



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL CASE 161 OF 2003

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL SINDAI LEMBO.....ACCUSED

JUDGMENT

The accused, Samuel Sindai Lembo, was charged with the offence of murder contrary to Section 203 as read with **Section 204 of the Penal Code**. The particulars of offence as contained in the information are that on the 20th of November 2003 at ole Sirwa Farm, Elementaita, Gilgil, Nakuru District, the accused murdered Ntoye Totui. When the accused was arraigned before court, he pleaded not guilty to the charge. At the hearing of this case, the prosecution called seven witnesses to establish the charge of murder against the accused. PW1 Dr Vitalis Kogutu, a Senior Medical Officer at Nakuru Provincial General Hospital testified that on the 4th of December 2003 he carried out a post-mortem on the body of Ntoye Tatui (*hereinafter referred to as the deceased*). He established that the deceased was about fourteen years old at the time of her death. There were post-mortem changes on her body. At the time of examination the skin had started peeling off. The nails had turned blue. There were bruises on the toes, left thigh, suprapubic area and left chest wall. The labia appeared swollen. There was inflammation of the vaginal wall. The Doctor was of the opinion that the deceased was probably raped before her death. Her lungs were congested. She had a crushed trachea and cricoid cartilage. PW1 established that the deceased had been strangled to death. The post-mortem report was produced as prosecution's exhibit No. 1.

PW2 Seki ole Lalolos Mentilel, a resident of Kimbogo, Gilgil testified that on the 24th of November 2003, as he was resting at his house at about 6.00 p.m., he was informed by PW3 Ngapulo ole Ntutui that his daughter who had been sent to fetch firewood had not returned home. PW2 mounted a search party of about twenty people to look for the deceased. It soon became dark and the search was abandoned. On the following day the party resumed the search. Among the search party was the accused.

PW2 testified that when the search party reached a particular point in the bush, the accused said he had smelt something like dip. The accused felt that the deceased was dead. This spot was about one hundred metres from the house of the accused. PW2 and other members of the search party went to the spot and discovered the body of the deceased. The body of the deceased was discovered after the search party had conducted a search for about eight hours or so. Due to the suspicious conduct of the accused, PW2 and some members of the search party apprehended him and took him to Elementaita Police Post, where the accused was detained by the police.

PW2 testified that on the 16th of November 2003, the father of the deceased (PW3) had found the

accused, who used to work for his family as a herdsman, having sex with the deceased. PW3 was unhappy. He wanted to report the incident to the chief but was dissuaded from doing so by the elders. PW3 however sacked the accused from employment as a herdsman. PW2 recalled that among the people who were in the search party were the mother of the deceased (PW 4), one Kandet ole Lemui and Stephen ole Ishimpi. During the search, PW2 testified that they kept a close watch on the accused as they suspected that he was somehow involved in the disappearance of the accused. It was PW2's further testimony that after the report was made to the police, the body of the deceased was taken away by the police. PW2 reiterated that on the 24th of November 2003 at about 3.00 p.m. and 6.00 p.m. respectively, he had met with the accused who had gone to his house to inquire if PW2 had medicine for headache. PW2 further testified that he had not seen the deceased on the material day.

PW3 Ngapulo ole Ntatui testified that he was the father of the deceased. On the 16th of November 2003, while PW3 was herding his cattle in a forest near his home, he found the accused having sex with the deceased. PW3 was able to restrain himself from harming either the deceased or the accused. When the two saw him, they ran away. PW3 reported the matter to the elders. The elders advised him to sack the accused who had been working for PW3 as a herds boy. PW3 sacked the accused and paid him his dues. PW3 testified that after he had relieved the accused from employment, he did not see him again until the day he testified in court. PW3 further testified that after his daughter had been reported missing, a search party was mounted which resulted in the recovery of the body of the deceased in the busy by a search party led by PW2. PW3 reiterated that after witnessing the sexual encounter between the accused and the deceased, his daughter sought forgiveness from him when they later met at home in the evening. PW3 stated that although he was annoyed, he did not beat the deceased.

PW4 Sintoye Nolentatui, the mother of the deceased, testified that after PW3 had found the accused having sex with the deceased, a decision was made to sack the accused from employment as a herdsman. PW4 testified that the accused was paid off and told to vacate the homestead of PW3. On the 24th of November 2003 at about 10.00 a.m. , PW4 sent the deceased to fetch firewood. The deceased did not return home on that day. In the evening of the said day, PW4 became concerned. She informed the people in the neighbourhood (including PW2) who mounted a search party with a view of tracing the whereabouts of the deceased. She further testified that the body of the deceased was found on the following day.

