



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 10 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS MUTHENGI NYAMU ACCUSED

J U D G M E N T

Julius Muthengi Nyamu (hereinafter referred to as the Accused) is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. It is alleged that on the 9th day of January 2005 at Kutus in Kirinyaga District within Central Province he murdered Rose Wangechi Muriithi (*hereinafter referred to as the deceased*).

This being a criminal case, the burden is entirely upon the prosecution to prove beyond reasonable doubt that the Accused did commit the offence. If there is any doubt the benefit must go to the Accused who must then be acquitted.

Ten witnesses testified on behalf of the prosecution. Their evidence was briefly as follows: -

On the 9th January 2005, Purity Karimi Muremi (P.W.2) was in her house in Kutus when the Accused went to her house at about 8.00 p.m. and demanded to talk to the deceased as he claimed to be having a message from the deceased's home. The deceased who was a 15 year old primary school student was a sister in law to P.W.2 and was at the material time living with P.W.2. The Accused was coming from the same home area as the deceased.

The deceased was reluctant to talk to the Accused, but the accused insisted saying he would only take 5 minutes. P.W.2 therefore told the deceased to talk to the Accused but cautioned her not to go far. The Accused and the deceased walked out. After a while P.W.2 went outside but did not see them. She waited upto mid-night but the deceased did not come back.

At around midnight John Muremi Mureithi (P.W.3) the husband to P.W.2 and brother to the deceased arrived at his home and learnt of the disappearance of the deceased. P.W.3 proceeded to their rural home in Kiamichiri village but their mother Jane Wawira Muriithi (P.W.4) confirmed that she had neither sent the accused to the deceased nor had she seen the deceased that night. P.W.3 & P.W.4 proceeded to the home where the accused was employed. They found the Accused asleep. He was asked whether he had been with deceased and he explained that they had parted with the deceased who had informed him that she was going to see a friend. He led P.W.3 & P.W.4 to Kutus to the friend's house but they did not find the deceased.

P.W.3 & P.W.4 therefore proceeded with the Accused to the Administration camp near Kutus where they reported the matter. They were referred to Kutus police post but since it was about 4.00 a.m. P.W.3 went to sleep whilst P.W.4, the Accused and Accused's mother proceeded to the police post and reported to P.C. Humphrey Munyi who advised them to go back the next morning.

The next morning P.W.4 and the Accused went back to the police station. In the meantime; during the same morning John Njenga Migwi (P.W.1) had gone to draw water from a fallow. He was drawing water with Jerry-cans and emptying on a drum which was on a donkey cart. It was while he was drawing water that P.W.1 noticed the body of a woman lying in the fallow. P.W.1 reported what he had seen to the Assistant Chief of the area Andrew Githinji Warui and together they proceeded to Kutus Patrol Base where they reported the matter to P.W.7.

P.C. Bernard Ndiku Muteti (P.W.8) accompanied P.W.1, P.W.7 and P.W.4 to the fallow where P.W.4 identified the body as that of her missing daughter. P.W.8 contacted Sagana Police Station and P.C. Joseph Muriungi (P.W.9) proceeded to the scene. P.W.9 noted that the fallow was only 4 ft wide and 1½ feet deep. They retrieved the body from the fallow. Dr. Paul Mbalu an officer attached to Kerugoya District Hospital later performed a post mortem examination on the body of the deceased. He noted that the body had scratch marks on the front and inner aspects of the thigh and that the hymen was broken and the edges were raw indicative of a recent onset. He also noted bruises on the chest, front part of the pelvis and on the face. He further noted excessive movement of the head and minute haemorrhage on the membranes covering the lungs and the heart which were indicative of asphyxia. He formed the opinion that the deceased had died of asphyxia due to strangulation. Vaginal swab analysis revealed no presence of spermatozoa or bacteria.

On 21st January 2005 the accused who had already been arrested was escorted to Dr. Abraham Gatangi (P.W.10) who examined him and found him to be physically and mentally normal. The Accused was thereafter charged with this offence.

