



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 13 OF 2007

LESIIT J.

REPUBLIC.....PROSECUTOR
VERSUS
JOSEPH NGOLUA M’AKAARI.....)1ST ACCUSED
DAVID KINYUA.....)2ND ACCUSED
FRANCIS MPEKETHU MITHIKA.....)3RD ACCUSED

J U D G M E N T

The accused persons **JOSEPH NGOLUA M’AKAARI KASUMANI DAVID KINYUA** and **CHRISTINE MUTHONI** and **FRANCIS MPEKETHU MITHIKA** are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 16th day of March ,2006 at Muringene Location, in Meru Central District of the Eastern Province murdered **REBECCA KAYATHI**. The prosecution called four witnesses. Among these witnesses the only person who was at the scene around the time of the incident was pw1. PW2 was a brother the deceased he told the court that on the 15th March 2006 he escorted the deceased from Maua Law courts to a place where they bought local brew. They were accompanied by the husband of the deceased. After taking the brew PW2 escorted his sister and his sister’s husband to their home where he left them at 6.30 pm. PW1 was a daughter of the deceased. She told the court that on the 16th March 2006 at about 7.30 p.m. she accompanied her mother and her step father to the step fathers home where they had been staying for 7 months before the date in question. She said that at the home they found the 1st and the 4th accused standing at the door. PW1 said that she prepared supper while her step father went and slept because he was very drunk. PW1 said that before the food was ready the 1st and 4th accused found her in the kitchen and that they wanted to beat her. She testified that she ran out of the kitchen to the back of the house and while there she saw the two i.e. 1st and 4th accused chasing after her mother. She went and hid in the tea bushes where she spent the night. She heard her mother saying “**David do not kill me I will never come to your home again**”.

The accused persons were placed on their defence except the 3rd accused who was acquitted at the stage of no case to answer. The accused persons all denied that the deceased ever visited their home on the night in question. They all denied that the accused was married to Isaack Mithika, the man that PW1 referred to as her step father. They all said that they knew the deceased as one who carried goods for clients to earn a living. The 2nd accused said that when he saw the body of the deceased hanging on a tree he went to Kaberia PW2 and reported to him the death of his sister. The 3rd accused in addition said that

he came to know about the death of the deceased on the morning that she was found dead. He said that he heard people saying that the deceased had hanged herself.

Mr. Akwalu for the accused person urged the court to consider the defence of the accused persons and find that there was no evidence tendered to establish that the accused persons or any of them were responsible for the hanging of the deceased. Counsel relied on the case Dhalay vs Republic for the proposition that where there is a possibility that the deceased could have committed suicide then the prosecution cannot be said to have proved the case.

Mr. Mungai for the state urged that the accused persons were seen with the deceased shortly before the deceased started screaming. Counsel submitted that the accused persons were the only ones who could explain how the deceased died. Counsel submitted that this was not a case of suicide but that the deceased was hanged on a tree.

I have carefully analyzed and evaluated the evidence adduced in this case. The case for the prosecution hinges upon the evidence of PW1. PW1 did not witness the hanging of the deceased on the tree. Her evidence was that the 1st and the 4th accused chased her out of the kitchen when he was preparing supper. She had been alone in that kitchen. It was 7.30 pm and therefore it was late. PW1 did not disclose whether there was any form of lighting outside where she went after being chased by the 1st and the 4th accused. Since it was 7.30 p.m. it was obviously after night fall.

In the case of CHARLES O MAITANYI VS REPUBLIC (1985) 2 KAR 75

“It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve.

That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into. In days gone by, there could have been a careful inquiry into these matters by the committing Magistrates, State Counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care the evidence of a single witness?”

I have carefully scrutinized the evidence of identification by PW1 with the greatest care. There was absence of any description of the lighting at the scene. In the circumstances apart from the 1st and 4th accused whom PW1 saw before she ran out of the kitchen any other persons she alleges to have seen thereafter were seen in the dark. PW1's evidence that she saw the deceased running away and the 1st and 4th accused and another chasing her must be treated with caution as there was no form of light which could have enabled her to identify these people. Whatever took place thereafter was in the dark and it is very clear that PW1 was assuming who it was who attacked the deceased. The evidence required to be adduced was such as would establish beyond any reasonable doubt that the 1st and the 4th accused and/or any other person committed an act or omission which caused the injuries that led to the death of the deceased. The prosecution should also have shown that whoever inflicted the injuries acted with malice aforethought. It was therefore not sufficient to say these two accused chased PW1 and therefore they must also have been involved in whatever happened to the deceased. The evidence of identification by recognition is totally unreliable.

It is trite law that where the evidence of identification has been made in difficult circumstances what is required is other evidence whether direct or circumstantial pointing to the guilt of the accused. PW1

testified that she heard her mother saying “**David do not kill me I will never come to your home again**”. The second accused in this case is the one who is called David. I scrutinized the evidence of PW1 and noted that she did not refer to the 2nd accused in her entire evidence until the point of reexamination when she said that all four accused had chased her mother on the material night. PW1’s evidence implicating the second accused was purely an afterthought. The other important point is that many people are called by the name David. The mere fact that the deceased called out that name as one of her attackers is not sufficient to implicate the second accused. Had she mentioned any other name by which the second accused is known it could have been more reliable to consider that it was the second accused she was referring to. I find that it is dangerous to hold that by that name David the deceased was referring to the second accused as one of her attackers. I find that that evidence does not provide any corroboration to the evidence of PW1 against the 2nd accused.

The accused persons have denied that the deceased and PW1 were at their home on the material night. It was therefore their evidence against that of PW1 Mr. Akwalu urged that there was a possibility that the deceased committed suicide. I considered the injuries noted on the knees and the elbow of the deceased and the circumstances described by PW1. I do not think that the deceased committed suicide. She was under attack but the prosecution was unable to adduce any evidence irresistibly pointing to the culprits of the offence.

Having found that the evidence of the prosecution was too weak to found a conviction I find, that the prosecution has failed to prove their case against the accused persons on the required standards of proof beyond any reasonable doubt. I therefore give them the benefit of doubt and acquit them accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF NOVEMBER, 2011

J. LESIIT
JUDGE