



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 12 OF 1997

REPUBLIC.....PROSECUTOR

VERSUS

KENNEDY MUIO.....ACCUSED

J U D G E M E N T

The accused, Kennedy Muio, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap. 63 Laws of Kenya). The particulars of the offence are that on the 4th day of August, 1994 at Umoja One Estate, Nairobi, within the Nairobi Area, jointly with others not before the court the accused murdered Dina Wangechi Gachago. The accused denied the charge. The prosecution called 13 witnesses to testify against the accused while the accused on being put to his defence gave a sworn statement and called no witnesses. The prosecution case can be briefly summarized as follows:

On 14th May, 1994 Mrs. Loise Murungi Njoroge (PW8) telephoned her mother requesting for a maid. Then a lady known as Mangas came with her son who is the accused and the following day this lady Mangas came with the accused and the maid (the deceased). The maid was introduced as a cousin to the accused's wife. The maid was then left and started working for PW8. After one month the accused and his mother visited PW8 and they requested PW8's husband to get a job for the accused as PW8's husband was working for City Commission. Towards the end of July, 1994 PW8 went home and found that her fridge was missing and on asking the maid (the deceased) she said that there had been a telephone call and as a result she had given away the fridge thinking PW8's husband had sent those people.

Then on 4th August, 1994, PW8 and her husband left the house leaving the young Eric Njoroge (PW10) at home. While at her place of work Mrs. Njoroge (PW8) received a telephone call asking her to contact her house. When she got this message she took a taxi to her house where she found many people. PW8 called the deceased but she could not answer and when PW8 looked through the window she saw the deceased lying on the floor. The police had already arrived at the scene and they asked PW8 not to enter the house as the maid had already died.

When PW8 finally entered her house at about 2.0 p.m, she found that the maid had been strangled and the sitting room was in a state of confusion. Beatrice Otieno (PW4) testified that on the material day (4th August, 1994) she received a report of murder and as a result proceeded to the scene at Umoja Estate House No. A 161. She was accompanied by P.C Juma Amimo (PW5). These two Police officers (PW4 and PW5) found the deceased who was a young lady lying on her back with her hands tied at the back with a belt and a piece of cloth inserted in her mouth. There were two belts which had been used in tying up the deceased. These two belts were produced as Exhibits 2 and 3 and the piece of table cloth as Exhibit 4. According to Inspector Otieno (PW4) it seemed as if there had been a serious struggle since flower pots were broken,

stools broken and telephone wire out. While at the scene, Inspector Otieno (PW4) called scenes of Crime Personnel who came to take photographs. These were taken by Inspector John Wainaina (PW7) who produced the booklet containing nine photographs (Exhibit 7).

Robert Njoroge Michuki (PW9) the husband of Loise Murungi Njoroge (PW8) testified that on the material day (4th August, 1994) he was called to his house and when he drove there, he found a big crowd of people outside. He entered the house with the policemen who had already arrived at the scene and found the sitting room in a mess. The maid had been tied with belts. PW9 managed to trace his son Eric (PW10) whose evidence was to the effect that on that day he had gone to the neighbour's house but when he went back to the house, he saw a body lying down. He also saw the accused and according to the young Eric the accused looked at him "with bad eyes". Eric said that he knew the accused well as the accused was present when the maid (deceased) was brought to that house and that the accused used to visit the maid.

Dr. Alex Onzere Kirasi Olumbe (PW3) is the one who conducted postmortem examination on the body of the deceased on 17th August, 1994 at the City Mortuary. As a result of the postmortem examination, Dr. Olumbe (PW3) concluded that the cause of death was manual strangulation. The postmortem form was signed by Dr. Olumbe (PW3) and the same was produced as Exhibit 1.

Douglas Kabiru (PW1) and Samson Wairobi Gachogo (PW2) identified the body of the deceased to Dr. Olumbe (PW3) for postmortem examination.

Chief Inspector Daniel Kipkorir (PW6) conducted identification parade on 28th August, 1996 in which the accused was the suspect and Eric Michuki (PW10) was the witness. The witness Eric (PW10) went round the identification parade and was able to identify the accused. Chief Inspector Kipkorir (PW6) produced the identification parade form as Exhibit 7. The accused raised no objection to the manner in which the identification parade was conducted.

Inspector John Mwaura (PW11) is the one who took a statement under inquiry which statement was admitted in evidence after a trial within a trial as the defence counsel objected to the admissibility of that statement which was eventually admitted as exhibit 10.

Inspector Bethwel Oburu (PW12) testified that on 30th August, 1996 he recorded a charge and cautionary statement from the accused. That statement was produced without objection as Exhibit 11.

And finally PC John Waruhi (PW13) was the officer who took over the investigation of this case. He said that he compiled all the evidence and that the accused was arrested by PC Edward Giseremi (who has left Police Force) two years after the commission of the offence. The accused was then charged with the offence. It should be stated that in the statement under inquiry (Exhibit 10) the accused made a long detailed statement in which he confessed as having been involved in the killing of the deceased. This statement was however objected to on the ground that it was not voluntarily given, but later admitted in evidence after a trial within a trial.

