



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Criminal Case 09 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

JACOB NJUE DANIEL ALIAS KIMWITHA.....ACCUSED

J U D G M E N T

The accused – Jacob Njue Daniel alias Kimwitha is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code- in that on 29th day of September, 2007 at Mbiri village within Kirinyaga District of the Central Province, jointly with others not before court murdered Agnes Wamarua Njue. He denied the charge.

Before the hearing in respect of the said charge commenced, the court held an inquiry into the mental status of the accused person. Several witnesses testified in the inquiry after which the court found him sane and fit to follow the pleadings. The plea was therefore taken and my predecessor **Justice Khaminwa** took the evidence of 6 witnesses before she was transferred from the station. I took over the matter after counsel for the accused agreed that the matter proceeds under Section 200 (4) of the Criminal Procedure Code and said that they wished to recall no witnesses. For ease of reference, I ordered that the proceedings taken before Justice Khaminwa be typed as her handwriting is not very easy to decipher. In the process, the proceedings all got mixed up with the evidence of the witnesses who testified in the inquiry being mixed up with those who testified in the main case. It took quite some time to synchronise the proceedings and it is for this reason that the Judgment could not be delivered on 23/2/2010 as earlier on as scheduled.

In brief, the deceased herein was the accused person's wife. The 2 of them were teachers at different institutions. According to PW1, PW2, PW3, PW5 and PW6 the accused person went to Mungania Tea Growers SACCO Limited and withdrew Ksh.60,000 which was meant to purchase some provisions for the school where he was the principal. This withdrawal was apparently authorized by the account signatories as they told the court. I took over this matter after those witnesses had testified and I seem to have missed the drift or purpose or the relevance of their evidence.

On the date in question, the accused person and his wife left their home in his motor vehicle Reg. No. KAU 937 F. According to the accused person, they were going for shopping but they also intended to go to a hotel known as "**Morning Glory**" where they would have a meal before driving back home. Incidentally, there is no other eye witness in this matter and so the chronology of the events as happened

that night is what has been given by the accused. He said that he parked his motor vehicle outside the hotel as the deceased left to go to a nearby “ATM” to check on her bank balance. She came back but as she entered the car, 3 other persons forced themselves inside, hit the accused person with the butt of a gun and placed a wet cloth across his nose and mouth. He is said to have passed out. The next time the motor vehicle was seen was at about 11.20 p.m. the same night. According to PW11 A.P Cpl Wachira, he received a phone call and was informed that there was a motor vehicle which was stationary in a particular compound with its headlights on and there was a person inside who was pleading for help. He alerted other officers among them PW12 and they proceeded to the scene. They both told the court that they found a motor vehicle Registration KAU 937 F stationary with some members of the public standing nearby but not attempting to open the boot. They told the court that somebody was calling from inside the car pleading for help. The officers opened the boot and they found the accused person inside. His lower body was inside a sack and his hands had been tied with a rope behind his head. They untied him. He told them that he had been hijacked with his wife and he did not know where she was at that time. He called his driver since he said he was not in a position to drive the car. He was taken to PW14’s house who prayed for him before he left. According to PW14, the accused person was shaken and was crying. He asked him to pray for the deceased’s safety. The accused person went home but the following day he reported the incident to Embu police station and investigations started. The accused person was claiming that he had been carjacked and robbed of money and personal documents.

According to PW16 Cpl John Kilonzo they started investigating a robbery and carjacking incident. An intensive search for the deceased was commenced. Interviews were conducted and according to PW16, the accused’s maid and children gave an account which differed from that given by the accused person. They therefore started suspecting that something was amiss. It is noteworthy however that the said maid did not testify and so whatever PW16 could have been told by her remained hearsay and thus inadmissible. The deceased’s body was recovered a few days later in NyamindiRiver.

According to PW16, they carried out further investigations that led them to the accused’s home. He told the court that most of the items the accused person had claimed had been robbed from him including his personal documents were found in his house. He also said that they found sacks that were similar to the one the accused person had been put in and similar ropes. They suspected that the carjacking incident was a set-up and so they decided to arrest the accused person which they did and charged him with the offence of murdering his wife. He is said to have volunteered to record a confession after he admitted having “*gotten rid*” of his wife.

