



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE 14 OF 2008

REPUBLIC PROSECUTOR

VERSUS

JOSEPHAT OTIENO ONGECHE) KELVIN ONYANGO TIM)
.....ACCUSED

JUDGMENT

The accused were charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the night of 10th June, 2008 at Kakangutu Sub location, Ramba Location Rachuonyo District, the accused jointly murdered Benta Anyango Okwa, hereinafter referred to as “**the deceased**”.

The prosecution evidence can be summarized as hereunder:

On 10th June, 2008, at about 8.00P.M, **Maxmillan Anyango Ooko, PW1**, went to the deceased’s house to pay her some money she had lent the witness. PW1 found the two accused. The second accused was working for the deceased. The first accused was a friend of the second accused. The deceased was not there and so PW1 left kshs.500/- with the second accused to pass on to the deceased upon her return.

On the following day at about 8.00a.m., **Judith Akoth Otieno, PW4**, a neighbour and a friend of both the deceased and PW1 went to the deceased’s house to call her so that the three of them could have breakfast together. She found the main door shut but not locked. She opened and got into the house. The bedroom door was open and she went in. She found the deceased tied with a rope and a net on the neck. The net had blood. She was shocked and went back to call PW1. Both PW1 and PW4 went to the deceased’s house and PW1 also saw the deceased. PW1 and PW4 reported the matter to the village elder who in turn reported to the Area Chief. The two accused were not in the deceased’s house when PW1 and PW4 went there. The incident was reported to the police who went to the scene and removed the deceased’s body and took it to the mortuary. The first accused was traced and arrested the same day but the second accused disappeared. PW2 added that the second accused had stayed with the deceased for more than a year. He used to help the deceased in her business. The deceased had told them that he was a son of her sister.

Although PW1 and PW4, testified that the second accused was a son of the deceased’s sister, **Joel Okwa, PW2**, the deceased’s husband who was living at Kisumu, testified that the second accused was not

related to the deceased at all. PW2 said that he had employed the second accused at his home and he sacked him. He was surprised to hear that the second accused had been living in the deceased's house at Olieny market. PW2 said that the deceased was engaged in the business of buying cassava and selling it at Nairobi.

Police Constable Albert Micha, PW3, testified that on 11th June, 2008 at about 1.00 P.M, he left Oyugis Police Station together with **Corporal Opanga, PW7**, to go and collect a suspect from Ramba Administration Police camp. They were also instructed to collect the body of the deceased. When they went to the deceased's house, they found the body lying on a bed covered by sheets and a mosquito net. There was also a rope round her neck and hands. They put the body in a vehicle and proceeded to Ramba Administration Police Camp where they picked the first accused. The first accused was wearing a T-shirt that had blood stains, PW3 stated. However, that T-shirt was not produced as an exhibit.

John Arogo Ogude, PW6, the Area Chief, corroborated the evidence of PW1 and PW4. He said that PW1 told him that she suspected the two accused because she had found them in the deceased's house the night before her body was discovered on her bed and they had disappeared after the discovery. PW6 notified the Area District Officer who sent two Administration Police Officers. They mounted a search for the accused and managed to trace the first one. He was found drawing water from some place near the market where the deceased was staying. He was arrested and taken to the District Officer's office at Ramba Division headquarters where there is Administration Police camp.

PW7 corroborated the evidence of PW3 in all material aspects. He produced as exhibits the rope and the net with which the deceased was tied. He also produced a sketch plan showing the scene of the crime. He further testified that the second accused was arrested at Mogogosiek in Bureti District and he went to pick him on 5th July, 2008.

A post mortem on the deceased's body was done by Dr. Oluoch who concluded that the cause of death was Cardio respiratory arrest due to strangulation. The body had no injuries but there was evidence of bleeding from the nose. A sample of the deceased's blood was drawn from the body to be sent to the Government Chemist for DNA analysis but that was not done.

In his defence, the first accused stated that on 10th June, 2008 he worked the whole day and in the evening he took a bath, had supper and went to bed. On the following day he went to his place of work. At about noon a chief and two Administration Police officers arrested him and took him to the D.O's office where he remained until late in the evening. Thereafter he was taken to Oyugis Police Station where he was assaulted by Police Officers as they interrogated him about the death of the deceased. He denied any knowledge of the same. He alleged that he was held in the police cells for sixteen days before being arraigned in court.

