REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

87y6trewqaAT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.24 OF 2017

REPUBLIC.....PROSECUTOR

COSMAS MUTINDA MU1GRFT4313Y67TKDHJKLRS\X7IA.....ACCUSED

JUDGEMENT

1. The accused person, **COSMAS MUTINDA MUIA** was charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It is alleged that on the night of 9th and 10th November, 2017 he murdered **MARIA MWELU MUOKI**.

2. The accused person was represented by Mr LangaLanga whilst the State was represented by Mr Machogu and later Mr Mwongera.

3. The prosecution called a total of nine **(9)** witnesses in support of its case. **Pw1** was **Ibrahim Mutiso** who testified that he had ferried the deceased who was in the company of the accused on 10.11.2017 to her home. He told the court that he learnt on 10.11.2017 that the deceased had been killed. He testified on cross examination that he had escorted the accused and another woman for about one kilometre away.

4. **Pw2** was **Joshua Mumo Kivula** who testified that he saw the accused in the company of the deceased and later learnt that his brother had been arrested on allegation of having killed the deceased.

5. **Pw3** was **Nicholas Wambua** who testified that on 10.11.2017 he spotted a dead body near a farm and he alerted the authorities.

6. **Pw4** was **Leonard Maingi** who testified that on 10.11.2017 he was alerted by Pw3 that he had discovered a dead body.

7. **PW5** was **Peter Kivuva Mutuku** who testified that he attended the post mortem that was conducted on the body of the deceased.

8. **Pw6** was **Dr Joyce Kalekye** who testified of the post mortem examination carried out on the body of the deceased on 17.11.2017. She stated that lungs were dark due to absence of oxygen and that she formed the opinion that the cause of death was asphyxia due to manual strangulation. The post mortem report was tendered in court.

9. **Pw7** was **Pc Fredrick Kosen** who testified that on 10.11.2017 he received instructions to investigate the instant matter but he did not visit the scene. He testified that he took witness statements and established that Pw1 had ferried the accused and the deceased and after Pw1 was arrested, the accused fled to Matuu but however Pw2 was used to track down the accused in Matuu and who was promptly arrested.

10. **Pw8** was **Margaret Wahu Maina**, an analyst at the government chemist who testified that she worked with Lawrence Kinyua Muthuri who had prepared a report in respect of samples received at the government chemist on 11.12.2017. She testified that the DNA profile obtained from the spermatozoa obtained from the vaginal swab from the deceased as well as the buccal swab matched the DNA profile generated from the buccal swab of the accused.

11. **Pw9** was **Cpl Martha Mutinda** who testified that on 10.11.2017 she received information that there was a dead body that had been discovered. She went to the scene together with the scene of crimes officer and after investigations, she established that the accused had been the last person in the company of the deceased before her lifeless body was discovered the following morning.

12. The court later established that the accused had a case to answer and placed him on his defence. Dw1 testified that on 11.9.2017 he left work at 1.30 pm and headed home. He testified that he received a call from Joshua Mumo Kivulo who asked him to join him at Kangundo for a drink. He testified that he met at Club Mzinga and that the said Joshua was in the company of a lady called Faith Ndindi. It was his testimony that a lady called Maria Mwelu joined them and they drank till 11 pm when he decided to befriend the said Maria Mwelu. He testified that he and Maria Mwelu agreed to spend the night in a lodging and they left the bar at 1.30 am. He recounted how he was ferried

with a bodaboda and alighted at his home and left Maria Mwelu with the bodaboda rider who was to drop her home. It was his testimony that he reported to work the following day and that Pw2 arrived in the company of police officers and who arrested him for the current offence. He denied killing the deceased but admitted having sexual intercourse with her at around 10pm in the club. On cross examination, he testified that he did not leave with the deceased as he had already had sex with her at the bar. He testified that he did not take the deceased to his house and he denied murdering her. The defence closed its case and the parties canvassed the case vide submissions.

13. The defence counsel submitted that there was no direct evidence linking the accused with the offence. It was pointed out that there was only circumstantial evidence and in placing reliance on the case of **Erick Odhiambo Okumu v R (2015) eKLR,** it was submitted that the accused was charged with the offence as he was last seen with the deceased but however the prosecution evidence failed to prove the charge of murder beyond reasonable doubt so as to sustain a conviction; that the defence tendered by the accused is plausible. The court was urged to acquit the accused under section 215 of the Criminal Procedure Code**.**

14. In reply, counsel for the state submitted that the evidence of Pw1 establishes that the accused was last person seen with the deceased. It was submitted that the cause of death was proved vide the testimony of Pw6 and that the injury was indicative of malice aforethought. It was submitted that the accused was identified by Pw1 and that the evidence of Pw8 spoke to the fact that there was intercourse between the deceased and the accused. It was submitted that the evidence of the accused could not shake the prosecution case. It was therefore the submission of counsel that the prosecution had proved its case beyond reasonable doubt. Counsel urged the court to convict the accused of the charge of murder under section 322 of the Criminal Procedure Code.

15. The burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all instances save for a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372.** In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

16. If there is a strong doubt as to the guilt of the accused, it should be resolved in his favour. Therefore, the accused person must not be convicted because he has put a weak defence but rather that the prosecution case strongly incriminates him and that there is no other reasonable hypothesis than the fact that the accused person committed the alleged crime. ***See Woolmington v DPP [1935] AC 462.***

17. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under section 203 as read with section 204 of the Penal Code are: -

i. That the deceased is dead;

ii. That the death was caused unlawfully;

iii. That there was malice aforethought; and

iv. That the Accused person directly or indirectly participated in the commission of the alleged offence.

