

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 65 of 2002

CATHERINE NGINA KISULE..... ACCUSED

-versus-

REPUBLIC..... PROSECUTOR

JUDGMENT

The accused Catherine Ngina Kisule is charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. As per the particulars of the charge it is alleged that on the night of 13th and 14th April 2002, she murdered one Lawrence Karanja Ndegwa Ndura, also known as Denis Karanja Ndegwa at Whispering Inn Bar in Ziwani within Nairobi area.

The accused was working as a Bar maid with Whispering Bar as well Wangui (PW 10) and one Jane who was not called as a witness. On that night they joined their three customers, i.e. the deceased, Amos (PW 11) and Peter (PW5) as well as John Ndungu (PW 17). The accused was the last to join them as she came around midnight after she had gone to Embakasi with other customers. Administrative police officers were in that group, She was then escorted back to the bar by officers of Chiefs Camp of the area. She was invited and on insistence she joined the group. But according to the evidence she drank only soda. However the deceased was said to have carried two bottles of beer with him when they went to sleep. As the story progressed, due to late night the customers decided to hire rooms to sleep. There is ample evidence in the prosecution case and that the accused and deceased went in together to room No. 1, Amos (PW11) and Wangui (PW10) went to room No. 6 and Peter (PW 5) and Jane went in room No. 4. The manager of the Bar (PW2) confirmed the hiring of the rooms. She further testified that after locking the door leading to the floor where they were drinking she gave the keys to Wangui (PW10).

Then comes (PW1) Jennifer Mwendu who is a cleaner of the bar. She reported on duty at 6.30 a.m on 14th April 2002. She was opened by Njoki (PW2), the manager. She while starting her duty she then noticed some blood stains on the floor as well as a T-shirt and man's underwear lying when she went to collect her cleaning things. She alerted the manager (PW2). Thereafter she along with others saw a person in a room not responding to the calls. She continued with her work and later was informed that all the workers at the bar were arrested by the police. She said the T-shirt belonged to the accused as she had seen her wearing it previously, when the other witnesses have testified that it belonged to the deceased. She confirmed that she found the T-shirt and other items at the entrance of the door of the 1st floor. It is not in dispute that the room at the bar are on 3rd floor.

The facts which emerge from the evidence thereafter are as under.

When PW1 the cleaner gave the items found by her to the manager PW2 (Ann Njoki Waguny, she called PW5 (Peter) who took them to the room where deceased was sleeping but found him not responding to his call. So Peter alerted PW2 and went to wake up his other friend Amos (PW11) who was found in room No.6 with Jane who was still asleep. All the witnesses around the bar stated that they found two empty bottles of beer and used condoms in the room No. 1 where the deceased was found lying on the bed except A. P. Inspector Joseph Saramoi (PW12) who was the first official to have visited the room and instructed the deceased to be taken to the hospital. Peter and Amos (PW5) and PW11) had stated that they found the deceased naked covered in a sheet with blood stains and that they, thereafter dressed him with trousers. PW2 (Njoki) had testified that the sheet was washed by the accused as it was her duty on that day to clean rooms. PW1 had also confirmed that she only cleans the bar and not the rooms. All relevant

witnesses had testified that they found the deceased with an injury on his head and that he was breathing heavily. It is also not in dispute that he was pronounced dead while under treatment at the hospital. The photographs taken by Scenes of Crime officer (ex. 2) confirm that injury, so does the postmortem report (Ex. 4).

Coming back to (PW 12) who is the first officer to have visited the scene, he had testified that he was shown some stains like blood between stairs cases of 1st and 2nd floor, that he was shown items received by PVV1 and that it was the accused who told him that the deceased fell from the stairs and it was she who brought him back to the room, I may note here that the defence persistently indicated to the possibility of a fall by the deceased during its cross-examination of all concerned witnesses. Dr. Maundu who performed the post report also conceded during his cross-examination that the injury could result from a fall. On the other sketch plan prepared by P. C. Samuel Kariuki (PW20) with the consent of both the counsel did indicate that the distance between the gents' toilets and the first step of the floor stairs was 8 feet. All the witnesses who slept at the bar testified that they did not hear any noise during the night. I may note that except for Njoki (PW2), her friend Kenneth Njoroge (PW8), and the accused were the only ones who were on record not to have consumed alcohol during the night. All others were consuming alcohol up to early hours of the morning. In any event (PW 12) after visiting the scene formed an opinion that it was an accident, and he did not make any arrest. That could be the reason why blood stains on the floor and blood stained sheet were cleansed.