The second accused said that in the year 2006 he lost his parents and the deceased, whom he said was her aunt, took him to Oyugis and they stayed together as he attended school. On 12th February, 2008 his uncle called the deceased and said that he was sick and wanted him to go and assist him. The second accused said he was given bus fare by the deceased and travelled to Kericho. He found his uncle at Kericho District Hospital.

In September, 2008 he was sent to Kericho town. On his way he met someone who told him that he used to see him (the second accused) at Oyugis. The accused recalled the person. They decided to go and take tea in that person's house. While there Police Officers came and arrested him. Later he was taken to Oyugis Police Station where he was assaulted and interrogated about the death of the deceased. He was held there for one month and two days before he was taken to court. His case was consolidated with that of the first accused who had earlier been charged. He denied having committed the offence.

Mr.Ogari for the first accused and Mr. Sagwe for the second accused made brief submissions. They urged the court to find that the prosecution had adduced very weak circumstantial evidence which could not sustain the murder charge. They urged the court to acquit the accused.

Mr. Mutai, Senior State Counsel, submitted that the prosecution evidence clearly pointed to the accused as the ones who murdered the deceased. He urged the court to convict them accordingly.

From the evidence of PW1 and PW4, the second accused was related to the deceased and he was living with her. However, that was not known to the deceased's husband, PW2, who said that he had employed the second accused but dismissed him. PW1 said that on 10th June, 2008 when she went to the house of the deceased she did not find her but she found the two accused. She left with the second accused Kshs.500/- to give to her. When PW4 went to the deceased's house on the morning of 11th June, 2008 she found the deceased lying dead on her bed. The door was open but the second accused was not there. PW4 did not testify of having seen the second accused the previous day. Only PW1 had said so. When PW4 called PW1 and they went to the scene, PW1 straight away suspected the accused simply because they had been in the deceased's house the previous night, though at the time the deceased was not there. There was no evidence given as to where the deceased was that night, when she returned and whom she might have been with. When PW1 and PW4 reported to the clan elder, the chief and the Administration police, they named the accused persons as suspects. When the Administration police went to the scene they began to look for the two accused. They traced the first accused, arrested and took him to the D.O's office. When PW3 and PW7, police officers from Oyugis police station went to the scene, they did not conduct any independent investigations. PW7 said that he did not even interview the neighbours of the deceased. Why did he not do so, yet they could have given him vital information like whether they saw the deceased coming in after 8.00P.M, whether she was alone, whether they heard any commotion in the deceased's house, and so on?

No effort was made to lift finger prints from the deceased's body and try to compare them with those of the accused. PW3 alleged that when the first accused was arrested he was wearing a T-shirt that had blood stains. If that was so, why was the T-shirt not produced as an exhibit? And more important, why didn't the prosecution try to find out whether that blood was from the deceased, since they had taken blood samples from the deceased's body? The Government Chemist would have identified the DNA of the deceased's blood and stated whether it matched that on the first accused's T-shirt.

An accused person is not bound to say anything in his defence. The prosecution case has to succeed or fail depending on the nature of evidence adduced by its witnesses. In this case the accused gave plausible defences. There was no eye witness at all. The prosecution relied entirely on circumstantial evidence. In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person, and incapable of explanation upon any other reasonable hypothesis than that of guilt. See JAMES MWANGI V REPUBLIC [1983] KLR 327.

In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence that was adduced in this case was not sufficient. PW1 and PW4 testified that the relationship between the deceased and the second accused was good. It was not shown that anything was stolen from the deceased's house or that she was sexually assaulted. It cannot be said with any certainty that the deceased must have been murdered by the accused and no one else. There were reasonable grounds for suspecting the accused but suspicion alone cannot be the basis of founding a conviction where no compelling evidence exists.

I find and hold that there is insufficient evidence to warrant a conviction against the accused. I acquit them of the charge of murder and set them at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF JULY, 2009

D. MUSINGA

JUDGE.

23/7/2009

Before D. Musinga, J

Mobisa – cc

Mr. Mutai for the state

Mr. Sagwe for the 2nd accused and HB for Mr. Ogari for the first accused.

Court: Judgment delivered in open court on 23rd day of July 2009.

D. MUSINGA

JUDGE.