-examined by **Mr. Mukofu**, learned State Counsel, he responded that the deceased had been taken by her parents for want of dowry on 30th March, 2010. Since then she had been staying with her parents. He had not been made aware that she had disappeared. During that month he was staying in Narok. He last saw the deceased on 30th March, 2010. However, he had no evidence to show that he was in Narok if at all. He denied having talked with the police on phone since he had lost his phone in February, 2010. He did not know where the body of the deceased was recovered. That then marked the close of the defence case.

Parties thereafter agreed to put in final written submissions. This was subsequently done. I have carefully read and considered the same alongside cited authorities.

A charge of murder is established where evidence shows that a ***“person who of malice aforethought causes the death of another person by an unlawful act or omission.”*** So that in this case for the prosecution to successfully prosecute the accused, it must show by cogent and credible evidence, that the deceased passed on, that she so passed on due to unlawful act or omission of the accused and that the unlawful act or omission was accompanied by malice aforethought .

Dealing with the first aspect of the matter, there is no denying that indeed the deceased passed on. Evidence is a galore that the body of the deceased was discovered in a cave in a forest. PW1, PW2, PW3, PW4, PW6 and PW7 attested to this fact. They are the ones who were involved in the search and eventual discovery of the body of the deceased. They all described the state in which they found the body. Eyes had been gouged out, ears and tongue cut, the flesh on the leg and face had been skinned. The deceased was dead. Besides that evidence, there is also the evidence of the post mortem report tendered during the trial. In the post mortem report, **Dr. William Oduor** opines that as a result of his examination of the body the cause of death was ***“cardio-respiratory arrest secondary to severe blood loss”*** There is no doubt therefore that the deceased passed on.

Did she pass on as a result of unlawful act or omission of another person? From the state in which the body was found, there can be no doubt that the deceased did not take her own life. She was found lying on her back, eyes gouged out, tongue and ears cut and the flesh on both her face and leg skinned. She was also tied with a rope. Further **Dr. William Oduor** observed the following with regard to external appearance of the body ***“... head decomposed. Only skull seen. Wound right leg approximately 10cms in diameter, wound left mastoid approximately 6cms in length, wound right lateral side of the chest 5cm in length...”*** With regard to cardio-vascular system, he observed ***“laceration of popliteal vessels of the right leg...”*** From the injuries it cannot be said that the deceased inflicted them on herself. It is not possible that the deceased could have gouged her eyes, cut her ears as well as the tongue, skinned herself and tied herself with a rope to a tree. This must have been the work of another person(s). It would appear that the said person intended that the deceased be seen as having committed suicide hence the rope around the neck. However, the lie did not quite work; as the body was perhaps discovered much earlier than he/she had anticipated with the gory injuries aforesaid still intact. No doubt the injuries were inflicted by unlawful act of another person.

Was that person the accused? There is no direct evidence linking the accused to the crime as nobody saw him commit the crime. Out of the 9 prosecution called, none of them testified as to seeing the accused

commit the crime or being with the deceased on the material time. The evidence however, tending to link the accused to the crime is purely circumstantial and the accused's own confession.

It is common ground that the accused and deceased were husband and wife. They had prior to the homicide separated due to domestic disagreements. As a result of the separation, the deceased was staying with her parents. It is also common ground that on 30th June, 2010, the deceased left for Mwingi Market and never returned. Her family mounted a search subsequently. Nonetheless they suspected the accused's hand in the disappearance of the deceased. In the course of search, they received information that the deceased had been killed and his body dumped in a cave in a forest near Kasina Primary School. This information was apparently volunteered by the accused in phone conversation with. The information volunteered led to the discovery of the body. Alongside the body was a hat which allegedly belonged to the deceased. There is also evidence by PW1 and PW3 that the accused had been in their home the previous day. This evidence was not seriously challenged despite the accused's claim in his defence that he was at the material time in Narok.

It again emerges from the evidence on record that the accused confessed to the crime, much as he denied in his defence that he never recorded any statements with the police. So that the circumstantial evidence linking the appellant to the crime is his strained relationship with deceased, his cell-phone conversation with PW6 that led to the discovery of the deceased's body, the hat found alongside the body which allegedly belonged to the accused and the accused's own confession.

With regard to the first link, all the family witnesses who testified attested to the fact that the relationship between the deceased and accused was strained much as they were husband and wife. As a result the deceased had relocated to her parents. Several attempts at reconciliation yielded nothing. The accused in his defence, concedes that much, That the deceased had been forcefully taken away from her matrimonial home by 3 women at the instigation of his in laws. To him, the in laws wanted him to pay dowry. However, to PW1, the deceased had fled the matrimonial home on coming by information that the accused was bent on having sex with her daughter which she had sired outside wedlock with another. Whatever the reason, it is clear that the deceased and accused were living separately as a result of disagreements. Could this state of affairs have acted as a catalyst to the homicide? Perhaps.

Alarmed at the failure by the deceased to return home that day after she had left in the morning for Mwingi Market, the family started searching for the deceased the following day. They also reported the matter to the police. As the family suspected the accused in the disappearance, they and in particular PW3 passed over to PW6, **Cpl Alex Ogutu** 3 cell phone numbers allegedly belonging to the accused namely; 0727418570, 0729786784 and 07119550385. Using the later numbers, PW6 managed to talk to the accused who allegedly directed him towards Kasina Primary School where the body of the deceased could be found. The body was indeed found at the location. He found that the deceased had been cut on the tongue, skinned on the face and leg with eyes gouged. At the scene a white blood stained hat was also recovered.

