



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**  
**CRIMINAL CASE NO. 55 OF 2003**

**CHARLES KYALO MUTIE .....**

**APPELLANT**

**AND**

**REPUBLIC**

**.....RESPONDENT**

**RULING**

The accused, **Charles Kyalo Mutie**, is charged with offence of murder contrary to section 203 as read together with section 204 of the penal code.

The particulars are that on the 10<sup>th</sup> day of April, 2000 at Mathare North Nairobi within the Nairobi Area murdered **Damaris Syombua Ngumbi**.

The prosecution called 7 witnesses in support of the state case.

**PW1, Catherine Mutheu**, Mutheu, recalled the events of 7<sup>th</sup> April, 2000 when accused slept at the house of deceased. The following day at 11.00 a.m. the two left together. The deceased never came back.

On 18<sup>th</sup> April, **Emma Ndinda** (PW2) disclosed to Mathew the demise of Damaris Syombua Ngumbi. On the same day, the accused resurfaced at the house of deceased and confirmed the demise of Damaris. Accused defiantly told Mathew that he did not fear anything. That he could face any weather.

At 5.00 p.m. on the same day another strange woman came to the house of Damaris and further confirmed her demise. This strange woman claimed to have been given the information by the deceased workmate. Mathew was emphatic that accused used to sleep at the house of the deceased and that they contemplated getting married.

**PW2, Emma Ndinda**, Ndinda's, evidence confirmed that **Mutheu's (PW1)** told her of Damaris and accused having left together. Ndinda accosted the accused. She sought to know the whereabouts of Damaris. According to Ndinda, deceased told accused that she was going to Lunga-Lunga to get money to pay at the hospital. On 16<sup>th</sup> April, 2000 when Ndinda enquired about deceased, the accused said he did not know her whereabouts. On 18<sup>th</sup> April, 2000 the accused feigned knowledge of the death of Damaris.

Later she learnt that the accused had tried to get permission from Ideal Academy, where he taught, to take

a sick relative to hospital in vain. Ndinda confirmed that the father of deceased identified the body for post - mortem.

**PW3 Paul Gumbi**, Gumbi, received information on 8<sup>th</sup> April, 2003 that his daughter Damaris had disappeared. On 20<sup>th</sup> April, 2000 he went to Kenyatta Hospital for the second time and identified the body of Damaris.

Later on he identified the body for post-mortem. Gumbi crowned his testimony that after the funeral the accused asked him for forgiveness. That he (accused) took the deceased to Mathare Hospital. However, he did not verify the same from the said hospital.

**PW4, Sarah Kerebi Omariba**, Omariba, a registered nurse recalled that on 9<sup>th</sup> April, 2000 at 10.00 a.m. he was at Uranus Medical Clinic in Kariobangi Area. She received a patient by the name Damaris Syombua (deceased) who had been brought by one **Charles Kyalo** and another person who did not identify himself. Omariba's testimony is that the patient was emitting foam at the mouth and could not talk. The accused slapped her once and admitted having beaten her prior to coming to the clinic. Omariba took offence and demanded to know why he was slapping a person who was ill.

On observation blood was coming through her private parts and also had a swelling on the head and injury too. Omariba declined to administer treatment on the patient. On enquiry from accused Omariba was told that the patient had taken poison as the accused wanted to jilt her.

Omariba referred the patient to Kenyatta National Hospital. The patient walked with the support of the accused and another person.

Cross-examined by defence counsel Omariba divulged that she wrote in her statement to police that the deceased took medicine to procure an abortion. That she referred the patient to Kenyatta Hospital verbally. That the patient was pregnant.

**PW5, No.217932, Inspector William Ekasi**, Ekasi, was at Muthaiga Police Station on 21<sup>st</sup> April, 2001 as the O.C. Crime. He received a report of murder of Damaris from Dandora Police Post. Later the accused was arrested in connection therewith and brought to the station. Interrogation of accused led Ekasi to Uranus clinic where he took statement from Omariba the nurse. Ekasi left further investigation to **PC Mbela**, who escorted the accused for mental assessment by a Dr. Kamau. Later he charged the accused with murder.

Ekasi, in cross-examination admitted that he came to learn that deceased had been admitted at Kenyatta National Hospital at casualty as No.2989 on 10<sup>th</sup> April, 2001. That immediately on examination she was pronounced dead. That the deceased had been taken by two people to the said hospital. According to the hospital record, **Richard Mokaya** took deceased to the hospital. Accused told Ekasi that the deceased was suffering from complicated typhoid.

**PW7, Dr. Moses Njue**, Njue, is attached to National Health Laboratories in-charge of medical legal services. Njue being conversant with the **Dr. P. K. Mwenda's** signature produced the post-mortem report drawn and signed by Dr. Mwenda as exhibit 1 by leave of the court pursuant to the provisions of section 33 as read together with section 77 of the Evidence Act (Cap 80) Laws of Kenya.