In the charge and cautionary statement (Exhibit 11) the accused denied the offence.

When put to his defence, the accused chose to give evidence on oath. He said that he knew what he had been charged with and that he had heard prosecution evidence. He stated that he was a vegetable seller at Umoja I Estate which business he started in 1986. He continued with this business until 1994 when he transferred it to Dandora Phase I where he continued operating until 1996 when he was arrested on 19th August, 1996. He was told that he was being arrested for killing Wangechi. He was then taken to Kinango Police Station. He said that he had known the deceased for about two months but he knew Michuki (PW9) and his family in 1988. He knew the children as they used to come for fruits from his kiosk. The accused went on to testify that at times he used to deliver vegetables at Michuki's house. He said that he learnt of the death of the deceased when he was arrested, but he emphatically stated that he knew nothing about the death of the deceased.

After the final submissions by the State Counsel and the defence counsel, I summarized the evidence and the law applicable to the assessors who assisted me in this trial and each assessor returned a verdict of guilty. Assessor Julius Irungu said:-

"After considering the evidence given and especially by PW10 I find the accused guilty of murder. Even though the accused and deceased were friends Eric Njoroge had known him from the beginning as they had brought Wangechi to the house as a maid. Wangechi had suspected the accused to have been involved in the theft of a fridge and a T.V. The accused decided to eliminate Wangechi for a cover up. I find the accused guilty beyond any doubt.

And Assessor Charles Gichuhi in his verdict stated:

"Due to evidence given by PW10 I find the accused guilty of murdering Wangechi. There is no doubt that Eric Michuki knew the accused. The young boy could not mistake him. He recognized him at the parade. Although accused and Wangechi were friends I do not see why accused changed his mind and killed her. There was misunderstanding between Wangechi and the accused about the fridge which was stolen. I find the accused guilty.

In this case there is no dispute that the deceased Dina Wangechi Gachago died on 4th August, 1994 as a result of strangulation. Those who arrived at the scene found her hands tied at the back by a belt and a piece of cloth inserted in the mouth. The scenes of crime personnel took photographs of the scene and these photographs were produced in evidence showing how the deceased was lying in that room. The relevant portion of Dr. Olumbe's (PW3's) evidence was as follows:-

"The body was of an adult female aged about 24 years. There was a bruise on the front of the neck marked on the left side. There were small pin-points of haemorrhage and bleedings. There was fracture of the bone around the throat. There was bleeding within the muscles. There was no evidence of natural disease. I concluded that the cause of death was due to manual strangulation. This could be by physical bare hands but could also involve major chord vessels on the neck. One can also use piece of clothing. The commonest cause is due to lack of oxygen."

The main issue is whether the accused (and some other person) was connected with this offence. It is prosecution case that the accused with another man were involved in killing the deceased. In this case it is the accused who is charged with the murder of the deceased. It is upon the prosecution to prove beyond doubt that it was indeed the accused who caused the death of the deceased. The accused is under no obligation to prove his innocence as the burden of proving his guilt remains on the prosecution throughout the trial.

Prosecution case is based mainly on the evidence of the young Eric Njoroge (PW10). This was a young boy aged 12 years old when he testified on 5th July 1999 but the offence had taken place on 4th August 1994. This means that when the incident took place the young boy was only seven years old. This boy testified that on the material day (4th August, 1994) he had gone to his neighbour's place but then came back to their house only to open the door and find the maid lying on the floor with the accused standing there. The boy said that the accused looked at him "with bad eyes" and so the young boy left. This boy said that he knew the accused well since the accused had been with the deceased when the deceased was brought as a maid. That portion of evidence is supported by Eric's mother Loice Murungi Njoroge (PW8) who testified how the accused and his mother had brought the deceased to work as a maid. The young boy said that the accused had been visiting the maid and so he (Eric) knew the accused well. Then the prosecution relied on the statement by the accused in which he admitted having killed the deceased. In that statement (Exhibit 10) the accused first explained how he with one Simon Ndungu Mungai (Saimo) had gone to where the deceased worked, locked her in a bathroom and took a fridge and a T.V set which they sold at Ngara. After this incident, the wife of the accused was told of this incident by the deceased. It was after this incident that the accused and his colleague Simon Ndungu went to where Wangechi was working and strangled her by using belts and a piece of cloth.

There is then the evidence to the effect that the accused and his mother brought the maid to Michuki

family and that the maid and the accused had become friends and so they had known each other well. Then we have to consider the fact that as soon as the deceased was found murdered, the accused disappeared from his place of business and kept away until two years later when he was arrested in Kwale.

From the foregoing, it would appear that prosecution case against the accused is based on evidence of the young boy (Eric Njoroge), retracted confession by the accused and circumstantial evidence. The accused's answer to the above is that he was nowhere near the scene of murder and that he knew nothing about this offence. The accused explained how he started his vegetable business in 1986 when he was located in Umoja I Estate and then moved to Dandora Phase I. Hence, it is the accused's case that he never ran away from the scene soon after the deceased was murdered.