The accused's response is that he did not have a mobile phone at the time and he could not therefore have spoken to PW6. It is instructive that the appellant never denied that phone number 0711950385 never belonged to him. Nor did he raise the issue of having lost his mobile phone sometimes in February, 2010 when he cross-examined PW6. I do not think that PW6 will have come with the evidence of the mobile number merely to frame the accused. He had nothing to gain for so doing. If the number that went through did not belong to the accused, how come that the information gleaned from the conversation pinpointed to where the body of the deceased was. If the owner of the line was a stranger, I do not think he would have provided such information. He could as well have said; - ***"I do not know what you are talking about."*** To that extent that information given by the person at the end in the telephone conversation with PW6 led to the discovery of the body of the deceased, that information could only have come from a person known to the deceased. That person could only have been the accused. However, I hasten to add that information was in the nature of a confession. If it were treated that then PW6 was unqualified person under our laws to receive a confession. To my mind the accused merely provided the information that led to the discovery of the body without saying that he was responsible for her death.

It is also worth noting that although the accused claimed to have been in Narok at the material time, there is evidence by PW1 and 3 that he had been in their homestead on 29th June, 2010. As already stated this evidence was not seriously challenged. I believe it. That the accused thereafter went underground only to resurface in Narok after the incident can only mean that the accused was running away from his horrendous act. It was not an act of innocence. This too can be circumstantial evidence tying the accused to the crime.

At the scene of crime, a hat allegedly belonging to the accused was recovered. PW1 testified that he was familiar with hat as he used to see it with the accused. It was also unique in that it had 2 colours. Outside it was white whereas inside it was blue. According to the witness he had never seen that hat anywhere else. PW3 too testified that he had seen the hat with the accused severally when he frequented their home looking for the deceased. Much as he conceded that there were similar hats elsewhere, he was nonetheless certain that the hat in question belonged to the accused. As for PW6, he also confirmed that the hat belonged to the accused, that the accused used to wear it every day. He never used to leave it behind. Though the hat had no special mark, he was nonetheless certain that it belonged to the accused.

In his defence, the accused states that the hat tendered in evidence was not his. Ordinarily he did not wear hats.

Family witnesses testified to seeing the accused coming to their homes in search of his wife. A hat similar to the one which the accused used to wear is suddenly found alongside the body of the deceased. Is it a mere coincidence? I do not think so. Yes there may be similar hats elsewhere but PW2 was categorical that he had not seen such hat in the village. It was only the accused who had such hat. He went ahead to describe the peculiarity of the hat. The special features of the hat enabled him to say with certainty that it belonged to the accused to the exclusion of others. All said and done, I am satisfied that the hat found besides the deceased's body belonged to the accused.

The accused was arrested within Narok town. He was subsequently escorted to Mwingi Police Station on 4th July, 2010. He was charged and cautioned by **Chief Inspector Jonathan Wafula** (PW8). In response the accused stated “*Nilimpiga kwa shauri ya pesa ya biashara shilingi elfu kumi na nane. Nilimua na kuacha mwili wake kwa kichaka*” which in English translates to “***I assaulted her because of the business money of kshs. 18,000/=.*** ***I killed her and left her body in the bush...***” The accused again recorded a statement under inquiry before **Inspector Harrison Kombo** (PW9). In the detailed statement, the accused confirms that he was with the deceased on 30th June, 2010 at Ngutani Hotel in Mwingi town from 2pm till 6.30pm. He then describes how he stabbed and killed her and left her body where it was found. He also confirmed having received a call from a police officer whom he told where to find the body of the deceased... Both statements were admitted in evidence. They all amount to a confession. They were all admitted in evidence without objection by the accused; so that a trial within a trial could be conducted to establish their authenticity and whether they were voluntary. I am therefore surprised that the accused is now submitting that when the prosecution wanted to produce in evidence, the confession statements, he objected and the court ordered a trial within a trial. And that the court has yet to make a ruling. This is totally misleading. The record speaks for itself. The only time that the defence objected to the admission of the statements is when the investigating officer wanted to produce them. The defence objected and insisted that the makers be availed. The objection was sustained. When the makers (PW8 & 9) eventually testified and tendered in evidence the statements, the defence did not object. Instead, the defence proceeded to cross-examine these witnesses. The accused cannot now be heard to claim that the said statements were not made by the accused nor were they voluntary. Time for such objection is long past. In the premises, I hold that confession statements were properly admitted in evidence. The statement by the accused alludes to facts that could only have been privy to the perpetrator of the crime. They are consistent and have been corroborated by medical and other evidence, including the mobile phone conversation that led to the discovery of the body of the deceased. Such details could only have come from a person who was at the scene of the murder at the material time. The confession lays out in his own words how he killed the deceased and left her for dead at Kasina. There can be no doubt therefore that it is the accused who caused the death of the deceased.

Was the killing of the deceased by the accused accompanied by malice aforethought? Section 206 of the

Penal Code states as follows with regard to malice aforethought:-

“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 or any person who has committed or attempted to commit a felony.”

In this case, the accused clearly intended to cause the death, or at the very least grievous harm to the deceased. He stabbed her in the mouth thereby cutting her tongue, gouged her eyes, cut her ears and skinned her leg and face. These multiple injuries can only impute malice aforethought on the part of the accused.

The accused has raised the defence of alibi that he was away in Narok when the offence was committed. Of course a person raising the defence of alibi need not prove it. It is upto the prosecution to dislodge it with a rider that the same should be raised early in the trial to give the prosecution opportunity to rebut it. In this case however, the same was not raised by the accused when cross-examining the witnesses. It only came through his defence statement. However, given his confessionary statement which lays out in his own words how he killed the deceased, the accused's *alibi* is wholly displaced.

On the whole, I am satisfied beyond reasonable doubt that the accused committed the offence charged. Accordingly I convict the accused for the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER 2012.

**ASIKE MAKHANDIA
JUDGE**