



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Case 14 of 2003

REPUBLIC.....PROSECUTOR

VS

FRED NALIANYA WEKESA.....ACCUSED

JUDGMENT

The accused herein, Fred Nalinya Wekesa is before this court facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the nights of 15th and 16th April 2003 at Soy Sambu Scheme, Soy Sambu Sub-location in Bungoma District within the Western Province, jointly with others not before court murdered Magdaline Wairimu Muriithi.

A total of seven (7) witnesses were lined up by the prosecution to prove the charge facing the accused. At about 7.00 a.m on 16.4.2003, Metrine Wafula and Alice Wanyama (P.W2) discovered that Magdaline Wairimu was lying dead in her bedroom when the duo forced the door open when they realized that she was not responding to their wake up calls. P.W.1 had gone to perform her duties of milking the deceased's cows whereas P.W.2 had gone to buy milk from the deceased's home at that time. The duo screamed and the neighborhood responded. P.W1 said by then she had worked for the deceased for a period of 2 months having taken over from Jackline Wamalwa Wekesa (P.W.3) who had quit the employment of the deceased due to some illness. P.W.1 said she was called to identify 4 cups, a torch, a radio and a bicycle at the police station.

It is the evidence of Charles Wanyonyi (P.W7) and Administration Police Officer, that he visited the house of the accused on 23rd April 2003 where he and other police officers carried out a search. The search yielded to the recovery of a radio, 3 radio compacts, 6 cups, a grey trouser and a bag. Jackline wekesa (P.W3), a person who had worked for 7 years with the deceased managed to identify 4 cups by the colour and the thread the deceased used to tie. P.W3 also identified the radio cassette by its make and by the broken cassette player. P.W.3 told this court that the 3 items plus a torch were the property of the deceased.

P.W.1, also gave a similar identification like that of P.W.3.

It is the evidence of Jane Nasimiyu, P.W4 that at about 6.00 a.m on 16.04.2003 she met the accused at Ndalumu Market. According to P.W.4, the accused appeared very dirty. She claimed she saw the accused wearing a long trouser which was dirty with blood stains and mud. P.W.4 said when she reached home she learnt that the deceased had been killed the previous night and that she suspected the accused may have been the murderer because of the way he appeared in the morning of 16.04.2003. It turned out later own that her son, Augustine, was held as a suspect. P.W4 did not give the details as to how her son was

released from police custody. Her son was not also called upon to testify.

Dr. John Ouma Juma (P.W5) produced the post mortem report prepared by doctor Kubasu. The doctor formed the opinion that the cause of death was severe brain injury due to trauma from assault.

In short, the prosecution's case is that the deceased's property were found in the accused's house. The property were identified to belong to the deceased by PW1, P.W2 and P.W3. The prosecution is applying the doctrine of recent possession to connect the accused with the offence.

When placed on his defence the accused gave an unsworn statement. He denied committing the offence. He stated that the items said to have been recovered at his house were actually not recovered from his house. He blamed P.W4 for fixing him to save her son called Augustine who had been arrested as a suspect.

The advocates appearing for the parties adopted their submissions made at the stage of no case to answer under section 306 of the Criminal procedure Code. It is the submissions of Mr. Onchiri that there was contradictory evidence between the evidence of P.W1 and P.W2 and that of P.W7 as to where the deceased's property were found. It is also argued that the property were not properly identified to be owned by the deceased. On his part the learned principal state counsel submitted at that stage that the evidence of P.W7 was consistent. It is the view of Mr. Onderi that the deceased was the owner of the items produced in evidence.

At the conclusion of the submission, I summed up the evidence to the assessors and directed them on the applicable legal principles. I then asked for the assessor's opinions. The assessors were unanimous that the accused person was guilty as charged. They were of the opinion that the property recovered from the accused's house were properly identified to belong to the deceased hence they drew the conclusion that he was the murderer.

Having considered the evidence, the submissions and the assessor's opinion, I am of the following view in this matter. The prosecution's case depends heavily on circumstantial evidence. The evidence connecting the accused with the offence of murder is the items recovered from his house. The evidence of Charles Wanyonyi (P.W7) indicates that P.W7 and other police officers visited the home of the accused on 23.4.2003 where they did a search whereby they recovered a radio, 3 radio compacts, 6 cups, a grey trouser, a torch and a bag. The deceased's employees namely Metrine Wafula (P.W1) and Jackline Wamalwa Wekesa (P.W3) managed to identify the radio, 4 cups and a torch to be the property of the deceased. I believed their evidence of identification. The accused denied that the items were found in his house. He however did not deny that the trouser was recovered from his house. There is no evidence that P.W1, P.W3 and P.W.7 had a grudge against the accused. I have no reason to disbelieve their evidence. I observed their demeanour and I am of the opinion that they were firm, straightforward and consistent witnesses.

In cases of murder two main ingredients namely actus reus and mensrea must be proved. In this case, the evidence actus reus can be inferred from the circumstantial evidence. In my mind, I do not think malice aforethought has been established. I can only infer that the accused must have been pushed by his desire to steal to assault the deceased to disable her so that he can succeed in taking away the deceased's property. In my view, the accused in this case has committed an offence defined under section 295 as read with section 296 (1) of the Penal code as opposed to murder.

For the above reasons, I, with respect disagree with the assessors. In the end, I find the accused not guilty of murder. He is acquitted of the offence of murder. I convict the accused for robbery under section 296 (1) of the Penal code and in pursuance of section 179(2) of the Criminal Procedure code.

Dated and delivered this 14th day of September 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Onchiri for the accused and Mr. Onderi for the state.

MR. ONDERI: The accused can be treated as a first offender.

MR. ONCHIRI: I pray for leniency. The accused is aged 27 years old. He was newly married and had a child who is now aged 3 years. He was the only bread winner. He suffers from cancer. He is remorseful. He pleads for mercy. The accused has been in custody for 4 years.

COURT: I have taken into account the mitigation given. I have also noted that the accused is a first offender and I have noted that he has been in custody for 4 years. He is sentenced to serve 6 months imprisonment.

Dated and delivered this 14th day of September, 2006.

J. K. SERGON

JUDGE