In his wisdom, the investigating officer got a magistrate to take the said confession. Neither him nor the magistrate appeared aware of the provisions of Section 25 A of the Evidence Act. The magistrate therefore went to the police station where he took the said confession. As held by this court in my earlier ruling, the law was flouted as Section 25 A clearly intimates that the statement shall be taken in court by the magistrate or Judge- and definitely not at a police station. I do not find it necessary to repeat my earlier ruling here. The gist of it was that the said confession was found to be inadmissible.

A post mortem was performed on the body of the deceased by PW7. He formed the opinion that the deceased had died of assault and head injury and not from drowning. She must therefore have been killed first and her body thrown into the river from where it was recovered.

The accused person as said earlier on denied having killed his wife and narrated his defence as outlined at the beginning of the Judgment. He testified on oath and called no witnesses. The fact and cause of the deceased’s death is not disputed. The circumstances under which she met her death and as to who was responsible for the death remain a mystery. Admittedly, the only evidence against the accused person is circumstantial. There is only one issue for decision herein and that is whether it was the accused person who killed his wife. Is the evidence on record sufficient to prove the case against the accused person beyond any reasonable doubt?

In the absence of the so called confession, the only evidence implicating the accused person is that he was the last person to be seen with the deceased. They left their house together. He was later found alone in his car. The wife was missing and her body was recovered from a river a few days later. Only the accused person could explain her whereabouts. I do not agree with his counsel that this amounts to shifting the onus of proof. The provisions of Section 111(1) of the Evidence Act come into play here. The same provides:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exception from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.”

This provision was applied and expounded by the Court of Appeal in the case of **Mkendeshwo Vs Republic (2002) 1 KLR 461** where the court held:-

“ In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond any reasonable doubt and generally the Accused assumes no legal burden of establishing his innocence. However, in certain limited cases, the law places a burden on the Accused to explain matters which are peculiarly within his own personal knowledge.”

Section 111(1) of the Evidence Act therefore does place the onus on an accused person to explain and prove- of course on the lesser degree of balance of probabilities matters that are peculiarly and solely within his personal knowledge. Only the accused person herein could explain what happened to the deceased. The explanation he gave was that they were car- jacked and robbed and he did not know where she had been. This was an explanation that was difficult to ‘buy’. For PW16 however, he said that he recovered from the accused’s house the very documents that he claimed he had been robbed of and this therefore heightened his suspicion. He nonetheless admitted that he had not recorded in the O.B the items the accused had claimed to have been stolen so that he could avail the same as evidence to support the said discrepancy. That basis of suspicion was therefore excluded from this court. The other evidence arousing PW16’s suspicion was the contradictory statements made by the accused on the one hand and by his maid and child on the other. The latter evidence was not availed to this court either. Some of the circumstances that raised the suspicion in the investigator’s mind were therefore not incorporated into this case by way of evidence to enable the same raise the same standard of suspicion.

I must say however, that the suspicion against the accused was serious and seemingly well grounded. The question however is whether such suspicion in the absence of any other evidence is sufficient to support a conviction against the Accused.

Going back to Section 111(1) of the Evidence Act, I find that the explanation given by the accused person was highly unlikely but possible. The possibility is 50:50. It is likely that he killed her with the help of others and then stage managed the entire incident; there is also a possibility that she was hijacked and killed by other persons.

The degree of proof under Section 111(1) of the Evidence Act is on a balance of probabilities and not beyond reasonable doubt. I would therefore say that the Accused has discharged his onus under Section 111(1) of the Evidence Act.

There was and still exists a very strong suspicion that it was the Accused person who killed the deceased for reasons that did not come out in Evidence. The law on this point is nonetheless very clear and settled as enunciated in the Court of Appeal decision in; **MARY WANJIKU –VS REPUBLIC (Cr. Appeal No. 17 of 1998)**; and later on adopted in the more recent case of **SAWE –VS-REPUBLIC (2003) KLR 365** where the Court of Appeal held;

“ A suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

The circumstantial evidence in this matter fails to meet the test set in the *Republic –Vs- Kipkering Arap Koskei* case way back in 1949 which has been adopted by our courts to the present day. The accused's defence which was tendered on oath did also cast some doubt onto the prosecution case. Although the strong suspicion against him still lingers, the court's duty is only to convict where the case has been proved beyond reasonable doubt, by way of the admissible evidence proffered in court. The evidence herein fails to meet that bar. Accordingly, I must acquit the accused person. I find him not guilty as charged and acquit him accordingly. He shall be set at liberty unless he is otherwise lawfully held.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 19th day of April, 2010.

In presence of:- Mr. Okwaro for accused- also present

Ms Metiru for the state.