In his defence the Accused gave an unsworn statement and called no witness. He explained that on 9th January 2005 he left his place of work and rode a bicycle to the *posho mill* where he left his maize with someone as he proceeded to P.W.3's house in Kutus. He explained that he had gone to see the deceased who was his lover. At about 4.00 p.m. he was sent by P.W.2 and the deceased to buy milk. They then prepared tea which he took after which he excused himself. The deceased said she wanted to see him and they walked a few steps ahead and she asked for 100/= which the Accused gave her. The Accused then said goodbye to P.W.3 picked his bicycle and proceeded to the *posho mill* where he found his flour ready. He then left. As he was riding his bicycle he met P.W.4 who asked him to buy her tea and he gave her 50/=. He went to his place of work and continued with his duties. He had his supper at 8.30 p.m. and then went to bed. At about 9.30 p.m. P.W.2, P.W.3 & P.W.4 woke him up looking for the deceased. He explained that he had left her at P.W.3's house. They asked Accused to accompany them to the police station where they were advised to go back the next morning. The next day they went back to the station and while at the station someone came and reported having seen a body. Officers from Sagana went and collected the body. The Accused was then arrested. He explained that the deceased had on one occasion threatened to commit suicide because her people were annoyed with her and that the Accused sought the assistance of one Kago who was his employer and asked him to talk to the deceased.

From the evidence of Dr. Paul Mbalu (P.W.5) the deceased died of asphyxia due to strangulation. Dr. Mbalu also noted injuries indicative of a sexual assault which were scratch marks on the front and inner aspects of the thighs, bruises at the groin and a broken hymen with raw edges.

The question is who assaulted the deceased and inflicted these injuries upon her. There was no witness who actually saw the injuries being inflicted upon the deceased. The case against the Accused is therefore purely based on circumstantial evidence.

The question which must therefore be addressed is whether there are any inculpatory facts which have been established against the Accused, and if so whether such facts are incompatible with the innocence of the Accused and lead irresistibly to the conclusion of guilt on the part of the Accused, or whether there

are any co-existing factors which may weaken the inference of guilt.

The case against the Accused is founded on the evidence of P.W.2 that on the material night the Accused went to her house at about 8.00 p.m. and requested to speak to the deceased so as to deliver a message to her from home and that when the two walked out of the house, the deceased did not come back. That was apparently the last time that the deceased was seen alive as her body was discovered the next day in a fallow.

The evidence of P.W.2 is supported by that of P.W.3 to whom P.W.2 reported the disappearance of the Accused the same night. P.W.3 together with his mother (P.W.4) sought out the Accused the same night and found him asleep at his employer's home. Both witnesses contend that the Accused admitted having visited the house of P.W.2 that night and having talked to the deceased, however the evidence of P.W.3 and P.W.4 was not consistent on what the Accused said as P.W.3 claimed the Accused told them He had escorted the deceased to her friend's place whereas P.W.4 claimed the Accused refused to say where He had taken the deceased.

In his defence the Accused admitted having gone to the house of P.W.2 but maintained that it was sometime before 4.00 p.m. and that he left the home after talking to the deceased and giving her Kshs.100/=. He was riding a bicycle and passed through the *posho mill* where He had earlier left his maize being grinded. By 7.00 p.m. the Accused claimed He was at his place of work where He milked cows then went for a bath. At about 8.30 p.m. He had his supper then went to bed and that He was woken up by P.W.3 and P.W.4 around 9.30 p.m. No effort was made by the prosecution to call the Accused's employer or to establish the movements of the Accused on this crucial day. It was thus the word of the Accused as against that of P.W.2 as to whether the Accused was at his employer's home from 7.00 p.m. until 9.30 p.m. when he was woken up by P.W.3 and P.W.4, or whether He had visited the house of P.W.2 at 8.00 p.m. and left with the deceased.

Even assuming for the purpose of argument that the Accused person did indeed visit the house of P.W.2 and left with the deceased at 8.00 p.m. as alleged. Is this sufficient to lead irresistably to the conclusion that the Accused is the one who sexually molested the deceased and strangled her? I find that this evidence only provides suspicion against the Accused, however suspicion no matter how strong is not sufficient to prove a criminal case. Indeed the fact that the Accused may have parted with the deceased before she met her unfortunate fate cannot be ruled out. The possibility of the deceased having parted with the Accused and proceeded to her friend was also not ruled out as no efforts were made by the prosecution to call the friend as a witness. The sum total of the above is that the alleged inculpatory facts are not incompatible with the innocence of the Accused nor do they lead irresistibly to the conclusion of guilt on the part of the Accused.

I must therefore with all due respect differ with the unanimous opinion of the assessors, that the Accused is guilty of murder. The assessors failed to appreciate that the evidence against the Accused being circumstantial, the circumstances had to be consistent only with the guilt of the Accused and not open to other possibilities as was the case herein.

I find that the evidence adduced cannot sustain the Accused's conviction. There is a doubt the benefit of which must go to the Accused. Accordingly I find the Accused person not guilty and acquit him of the offence charged. The Accused shall therefore be released unless otherwise lawfully held.

Dated, signed and delivered this 26th day of January 2007.

H. M. OKWENGU

JUDGE