



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 99 OF 2003

REPUBLIC ::::::::::::::::::::::::::::::: PROSECUTOR
=VRS=
WYCLIFFE NYONGESA OPICHO ::::::::::::::: ACCUSED

JUDGMENT

The accused, **Wycliffe Nyongesa Opicho**, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The allegation being that on the 8th day of November, 2003, at **Mombasa Ndogo** Estate, Matunda Sub-location, Nzoia Location in Lugari District within Western Province, the accused murdered **Lucia Wanjiru**.

The accused was first brought before the court on 21st November, 2003 but his plea was taken before **Dulu J.** on 30th March, 2004. He pleaded not guilty to the charge and after several adjournments, the trial commenced on 16th June, 2005 with the aid of assessors. The learned Judge took the evidence of one witness, **Joseph Sifuna Busuru**, and adjourned the hearing to another date. Unfortunately, he was transferred from this station and it fell upon **Ibrahim J.** as he then was, to take over the trial. The learned Judge heard all the witnesses of the prosecution and at the end determined that the accused had a case to answer. He was then transferred from the station and the case was placed before **Osiemo J.** (retired) who directed that the trial proceeds from where Judge Ibrahim had reached. The record does not show that the provisions of section 200 were explained to the accused but the record shows that the order to continue from where **Judge Ibrahim** had left was made by consent.

The learned Judge then took the testimony of the accused but retired before receiving final submissions. After several adjournments, the final submissions were made before me on 7th November, 2011. After that brief history, I turn to the evidence.

The prosecution called a total of seven (7) witnesses in support of the charge whilst the accused testified on his own behalf and called no other witness.

P.W.2, **Joseph Sifuna Busuru**, testified that on 8th November, 2003, at 10.00 a.m., while at his home washing clothes, **Lucy**, the deceased called to see his brother's wife who was her friend. She was not at home then. Shortly after, the accused went to P.W.1's home and was angered when he found **Lucy** who was his wife with P.W.1. He dragged her to his home as he beat her. The accused did not respond to P.W.1's enquiries as to why the accused was angry with his wife.

P.W.2 continued washing clothes after which he went to Matunda Trading Center to meet his employer **Mengo**. The latter had engaged him to build his house. He did not find **Mengo** and returned to his house after buying vegetables. He prepared and took his lunch and decided to try to meet **Mengo** in the

afternoon. He did not find him and therefore returned home, took his supper and slept.

At about 5.00a.m., the next morning, he went outside his house to answer a call of nature and saw a body lying near his gate. Shocked with the finding, he went to report to his village elder, **Chrisantus Wafula** (P.w.5). The village elder visited his home and they both made a report to the police station at Matunda. The police officers who included P.C **Wycliffe Nandasaba** (P.W.6) visited P.W.1's home and that of the accused.

The body of the deceased was on the ground in P.W.2's compound. It lay on its back and according to P.W.5, it had several injuries. The tongue was severed, there were stab wounds on the buttocks, her private parts had a cut and her face was burnt.

In the home of the accused, P.W.2, P.W.5 and P.w.6 observed blood drops in the compound, on the floor, on a blanket and on a mattress.

P.W. 6 then called scenes of crime personnel who photographed the scene and the body of the deceased. P.W. 6's team took the body of the deceased and the items recovered from the accused's house. The body was taken to Moi Teaching and Referral Hospital Mortuary (M.T. & R.H.) and the said recovered items taken to the police station for safe keeping.

The police also detained P.W.2 as a suspect but he was released after six (6) days incarceration.

Beatrice Namukhulu Kalacho (P.W.3) testified of her knowledge of the deceased and the accused. She identified the accused in the dock and the deceased from the photograph shown to her by the prosecution in Court.

Dr. Joseph Embenzi (P.W.1) produced the postmortem form prepared by **Professor Koslova** who had, at the time of trial left the country. The Professor opined that the immediate cause of death of the deceased was fat embolism of pulmonary artery which was as a result of fat from bone marrow entering the blood circulation after fractures of the ribs and major bones. The body of the deceased was identified to the doctor by **Jacob Mwangi Njamu**, (P.W.4).

I.P. John Oyugi Ogutu, (P.W.7) was the substantive investigating officer. He was in the company of P.W.5 when the scene was visited and the body and other items recovered. He produced a mattress and a blanket at the trial. He concluded that the accused was annoyed with the relationship between the deceased and P.W.2 and could have killed her as a result. In cross-examination, he admitted that he could not identify any blood on the items he had produced. Indeed, the blanket had been partly eaten by rats.

After the testimony of P.W.7, the prosecution closed its case.

As already stated, **Ibrahim J.** placed the accused on his defence and he opted to give evidence unsworn which statement was taken by **Osiemo J.** The accused testified that long before the incident took place he, on 20th September, 2003 left Matunda for his home when the vehicle he was working with left for North Eastern Province. On 10th November, 2003, he was informed that something had happened at home. At the time, he was living in a rental house. He decided to carry his goods to Lumakanda Police Station for safe keeping before he could travel home. He was then arrested by Lumakanda Police Officers and take to Matunda Police Station where he found P.W.2 and another man being held. The police also arrested the wife of P.W.2 and placed her in cells. On 14th November, 2003, the others were released on bond and he was charged. He denied the murder of his wife.