Cross-examined by defence counsel, and re-examined by state counsel, Njue testified that according to the report the uterus showed the deceased had pregnancy of between 6 – 7 months and the uterus had been ruptured which could be the probable cause of death. Njue was categorical that death could have been caused by either brain haemorrhage or rupture of the uterus. That independently any of the two injuries could have caused death.

At the close of the prosecution's case **Mr. Kasyoka** for the defence submitted that there was no evidence connecting the accused with murder of the deceased that documentary evidence at Kenyatta National

Hospital shows that a **Mr. Mokaya** took the deceased to the hospital on 10/4/2000.

According to counsel the entire case is based on circumstantial evidence which must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis other than that of his guilt. That there must be no co-existing circumstances weakening the chain of circumstances relied on. The burden of proof is on prosecution to justify the drawing of such inference which the prosecution failed to do. For this proposition counsel referred me to **Joan Chebil Sawe – vs – Republic: Criminal Appeal No.2 of 2002 [ C.A.] [Unreported]**

**Mr. Biouoli** for prosecution on the other hand contended that the prosecution had adduced sufficient evidence to warrant the accused being put on her defence. He pointed out that evidence of PW1 that accused beat the deceased and that they left together added to the evidence of Omariba (PW4) that the accused took the deceased to Uranus Medical clinic on 9<sup>th</sup> April, 2000 and slapped the deceased was sufficient. That Omariba (PW4) recommended to accused that deceased should be taken to the Kenyatta National Hospital was additional relevant evidence. Given the chain of circumstantial evidence the prosecution submitted that prima facie case had been established sufficient enough to warrant putting the accused on his defence. Mr. Bwofili referred me to the case of R - vs – **KIPKERING ARAP KOSKE - VS- R (1949)16 EACA at page 135** quoted with approval in the case of **JOAN CHEBII SAWE -VS – REPULIC (Supra)**

Section 306 of the Criminal Procedure Code provides:

**“306 (1) when the evidence of the witnesses for the prosecution has been concluded, the court, if it considers there is no evidence that the accused or any of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of NOT guilty.”**

Section 306 (supra) is the equivalent of section 210 in trials before subordinate courts.

Section 210 of the Criminal Procedure Code provides:-

**“If at the close of the evidence in support of the charge after hearing such summing up, submission or arguments as the prosecutor and the accused person or his advocate may wish to put forward, if it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”**

What amounts to a prima facie case under the equivalent Tanzanian provision was considered by the Court of Appeal in **Ramanlal Bhatt - vs – R.(1957) EA 352 thus:**

**“It is true that the court is not required at this stage to decide finally whether the evidence is worthy of credit, or whether if believed is weighty enough to prove the case conclusively, that final determination can only be properly made when the case for the defence has been heard. It may not be easy to define what is meant by a prima-facie case but it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence”.**

Applying those principles to the current case there is evidence that the accused and the deceased were friends. That the two spent the night together and left together in the morning of 8<sup>th</sup> April, 2000. There is equally evidence that the accused took the deceased to Uranus Medical Clinic on 9<sup>th</sup> April, 2000. At the said clinic the deceased was verbally referred to Kenyatta National Hospital. That is so far as evidence connecting the accused with the murder goes. The next chain of evidence is that Mr. Mokaya took the deceased to Kenyatta National Hospital where she died on admission but before treatment.

Dr. Njue (PW7) produced post-mortem report showing that the deceased could probably have died of rupture of the uterus or hemorrhage to the head arising from injury. That independently any of the two injuries could have cause death.

In a case purely based on circumstantial evidence, the burden of proving facts which justify the drawing of this inference of guilt to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden that never shifts to the party accused. In my view that burden has not been discharged as required by law.

In my view the evidence adduced merely turns around on suspicion. Suspicion alone however strong can never be enough. Circumstantial evidence must be inconsistent with the innocence of the accused and incapable of explanation on any other hypothesis other than that of guilt. (***See Joan Chebichii Sawe -vs- Republic Criminal Appeal No.2 of 2002 (C.A)***). No such evidence was adduced at the close of the prosecutions case.

In the premises, in my judgement the accused association with the deceased may have been suspicious but there is no sufficient circumstantial evidence to link the accused with the murder of the deceased on the available evidence.

Accordingly, I am constrained to record a finding of **NOT GUILTY** under Section 306 (1) of the Criminal Penal Code in respect of the accused herein. The accused person is forthwith set free unless lawfully held for some other lawful reason.

DATED at NAIROBI this 31<sup>st</sup> day of January, 2005.

N. R. O. OMBIJA,

**JUDGE.**