Mr. Mutua for the accused submitted that prosecution had failed to prove malice aforethought and that the evidence of Eric Njoroge (PW10) had to be taken with caution in view of Section 124 of the Evidence Act as the evidence of PW10 was not corroborated.

Mrs. Shikuku for the State submitted that the case against the accused had been proved beyond doubt. She referred to retracted confession by the accused which in her view was a detailed statement which should be accepted as true. She then referred to the conduct of the accused of disappearing for two years before he was arrested. Then she submitted that PW10 was able to identify the accused at the identification parade and that the accused had the opportunity to commit the offence.

Having summarized the evidence on record together with the submissions by counsel appearing it is now the duty of this court to examine carefully this evidence and the submissions made and see if indeed a charge of murder against the accused has been proved to the required legal standards. We must consider the evidence of Eric Njoroge (PW10) who was a young boy and hence his evidence will be considered in the light of section 124 of the Evidence Act (Cap.80 Laws of Kenya) which provides:-

"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him".

The young Eric Njoroge (PW10) testified that he saw the accused in their house and that the maid was lying on the floor. This is evidence of a child of tender years which requires corroboration. I examined this young boy and found him sufficiently intelligent and hence he gave evidence on oath. He was cross-examined but he remained unshaken. But still his evidence requires corroboration. Mrs. Shikuku for the State invited the court to consider the accused's disappearance of two years as providing corroboration. In Malowa v. Republic (1980) Kenya L.R.110 the Court of Appeal observed:-

"The case against Malowa, however, went further. A group of youth wingers went to Malowa's house on the night of the crime at 3.00 a.m. and found him sitting on his bed. They told him he was wanted by the Government. Malowa asked to speak to his father, called him and ran away. He then disappeared from his home and although assiduously sought by the police was not found until May 1978 when he was arrested in a bar at Bondo near the Uganda border. In a charge and caution statement made to Ins. Tole on 10th May he denied all knowledge of the murder of Blazio and said that he had been in Uganda from April, 1977 to May, 1978. At the trial he changed this story and said that he had been at home on the night of the murder. He said that he had run away because the people who came to his house had walking sticks and he was afraid they would injure him. The judge held on the authority of Terikabi V. Uganda (1975) E.A 60 that corroboration of the evidence of Paulina and of the dying declaration of Blazio was provided by the conduct of Malowa in disappearing from his home immediately after the murder to avoid arrest and in remaining absent for six months, and he was left with no reasonable doubt that Malowa was guilty of the murder of Blazio. We see no reason to differ; the evidence in this case leaves us with no reasonable doubt that the appellants were properly convicted".

In the present case, we have evidence to the effect that the accused was related to the deceased and that he used to visit her. The accused's visits were however clandestine since he avoided visiting the home when the owners Mr. Njoroge (PW9) and his wife Lice (PW8) were present. The accused on his own admission said that he knew this family very well. It is then to be noted that the accused disappeared soon after the death of the deceased. He remained away for two years when he was arrested in Kwale. In his defence, the accused said that he was arrested at Dandora where he had transferred his business but this was never put to any of the police officers who gave evidence. It would appear to be an afterthought.

Then there was the detailed statement (Exhibit 10) in which the accused explained how he and one Simon Ndungu had first stolen a fridge and a T.V from that house and then went there and killed the deceased. In that statement the accused said that it was when they were trying to remove the body of the deceased that a male child aged 10 years came in and then the accused and his companion ran away. Taking this statement by itself, it amounts to confession. The accused however denied having made the statement. The law relating to retracted and repudiated confessions (as is the case in the present trial) was stated in *Tuwamoi v. Uganda* (1967) E.A 84 at p.91 as follows:-

"We would summarize the position thus - a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true".

In this case the accused recorded a detailed statement giving the background that led to the death of the deceased. It was only the accused who knew all these details. It cannot be said that the police manufactured this story and then asked the accused to sign the statement. Hence in my view this confession cannot but be true. It does not need any corroboration. But there is corroboration from the conduct of the accused of disappearing from his place of business for a period of two years. It is significant to note that the accused was not arrested in Nairobi or at his place of birth but in Kwale.

In view of the foregoing, I would say that taking all the circumstances into account I find that it was the accused who killed the deceased. The two assessors were of unanimous opinion that the accused was guilty as charged. Now that I am satisfied that it was the accused who killed the deceased the only issue is whether he should be convicted of murder or manslaughter. In his own confession the accused stated why he and Simon Ngugi wanted to eliminate the deceased. Police Officers who visited the scene found the house in a mess. We do not know whether there was a quarrel prior to this nasty death of the deceased. I would give the benefit of doubt to the accused and find that maybe there was a quarrel or some provocation from the deceased and hence I shall find the accused guilty of manslaughter contrary to Section 205 of the Penal Code and he is accordingly convicted.

Order accordingly.

Delivered and dated at Nairobi this 22nd day of September, 2000.

E. O. O'KUBASU

.....

JUDGE OF APPEAL