Analysis and Evaluation of the evidence on record.

This being a criminal case, the onus rests on the prosecution to prove beyond reasonable doubt that the accused committed the murder of the deceased **Lucia Wanjiru**. The accused bears no legal responsibility in proving his innocence since he is presumed to be innocent until and unless the prosecution proves him to be guilty.

The prosecution case is that on the material date, 8th November, 2003, at an unknown time, at Mombasa Ndogo Estate, Matunda Sub-location, Nzoia Location, the accused murdered the deceased. There is no direct evidence by the prosecution that any witness saw accused kill the deceased. The key witness for the prosecution is **P.W.2, Joseph Sifuna**. He is the witness who, according to the prosecution, saw the deceased alive for the last time. And at that time, which was 10.00 a.m. of 8th November, 2003, the deceased went to his home ostensibly to see the wife of his brother. Shortly after arriving, she was followed by the accused who was angry. He got hold of the deceased and pulled her away presumably to their home. P.W1 continued with what he was doing.

The next day, 9th November, at 5.00 a.m., he found the body of the deceased at his gate. He was shocked and went to call the village Elder, P.W.5 **Chrisantus Wafula**. So, the only thing P.W.2 witnessed was the accused pulling away the deceased in anger. P.W.5 merely received the report made to him by P.W.2 and visited the scene, saw the body with various injuries and in the company of P.W.2 reported the finding to Matunda Police Station. P.W.3's evidence added no value to the case of the prosecution and P.W.4 merely identified the body to Dr. **Koslova** who performed the postmortem on the body of the deceased. P.W.6, P.C. **Wycliffe Nandasaba** received the report which was made at the station by P.W. 2 and P.w.5. He visited the scene with other police officers including I.P. **John Oyugi Ogutu** (P.W.7).

The two police officers observed the body and made recoveries of a blanket and a mattress which were both blood stained. P.W.6, P.C. **Wycliffe Nandasaba**, is the only one who testified that he saw blood drops on the way from the scene where the body of the deceased was upto the accused's house. The significance of those recoveries was weakened by the failure of the prosecution to subject blood samples from the scene to forensic analysis. The two officers P.W.6 and P.W.7 talked of blood drops found on the way to the house of the accused, in the compound and inside the house. There were more blood drops on the mattress and blanket. That suggests that the scene was visited by the two officers before it had been disturbed and the blood drops could have been subjected to analysis. They were not. That evidences was further weakened when, at the trial, the prosecution produced a mattress and a blanket which had been partly eaten by rats. The exhibits' probative value was extremely low.

The testimonies of P.W.4 and P.W.5 are significant in several other respects. P.W.2 was initially treated as a suspect by the police. He was indeed arrested and placed in custody for six days. He was also suspected to have had an illicit relationship with the deceased. The body of the deceased was also found in his compound. His testimony was therefore not the best evidence. He also saw the deceased with the accused in the morning of 8th November, 2003, at about 10.00 a.m. and he discovered the body of the deceased the next morning at 5.00 a.m. A period of 18 hours had elapsed in between. No evidence was led as to where the deceased was for that period. P.W.4 **Jacob Mwangi Nyamu** testified inter alia as follows:-

“I knew the accused. He lived with the deceased as husband and wife they used to quarrel frequently. The accused used to disappear; The accused used to stay out and come in the morning ...”

So, on the testimony of P.W.4, there was nothing unusual for the accused to disappear. On many occasions, according to him, the accused would spend nights out of his house. That testimony could suggest that the accused could probably not have been in his house in the night of 8th November, 2003, considering that P.W.2 only saw him at 10.00 a.m. of that day.

P.W.5 on his part, testified that the deceased before her marriage to the accused was married to one **Maturi** , who was also their neighbour. P.W. 5 did not have kind words for the deceased. In cross-examination, he stated as follows:-

“The deceased was a drunkard. She liked fighting. They quarreled with the accused. She drank every day. The accused also drunk. The deceased was like a mad woman. I do not know who killed the deceased. The blood was fresh”.

The drinking habit of the deceased was further confirmed by the post mortem report prepared by **Prof.**

Koslova. When she performed the post mortem, there was smell of alcohol.

There is therefore the possibility that after 10.00 a.m., when she was seen by P.W.2, she could have gone on her usual drinking sprees and could have been in the company of others not necessarily the accused. She could even have met her death in her house but not necessarily at the hands of the accused.

The above analysis of the evidence shows that the circumstantial evidence relied upon by the prosecution did not conclusively point to the guilt of the accused person but the same evidence could lead to an inference that others may have been involved in the murder of the deceased.

The inevitable conclusion therefore is that the prosecution has failed to prove the charge of murder against the accused person beyond all reasonable doubt. I find the accused Not Guilty. He is acquitted. I order that he be set at liberty forthwith unless he is otherwise lawfully held.

DELIVERED AT ELDORET THIS

7TH DAY OF DECEMBER, 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Kabaka for the State and **Mr. Chepkwony** for the accused.

F. AZANGALALA

JUDGE

7/12/2011.