



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Case 1 of 2002

REPUBLIC..... PROSECUTOR

VERSUS

EMMANUEL TUNE KIRIGI..... ACCUSED

JUDGMENT

Emmanuel Tune Kirigi ("the Accused") is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The Particulars of the charge are that on the night of 13th/14th December, 1999 at Majajani Village in Kilifi District within Coast Province jointly with others not before Court he murdered AH Abdalla ("the Deceased").

The prosecution called six witnesses. PW1 DR. ATRINSMWAYAYI MWADENA was a Medical Officer at Kilifi District Hospital. On the 15TH December, 1999 he carried out a post mortem examination on the body of the deceased. The said deceased was a male African adult in good nutritional status. He found the body with a rope tightly tied around the upper part of the neck. The lower part of the neck was swollen and had some lacerations which he said could have been caused by the tightening of the rope around the neck. He said he did not open the body due to the family's Islamic rites. However on outside examinations and observations of the body he formed the opinion that the cause of death was asphyxia secondary to strangulation. On cross-examination he said there was no evidence of blood on the body but there was cyanosis on the mucus membrane and nails.

PW2 KACHE ALI ABDALLA is the widow of the deceased. She stated that on the night of 13th December, 1999 she slept in the same house with the deceased and her young children leaving a small kerosene lamp on. She said she slept in the same room with her husband. The room could only accommodate two beds leaving a small space in between. While lying on her bed and the deceased on the other and before she fell asleep about five people went into their house. The Accused whom she was able to recognize as their small lamp was still on blindfolded and warned her not to scream. Although she was able to remove the blindfolds after twenty minutes she stayed in the house until the following day. When she got out she found the deceased tied with a rope around his neck and the rope was tied to a tree at the rear of their house. She found the deceased in a standing position with his feet touching the ground. She called the deceased but he did not respond. She then went and told their neighbour Alfani Mohamed, who was also the deceased's brother, that the deceased had hanged himself.

On receipt of that information Alfani Mohamed PW3 went to the house of the deceased and saw the body in the position as described by PW2. PW2 was not crying and did not appear shocked. He went and reported the matter to the area Assistant Chief PW6 who gave him a letter to Kilifi Police Station. Although the deceased's home was only about 100 metres from his, PW3 did not, during the night of 13th/14th December, 1999, hear any noise or commotion.

After reporting the matter to the police, police went to the deceased's home and took the body to the mortuary. The following day post mortem examination was carried out on the body of the deceased but the witness and other members of the family instructed the doctor not to open the body as that was against their Islamic faith rites. The witness on cross-examination said he knew that the Accused has a lame right hand which cannot lift anything heavy.

PW4 SAFARI CHARO CHIDZI was a brother-in-law to the deceased. He is a brother to the deceased's widow, PW2. On 14th December, 1999 the deceased's son went to his home and informed him that the deceased was dead. He immediately went to the deceased's home and on enquiring from his sister, PW2, what had happened, she told him that while in bed the previous night at about mid-night she saw the deceased go out with a rope. She did not ask him where he was going or follow him out. She slept until the following morning when she discovered that the deceased had hanged himself and sent their son to call the witness.

PC Edward Mwigandi PW5 is the police officer who received the suicide report from PW3 the brother of the deceased at Kilifi Police Station. After booking the report in the OB he went with IP Muganda to the scene. At the deceased's homestead he found about 50 people. After going round in the homestead he went to the rear of the deceased's house where the deceased's body was. He found the deceased's body with a nylon string (rope) tied around its neck. The string was also tied to a tree. The body of the deceased was in a standing position with the legs slightly bent. With the vegetation around the body having been disturbed and considering the small tree branch to which the rope or string from the deceased's neck was tied and also the position of the body, he ruled out suicide. He said he talked with the deceased's widow who told him that on the 10th December, 1999 the deceased had left a funeral ceremony in a huff telling her that he had been threatened. She also told him that on the night of 13th/14th December, 1999 the Accused and other people had gone to their home, blindfolded her and warned her not to say anything as he (Accused) would kill her after his jail term if he was jailed. PW5 said that that information was the basis of the charge against the Accused. In cross-examination he said the scene was not photographed and that he did not go to the village where the deceased had been threatened. The tree branch to which the deceased's body was tied was not cut to be produced as an exhibit nor was the deceased's body dusted for fingerprints as that was not possible.

The last prosecution witness was Douglas Mwatsuma Nyambu PW6. He is the area Assistant Chief. He said that on the 14th December, 1999 at about 9.00 a.m. one Abdallah Salim went to his office and told him that the deceased had committed suicide. He went to the deceased's home but from his observation and the standing position he found the deceased's body, he doubted the suicide theory. He took the deceased's widow aside. She told him that during the night of 13th/14th December, 1999 the Accused had gone to that home with another person. Their kerosene lamp was still on. The accused blew it off and warned her not to scream or say anything lest he would kill her even after he came out of jail. She said the two carried her husband out and the following day she found his body tied to a tree.

The witness waited at the deceased's home until the police went there and the following day on 15th December, 1999 he got the Accused arrested and taken to Kilifi Police Station. He also stated that on the 25th December, 1999 he got instructions from Kilifi Police Station to arrest Bora Charo Katsari and Chira Nyale which he did.

