



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 43 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL MUCHIRI RONO.....ACCUSED

JUDGMENT

Samwel Muchiri Rono is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on 26/4/2009 at Pembe Mbili Mwariki Estate, within Nakuru District, murdered Florence Mumbi Kamwana. The accused denied the offence. The prosecution called a total of 7 witnesses in support of their case. The accused was represented by Mrs Mukira Advocate and he opted to exercise his right to say nothing in his defence.

The deceased was the wife of the accused. Nobody witnessed the murder. PW2, Rosemary Wambui Mwangi, the Chief of Bondeni Location recalled that on 27/4/09, Patrick Kingori of Kenya Red Cross, PW4 called her on phone and informed her that the accused had differed with the wife the night before, he slapped her, went to work the next day but on going back home, he found her dead. PW2 called Inspector Mutie of Bondeni Police Station and informed him about it and together they went to accused's house at Langalanga Mwisho after they met accused at Langalanga and he led them to his house. They found the deceased's body on the bed in the house and on confirming that she was dead, the accused was arrested, inquiries began and the body taken to the mortuary. PW2 saw some bruises on the left ear of the deceased which looked like a bite by rats.

PW3, Francis Muchiri the accused's son aged 7 years was not able to recall anything about his mother or where he lived before he was taken to the place he now lives.

PW4, Patrick Kingori who works with the Red Cross recalled that he was with accused's brother, Isaac Nyoroge, who is his very good friend. After supper, the accused came, called the brother and they talked and he then called PW4 and informed him of what happened on 26/4/2009, that he had a quarrel with his wife, he slapped her twice and slept. He left the next morning and later found her dead. It is then that Patrick called the Chief (PW2) who came with police who entered the accused's house. PW4 did not enter the house to view the body. PW5, Steven Kariuki Kamwana, a brother to the deceased learnt of the death of his sister, went to the Nakuru Municipal mortuary where he identified the body to the Government Pathologist who carried out the post mortem.

PW6, PC Willy Ngunjiri is the one who accompanied PW3 to accused's house where they found deceased's body. He recovered the stick allegedly used by accused in assaulting the deceased. It was shown to him by a child. He observed the body and saw blood in the nostrils. He did not know the cause of death. PW7, Evanson Kamwana is the father of the deceased. He was also present when the post mortem examination was conducted.

PW1 Dr. John Omboga who examined the deceased's body found that there was post bleeding from the nostrils, large bruise on left ear, the head had a massive subdural and intracerebral haemorrhage and haematoma. The doctor formed the opinion that the cause of death was severe head injury due to a blunt object trauma to the head. The post mortem report is PEXNO1. The doctor denied that the deceased's ear had been eaten by a rat but that it is where the blunt injury was inflicted.

After the prosecution closed its case, the accused exercised his right and opted to remain silent and it is left to the court to consider the evidence of the prosecution.

Of the seven prosecution witnesses, none of them saw the accused person murder the deceased. The prosecution case is based on circumstantial evidence alone. The law of circumstantial evidence was espoused in **REP V. KIPKERING ARAP KOSKE & ANOTHER (1949) 16 EACA 15**. The court said that for such evidence to found a conviction:-

“The incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

In a later case **OMAR CHIMERA V REP CR AP 56/98**, the Court of Appeal said:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;**
- ii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

I have now considered the evidence adduced herein in light of the above authorities. The deceased was accused's wife. She was found in their bed, dead with injuries to her head which the doctor found to be the cause of death. PW6 recovered a stick in the house but there was nothing peculiar on the stick that pointed to it to being the murder weapon save that it was shown to PW6 by a child who did not testify.

The death of the deceased came to the light when the accused went to inform his brother who was in company of PW4 what had happened. It is PW4 who then called the area Chief, PW2 who in turn called the police, PW6 and together they went to accused's house in Langalanga Mwisho. Both PW2 and PW4 testified that it is accused who led them to his house after meeting them at Langalanga. They found the body still lying in bed, dead. Had it not been for the accused, the death of the deceased may never have been discovered. It is the accused who had access to the house. The accused had the opportunity to commit the murder and in my view, the facts on record are incompatible with the innocence of the accused or the guilt of any other person and incapable of any other reasonable hypothesis than that the accused is guilty of the offence of murder. There was nobody else in the house except children. There is no evidence that anybody else had access to accused's house. PW3 (7 years old) one of the children did not understand what was going on in court and was not able to testify and was not able to say where he used to live.

PW4 told the court that accused called his brother and informed him of the death. The said brother was not called as a witness. However, I find that failing to call him does not in any way prejudice the prosecution case because once PW4 informed the Chief, PW2, they visited accused's house and confirmed the death.

Under **Section 111(1)** of the **Evidence Act**, a person accused of an offence has 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 the person is charged and the burden of proving any fact especially within the knowledge of such person is upon him. The burden is discharged if the

court is satisfied by evidence tendered by the prosecution or in cross examination. In this case, the accused lived with the wife in the same house and she was found dead in her bed with injuries to her head. These are facts peculiarly within the accused's knowledge under **Section 111(1)** of the **Evidence Act**, a rebuttable presumption arises that he knows the circumstances under which the deceased met her death. That is a presumption of fact which this court makes under **Section 119** of the **Evidence Act**. In **Muchemi V. Rep (2002)2 KLR 367**, the Court of Appeal said:-

“1. It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the Court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exist no co-existing circumstances which would weaken or destroy such inference.

2. It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains as such.

3. As the appellant had failed to explain where he had parted company with the deceased, a fact which was peculiarly within his knowledge as envisaged under Section 111(1) of the Evidence Act, a rebuttable presumption arose that he knew under what circumstances the deceased was killed. This was a presumption of fact which the court was entitled to make under section 119 of the Evidence Act.”

I am satisfied that the circumstances under which the deceased met her death are only within the knowledge of the accused and points at none but the accused as the person who had the opportunity and he murdered her. I therefore find the accused guilty as charged under **Section 322(2)** of the **Criminal Procedure Code** and he is convicted of the offence of murder as charged.

DATED and DELIVERED this 18th day of November, 2011.

R.P.V. WENDOH
JUDGE

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PRESENT:

Mr. Mukira holding brief for Mrs Mukira for the Accused.

Mr. Nyakundi for the State.
Kennedy – Court Clerk.