PW4 was with the search party when the body of the deceased was recovered. She saw the body of the deceased. There were visible injuries on the neck and head of the deceased. PW4 conceded that she did not see the accused kill the deceased but reiterated that it was the accused who had killed the deceased.

PW5 Martine ole Ntakajai and PW6 Paimot Nkarpolo, relatives of the deceased, both testified that on the 4th of December 2003 they were at the Nakuru Provincial General Hospital where they witnessed the post-mortem being performed on the body of the deceased by PW1. Later they witnessed the deceased's burial at Nakuru.

PW7 Police Constable Joseph Olege (P/F No. 70406) testified that on the 25th of November 2003 at about 8.15 p.m. while manning the report office at Elementaita Police Post, he received a report of murder from four masai men. The four had apprehended the accused, whom they had suspected to have killed the deceased. PW7 rearrested the accused and detained him. On the following day, the body of the deceased was collected from the scene of the murder and taken to Nakuru Municipal Mortuary. PW7 further testified that the accused was taken to Nakuru Provincial General Hospital where he was examined by Dr Musalia, who found him to be mentally fit to stand trial. The P3 form duly filled by Dr Musalia was produced in evidence as *prosecution's exhibit No. 2*.

After the close of the prosecution's case, and after evaluating the evidence adduced by the prosecution, this court established that the prosecution had adduced sufficient evidence to enable the accused to be put on his defence. In his unsworn testimony before court, the accused testified that on the 24th of November 2003 he had woken up not feeling well. PW4 came to his house to borrow a gunny bag. The accused asked PW4 if she had drugs for headache. PW4 answered in the negative. The accused then went to the house of PW2 and asked him if he could give him drugs. PW2 likewise told the accused that he (PW2)

did not have any drugs. The accused then decided to go to the local shopping centre to purchase drugs. He bought panadol and stayed a while at the shopping centre. He then returned to his house. While at his house he was visited by PW2 who asked him if he had seen the deceased. The accused answered in the negative. Later in the night, at about 8.00 p.m., PW2 again went to the house of the accused accompanied by PW4, the mother of the deceased. They requested him to assist them the following day to look for the deceased who had disappeared.

The accused testified that as requested, on the following day he assisted PW2 and other members of the local community to look for the deceased. He further testified that the search party was split into several groups. He was in a search party of about four people. They were not successful in the search of the deceased. The accused then decided to go to his house. At about 2.00 pm, while he was relaxing in his house, he was arrested by PW2 who had been accompanied by three other people who included, the chairman of the area called Lenamuny. The accused testified that he was beaten and told to disclose the whereabouts of the deceased. They claimed that the accused had killed the deceased. The accused denied that he had had anything to do with the death of the deceased. The four apprehended him and escorted him to Elementaita Police Post where he was detained. At the time the accused was taken to the police post, he testified that he was already injured. The accused denied that he was involved in the death of the deceased. The defence then closed its case.

Mr Ndubi, Learned Counsel for the accused made closing submissions urging this court to acquit the accused as no evidence had been adduced by the prosecution which could directly or circumstantially connect the accused with the death of the deceased. Mr Gumo, the Learned Assistant Deputy Public Prosecutor relied on the evidence on record in support of the prosecution's case.

I have carefully evaluated the evidence adduced by the prosecution and the defence offered by the accused. The issue for determination by this court is whether the prosecution has established to the required standard of beyond reasonable doubt that it is the accused who killed the deceased. In reaching its determination this court is required to always put in mind that it is always the duty of the prosecution to establish its case against an accused person. The burden of proof in criminal cases, in nearly all the circumstances, never shifts to the accused. This onerous burden must be discharged by the prosecution. In the instant case, the prosecution has relied entirely on circumstantial evidence to establish its case against the accused. As was held by the Court of Appeal in James Mwangi –versus- Republic [1983]KLR 327 at page 331;

“In a case depended on circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on evidence – 10th Edition p. 31). It is also necessary, before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference Teper –versus- Republic [1952] AC 480 at page 489.”

For the evidence of circumstantial evidence to succeed in sustaining a conviction, the incriminating evidence must be such that it excludes any other person from the crime other than the accused person. The facts of the case must such that no other inference can be drawn from it other that the explanation that it is the accused who committed the offence. In the instant case, the prosecution's case was that the accused, who used to work for the deceased's father raped and killed the deceased after he was sacked.