On ruling that the Accused had a case to answer, the Accused testified on oath and denied killing the deceased. He said that on the 10th December, 1999 he had a funeral ceremony for his late father at his home. For a few days thereafter he had several people visiting his home. He therefore did not leave his home. On the morning of 14th December, 1999 a neighbour told him that the deceased had hanged

himself. Before he could go to the deceased's home the Chief's Askaris arrested him and took him to Kilifi Police Station. He stayed at the police station until the 27th January, 2000 when he was released on Police Bond and ordered to report to the police station twice a week. He kept reporting until 7th February, 2000 when he was re-arrested and thereafter charged with the murder of the deceased. In cross-examination he said that neither the deceased nor his widow, PW2, attended the funeral ceremony at his home on 10th December, 1999. He said he had had no problem with either the deceased or PW2 and did therefore not know why PW2 implicated him in the murder of the deceased. The Accused rested his case with his testimony. He did not call any witness.

Counsel made short submissions. Mr. Okuto for the Accused in particular attacked the evidence of the deceased's widow. He submitted that her story was inconsistent. She told PW3, the deceased's brother and PW4, her own brother, that the deceased had committed suicide. It was not until PW6, the Assistant Chief prodded her that she changed the story and implicated the accused in the death of the deceased. Citing the authority in the cases of Roria -vs- R[1967]583 and Abdatla bin Wendo -vs- R[1953]20 EACA 166 he submitted that her evidence cannot be relied upon to found a conviction. He concluded that the prosecution has not proved the case against the Accused as required and the Accused should therefore be acquitted.

Mr. Ogoti, Learned Senior State Counsel, on his part submitted that the prosecution had proved the case against the Accused. He submitted that there was both direct and circumstantial evidence against the Accused. PW2, he further submitted, clearly identified the Accused before the latter blew off the kerosene lamp. He urged me to ignore the contradictions in the prosecution evidence as minor and reject the Accused's defence as a sham.

From the evidence as I have summarized it herein above it is clear that the basis of the prosecution case against the Accused is the evidence of the deceased's widow, PW2. Hers is identification evidence of a single witness.

The law on such evidence is clear. It has to be treated with the greatest care. In the old case of Roria -vs- Republic [1967]EA 583, at page 584 the Court of Appeal for Eastern Africa had this to say on identification evidence by a single witness:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness.... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification. In Abdala bin Wendo and another -vs- R (1953) 20 EACA 166 this court reversed the finding of the trial judge on a question of identification and said this... at page 168.

*'Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.**

This case has been applied and followed in numerous subsequent cases. The identification evidence of a single witness can be relied on to prove a fact but it is to be treated with the greatest care especially when it is known that the conditions favouring a correct identification were difficult.

I suppose the "test with the greatest care" of such testimony must include observing the demeanour of the witness and considering the whole of his evidence to determine if he is a truthful witness whose evidence can safely be relied upon. Care must also be taken to ensure that his testimony is free from the possibility of error for a witness can be honest and truthful but mistaken.

Is the testimony of PW2 in this case "free from the possibility of error and reliable". Let us consider it. She said that they went to bed leaving their kerosene lamp still burning. Why would they do that? If that is true and she saw the accused, why would the accused need to blindfold her while still talking to her warning her not to say anything? I also find the deceased's behaviour as related by her rather surprising. He did not put up any resistance at all or even scream for help. Their neighbour PW3 who was also a brother to the deceased did not hear any commotion. If the deceased's widow indeed feared the deceased's threats why did she not tell the deceased's brother PW3 the truth? Why did she not tell even her own brother, PW4, the truth?

I was not impressed by the demeanor of PW2. She did not impress me as a witness who was entirely truthful. Besides that I do not even think that their kerosene lamp was left burning when they went to sleep. Her evidence was riddled with a lot of inconsistencies as even the assessors found. It has not passed the test required of a single identifying witness stated in the above authorities and it cannot therefore be relied upon to prove that the accused went to the home of the deceased during the night of 13th/14th December, 1999, unless there is some other independent evidence to corroborate it.

I have carefully examined the evidence of the other witnesses. There is absolutely no corroboration of PW2's said testimony that the Accused either alone or with other people went to their house during the night of 13th/14th December, 1999. The alleged threat by the Accused to the deceased on the 10th December, 1999, as the Assessors correctly found, was not investigated. It does not prove anything.

The evidence of PW1, Dr. Kombe, is not conclusive as to the cause of death. He was restrained by the family members of the deceased from opening the body. It cannot therefore be said with certainty that the cause of death was asphyxia due to strangulation. The deceased could have died from any other cause. Even if I were to accept that as the cause of death there is no evidence to prove that the accused with a lame right hand strangled or caused the strangulation of the deceased.

I agree with the unanimous verdict of the Assessors that apart from the discredited evidence of the deceased's widow, PW2, there is no evidence, direct or circumstantial, connecting the Accused with the murder of the deceased.

For these reasons I find the Accused not guilty of the murder or killing of Ah Abdalla, the deceased, and acquit him. Accordingly I order that he be released forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MALINDI THIS 28th DAY OF APRIL, 2004.

D. K. MARAGA

AG. JUDGE