It is also an undisputed fact which was accepted by the accused that emerged to the effect that the accused and the deceased were friends and also having close physical relation. However, a strain had emerged in their relationship as the deceased was not very happy with accused's relationship with other males. Any way, according to the accused, she went to sleep in her room and heard everyone went to their respective rooms.

On the other hand, it is also not in doubt that the deceased was found lying with head injury and breathing heavily. The defence has suggested a theory of fall by him while visiting toilet which is at a distance of 8 feet from the staircase. Except PW12 who stated during his cross-examination that it was the accused who gave that explanation no other witness has suggested that theory. However, there is nothing from the prosecution to rebut the suggestion or to give evidence that the theory is impossible in reality. I have a dead person who has died as a result of the head injury consistent with blunt weapon and a fall as testified by the medical expert Dr. Maundu. In my view of the criminal justice, it is not the accused who has to prove that it was as a result of a fall, but it is up to the prosecution to negate that by leading cogent evidence.

Anyway this, in short is the evidence before me. There is no witness who had seen the committal of crime and that makes the evidence before me, circumstantial evidence.

All witnesses who were with the deceased during night have stated that the accused and the deceased went to sleep in room No.1. Accused has denied that averment. The accused and other witnesses who slept there do not give any evidence of any noise during the night. Amongst them PW17 accepted he was totally drunk. Other accepted drinking over a long time. They all, except PW17, slept in pairs. With these facts, the prosecution had failed to oust or rebut the theory of a fall from the staircase. Once again, out of three items alleged to have been found i.e. T-shirt, wallet and man's underwear, only T-shirt is produced, and its ownership is not appropriately proved. Two beer bottles and used condoms mentioned by all when the deceased was found in serious condition are not produced before the court. Absent of murder weapon also is a glaring commission and a glaring example of the inefficient and haphazard manner of investigating a serious crime like murder. The police had arrested almost all the prosecution witnesses who were present in the morning along with the accused. I can say that the prosecution is simply relying on their evidence only, without substantive corroboration of their verbal testimony. The proof in murder cases deserves to be above any suspicion which is not the case before this court. While saying so, I am not ignoring the fact that as per the prosecution case it was the accused who was seen last with the deceased.

The prosecution thus, in my humble opinion has not met the accused burden of proof required when its case is based on circumstantial evidence.

I shall only quote from Kariuki Karanja -vs- Republic (1986) KLR 190 at 193 wherein the Judges of Court of Appeal while relying on the case of Rex -vs- Kipkering Arap Koske 16 EACA 135, stated as follows:

"Secondly circumstantial evidence, to sustain in conviction must point irresistibly to the accused, in order to justify, on circumstantial evidence the inference of guilt the inculpatory facts must be incorruptible with the innocence of the accused and incapable of any explanation upon any other hypothesis than that of a guilt. The burden of proving facts which justify the drawing of that inference that the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts. Rex. -vs- Kipkering Arap Koske 16 EACA 135. because they are as consistent with innocence as with An aggregation of separate facts and inconclusive guilt and is not good enough evidence "

The prosecution has simply neglected to collate and co-ordinate the piece of evidence as per legal requirement and this court has no option but to find as per law.

I find accordingly, that the prosecution has failed to prove beyond reasonable doubt that it was the accused who murdered Lawrence Karanja Ndura on that fateful night. I therefore acquit the accused of the charge of murder and direct that she be released forthwith unless otherwise held in custody as per law. Right of appeal within 14 days.

I may also note that the assessors also gave opinion that the accused was not guilty of offence of murder.

Dated and delivered this 9th day of February 2004

J. RAWAL

JUDGE