What is the prosecution's evidence?

The prosecution called PW3 the father of the deceased who testified that on the 16th of November 2003 while herding his cattle in the forest he came across the accused having sex with the deceased. When the accused and the deceased saw PW3 they ran away. PW3 was not happy with what the accused had done with his daughter who was aged fourteen years. He discussed the issue with the elders. PW3 was of the view that the accused should have been reported to the authorities for what he had done. He was however persuaded by the elders not to take such an action. He then made the decision to terminate the

employment of the accused, who was then working for him as a herdsman.

When the deceased was reported missing by PW4, suspicion immediately zeroed in on the accused. PW4 and PW2 suspected that the accused was somehow involved in the death of the deceased. PW2 asked the accused to join the party that had been assembled to look for the deceased. According to PW2, when the party passed by the place where the deceased was ultimately found, the accused told the group that were in his search party that he had smelt something like dip. When the body of the deceased was later in the day found at the scene where the accused said he had smelt something like dip, PW2 and PW4 concluded that it was actually the accused who had raped and murdered the deceased. When the accused was put on his defence, he testified that on the material day he had gone to the local shopping centre to purchase drugs as he was not feeling well. He denied that he had anything to do with the death of the deceased. The post-mortem report which was produced by PW1 clearly indicates that the deceased was raped before being strangled to death.

Does this evidence constitute sufficient circumstantial evidence to connect the accused with the death of the deceased?

I do not think so. The evidence on record clearly show that the accused and the deceased were lovers. Eight days before the deceased was raped and killed, PW3, the father of the deceased had found the accused and the deceased having sex in the bush. PW3 conceded that the accused and the deceased were having, what in all senses, could be described as consensual sex. When the accused and the deceased discovered that they had been seen by PW3, they fled from the scene. PW3 and PW4, the parents of the deceased were not happy that the accused had engaged in sex with the deceased who was still a very young girl. According to PW4, the mother of the deceased, the deceased had not reached an age where she could have undergone circumcision and thereafter get married. PW3 and PW4 did not approve of the relationship between the accused and the deceased.

After evaluating the evidence on record, I do hold that it was most improbable that the accused could have forcefully had sexual intercourse with the deceased eight days after the deceased had willingly had sex with him. The theory by the prosecution that the accused raped and then killed the deceased does not hold in the circumstances of this case. The deceased was raped by someone whom she did not consent to have sex with. From the post-mortem report it is clear that the deceased struggled with her attacker before she was subdued, raped and strangled. The deceased was raped in the bush. No evidence connected the accused with the deceased. PW2 with the assistance of the youth from the community searched the house of the deceased and found nothing incriminating. The conduct of the accused on the day the deceased disappeared and subsequently when the deceased was being looked for did not point to the accused's guilt. He behaved as normally could be expected of an innocent person.

Further evidence of PW2 and PW4 as regards the suspicion of the accused was not backed by solid evidence. PW2 testified that the accused stated that he had smelt something like dip near the place where the body of the deceased was finally found. The accused testified that on the day that the search was conducted he was not feeling well. The fact that the accused smelt something that the others could not, does not indicate his guilt, rather it could be explained by the fact that the accused was sick and could have been imagining that he had smelt something. In any event, there is no connection between what the accused smelt and the death of the deceased. The evidence of PW2 and PW4 as regards the way the search was conducted, and their suspicions should be taken in the context of what had transpired before, especially the sexual escapade between the deceased and the accused.

In my evaluation of the evidence, the prosecution has failed to establish beyond any reasonable doubt that it is the accused who raped and murdered the deceased. The crime most probably was committed by someone else who opportunistically attempted to rape the deceased and when the deceased resisted, he strangled her in pursuit of sexual gratification. The evidence adduced by the prosecution is that of mere suspicion. As was held by the Court of Appeal in **Sawe –versus- Republic [2003]KLR 364** suspicion, however strong cannot form a basis for a conviction. In the circumstances I do find that the prosecution has failed to establish the charge of murder against the accused to the required standard of proof beyond reasonable doubt.

For the reasons stated above, I order that the accused be acquitted of the said charge. The three assessors who assessed this murder trial, all reached a similar verdict of not guilty. I have no reason to disagree with them.

I order that the accused, having been acquitted, be released from prison forthwith unless otherwise lawfully held.

DATED at NAKURU this 30th day of June 2005.

L. KIMARU

JUDGE