



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 33 of 2001

REPUBLICPROSECUTOR

VERSUS

ABDALLA OMAR KARANI.....ACCUSED

JUDGMENT

Abdalla Omar Karani, the Accused in this case, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of the 23rd/24th June 2000 at Kisumu Ndogo Village Changanwe in Mombasa District of Coast Province he murdered Mwana Juma Idd.

The prosecution case is that the Accused, a 66 years old man was married to two wives. The first wife Sikuku lives at Changanwe in Mombasa while the second, the deceased in this case, lived at Musikiti Noor in Kisumu Ndogo village also in Mombasa. The Accused used to visit the deceased twice or thrice a week and whenever he visited he left early the following morning to go fishing.

On the 23rd June 2000 at about 7.00 p.m. the Accused went to the deceased's residence and after the evening meal with the deceased and her daughter, the daughter retired to her room leaving the Accused and the deceased in the latter's room. The following day at about 4.00 p.m. the deceased's body was found at the rear of their residence with head injuries. The matter was reported to police who commenced investigations. On 25th June 2000 when the police failed to get the key to the deceased's room they broke in. The deceased's bed was well made but upon removing the bed-cover they saw a blood stained mattress and bed. While still at the scene the police were shown a spot where the deceased's blood stained clothes were found. As the scene where the body was found was not disturbed the police concluded that the deceased had been killed in her room and her body taken out and dumped where it was found. After investigations the Accused was charged with the murder of the deceased.

Upon being put on his defence the Accused testified on oath but did not call any witnesses. In his testimony he said he was married to two wives, one Sikuku and the deceased. On 23rd June 2000 he went to the deceased's residence and not finding her at home he busied himself with splitting firewood to be used in cooking during the deceased's daughter's wedding which was a few days ahead. After the evening meal he slept in the deceased's room with her until about 4.30 a.m. the following morning when she left saying she was going to see her aunt Muingeresa after which she would go to Malindi to arrange her daughter's wedding. She locked her room and left him praying in the corridor. He left at about 5.00 or 6.00 a.m. and went fishing.

Accused further stated that he returned in the late afternoon to his elder wife's house where he was told of the deceased's death. He immediately went to the deceased's residence where he found police and many

other people. He confirmed that when police broke into the deceased's room he saw a blood stained mattress. He denied killing the deceased. After the testimony of the Accused, both the state and defence counsel made final submissions.

Mr. Monda the state counsel submitted that even though there was no eye witness to the murder, the circumstantial evidence adduced by the prosecution pointed to the guilty of the Accused. He said the deceased was last seen alive with the Accused. The following day she was found dead. Items with blood similar to that of the deceased were recovered from her room and some with fresh blood outside the room. He said that was proof that the deceased was murdered in her room. The items found outside were identified as those of the deceased which PW1 said were kept in the deceased's box in her room.

He submitted that whoever took them out had access to the deceased's room. He concluded that the Accused in his defence contradicted himself and urged that he should be found guilty as charged. On his part the defence counsel Mr. Muraya submitted that the prosecution had failed to prove the charge of murder against the Accused. He said there is no evidence of malice aforethought, an important element of the offence of murder. There is no evidence of any quarrel between the Accused and the deceased. What there is instead is evidence that the Accused had a cordial relationship with the deceased. On the fateful night PW1 did not see anything unusual between the two even when she returned to their room for a mosquito coil.

Mr. Muraya further submitted that the blood stains on the mattress and bed is no evidence that the deceased was murdered in her room. According to him, from the injuries found on the deceased's body it is clear that the deceased was brutally murdered and if that had been done in her room PW1 or the deceased's son or even the neighbours could have heard a commotion. Dr. Mandalya, the pathologist who performed the autopsy ruled out strangulation meaning the deceased was not prevented from screaming.

Counsel also submitted that the prosecution evidence was contradictory. Whereas PW 7 said the deceased's bed was well made PW 8 disagreed with that and said the deceased's room was disturbed. He wondered why the police did not interview or call the aunt the deceased was said to have gone to see that morning or in any way attempt to dislodge the Accused's alibi. He said that there was nothing unusual about the Accused being with the deceased as that was his wife. He suggested that the deceased could have been killed by anyone and urged me to find that there is no evidence against him and acquit him.

After summing up the case to the two remaining assessors, one having dropped out, they opined that the Accused is guilty of the deceased's murder. Mr. Rathia Kombo who read their joint opinion said that if the deceased left her room as alleged by the Accused how come that there was blood found in her room. He further stated that the Accused should not have allowed the deceased to leave the room at 5.00 a.m. that morning. I have considered all the evidence adduced in this case along with the submissions made by both the state and defence counsel. It is not in dispute that there was no eye witness to the murder of the deceased. Mr. Monda, learned state counsel submitted that the prosecution case is based on circumstantial evidence. The law is clear when an accused person can be convicted on the basis of circumstantial evidence. In a case based entirely on circumstantial evidence before convicting an accused person the trial court must find that the incriminating facts are incompatible with the innocence of the accused person and incapable of explanation upon any other hypothesis than that of his guilty.

It is also necessary before drawing the inference of the accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. – Mwangi –Vs – Republic (1983) KLR 522 Are there incriminating facts in this case which are incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of the Accused's guilty?

I am afraid I can find none. Other than the fact that the Accused was the last person seen and left with the deceased in her room there is no any other evidence against the Accused. There is no evidence of any frosty relationship between the Accused and the deceased. To the contrary I agree with Mr. Muraya that what there is is evidence of a cordial relationship. Suleiman Said Tofik PW 2, an uncle to the deceased who had known of her relationship with the Accused for over ten years said that except once when the

two had a normal domestic quarrel he knew of no problem between them.

The deceased's daughter Ray Salim PW 1 testified that on the 23rd June 2000 at about 7.00 p.m., the deceased asked her to cook supper for four people, that is her brother Bakari, the Accused whom the deceased was expecting, the deceased herself and the witness. Before she finished cooking the Accused went to their home. They all except Bakari ate together. Before she retired to her room she did not notice anything unusual between the Accused and the deceased. Not even when she returned for a mosquito coil. In his testimony in court the Accused repeated basically what he had told the police on 30th June 2000 soon after his arrest. He said that on the night of 23rd/24th June 2000 he slept with the deceased in her room. At about 4.30 or 5.00 a.m. of 24th June the deceased left saying she was going to see her aunt after which she could travel to Malindi to arrange her daughter's wedding.

He also left at about 6.00 a.m. and went to the beach to fish as usual. It is strange that the deceased's aunt whom the Accused said the deceased had gone to see was not called as a witness. The police have not told the court whether or not they even interviewed her. That leaves me with no option but to draw an inference that her evidence would perhaps have supported the Accused's case. The police want the court to believe that the deceased was killed in her room because the spot where the deceased's body was found was not disturbed and because the deceased's mattress and bed had bloodstains which on examination were found to be similar to that of the Accused. That evidence alone is not enough to draw that inference.

PW 1 said that her room was close to that of her late mother and that if there was any commotion in her mother's room she could have heard. C1 Abdi Jill Galgalo PW 7 said he interviewed the deceased's neighbours who said they heard no commotion in the deceased's room on the fateful night. Not even a drop of blood was found leading from the deceased's room. I have observed the photograph of the blood stained mattress. The stains appear superficial. One would have expected the mattress to be soaked with blood if indeed the deceased was killed on her bed as the police would like us to believe. I have no doubt in my mind that those bloodstains are a red herring. If indeed they are of the deceased's blood, then they were smeared on the mattress and the bed.

This is one case which was poorly investigated. There is no murder when malice aforethought is not proved. There is no evidence at all to prove let alone attempt to prove malice aforethought against the Accused. I am sorry I have had to differ with the opinion of the assessors, which all the same I respect. I find that there is no evidence in this case to warrant the conviction of the Accused and I accordingly acquit him and order that he should be freed forthwith unless otherwise lawfully held. DATED and delivered this 20th day of September 2005.

D. K. MARAGA

JUDGE