18. The post-mortem report on the examination of the body of the deceased has not been objected to nor controverted. This ingredient of the offence was duly proved by the prosecution. Dr Joyce Kalekye who conducted the post mortem confirmed that there was a fracture on the larynx and formed the opinion that the cause of death was asphyxia due to manual strangulation.

19. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held :

> "*Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property*."

20. The deceased in this case was found to have died from asphyxia due to manual strangulation. None of the prosecution witnesses gave direct evidence as to witnessing the attack on the deceased. However, there is certainty as to what was the cause of death. Given the nature of injuries suffered by the deceased that resulted in her death as indicated in the post mortem report it can safely be inferred that death was the desired outcome of whoever the assailant was. The pathologist confirmed that there was a fracture of the larynx and that there was manual strangulation causing asphyxia.

21. It was upon the prosecution to ensure that the allegation that the accused assaulted the deceased was with malice aforethought and not excusable.

22. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. The evidence of Pw8 was to the effect that there was sexual intercourse between the deceased and the accused and that the accused admitted that indeed he had sex with the deceased albeit in the club. This evidence dislodges the theorem that the accused had sex with the deceased and killed her.

23. It is trite law that the court is required to investigate all the circumstances of the case including any possible defences even though they

were not duly raised by the accused for as long as there is some evidence before the court to suggest such a defence (see **Abdalla Omar Mwangeshi v R (2019) eKLR**). The evidence of the accused suggested intoxication as negating malice aforethought since the accused had quite some alcoholic drinks from 11 pm to 1.30 am when he left the bar.

24. Under section 13 of The Penal Code, for intoxication to constitute a defence to a criminal offence, it must be shown that by reason of the intoxication, the accused at the time of the act or omission complained of, did not know that the act or omission was wrong or did not know what he or she was doing and the state of intoxication was caused without his or her consent by the malicious or negligent act of another person, or that the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission. Since in the instant case there was no suggestion that the condition of intoxication the accused was labouring under was caused without his consent, it was necessary to adduce evidence to show that at the time of the act, he did not know that the act was wrong or did not know what he was doing since by reason of that intoxication he was insane, temporarily or otherwise.

25. Intoxication can provide a defence for offences of specific intent but not for offences of general intent. For offences such as murder which require a particular intent or knowledge, a person who performs the act causing death while in a state of intoxication is liable to be dealt with as if he or she had the same knowledge as he or she would have had if he or she had not been intoxicated, unless it is shown that the substance which intoxicated him or her was administered to him or her without his or her knowledge or against his or her will. Alternatively, that by reason of intoxication he or she was insane, temporarily or otherwise to the extent of not knowing what he or she was doing or that it was wrong. The law was aptly summarized by the House of Lords in **Director of Public Prosecutions v. Beard [1920 AC 479**] thus:

> "*There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act*."

26. The defence of intoxication can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about the reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. In the instant case, the accused bore the evidential burden of adducing some evidence creating the possibility that he was labouring under such a degree of drunkenness that he was rendered incapable of forming the specific intent essential to constitute the crime of murder. Once he adduces such evidence, then the persuasive burden is on the prosecution to disprove it by showing that the evidence of intoxication adduced by the accused falls short of proving such incapacity. The onus is on the prosecution to prove that an accused person was not so drunk as to be capable of forming an intent to kill.

27. Although the accused adduced evidence that he had been drinking before this incident, there is no evidence that he was so drunk that he did not know what he was doing within the meaning of section 13 of The Penal Code. In his defence the accused gave a detailed account of his version. He narrated how he even had time to befriend the deceased and have sex with her then get her ferried on a bodaboda. That conduct is not consistent with a person so drunk as to have lost the capacity of moral judgement.

28. The evidence taken as a whole clearly shows that the drink the accused had consumed had not impaired his judgment in any way. Mere drinking alcohol does not count in law otherwise many killers would get off by arming themselves with alcohol before they go on their murderous missions (see **Kongoro alias Athumani s/o Mrisho v R (1956) 23 EACA 532**). The defence of intoxication is therefore not available to the accused.

29. The prosecution evidence seemed to suggest that the accused was the last person seen with the deceased and therefore he was identified as the assailant. The last seen doctrine is one that relates to circumstantial evidence. The evidence of Pw1 is that he had ferried the accused and the deceased and left them at their desired destination and was thus shocked to learn the following day that the accused's female companion had been killed. The evidence of Pw1 was corroborated with that of Pw2 and further the accused after the incident went into hiding in Matuu town until he was enticed by Pw2 leading to his arrest. The accused having been the last person in company of the deceased had a lot to with her demise. The accused's claim of a frame up is not believable since he was last in the company of the deceased before her death and further the evidence of Pw1 is that he had ferried the accused and the deceased and left them at the house of accused at Mulingani area. The DNA profile lifted from the buccal swabs of the deceased and the accused as well as the spermatozoa matched and thus he was squarely placed at the scene of crime. In any case he stated in his defence evidence that he had had sexual intercourse with the deceased. His version that he had the sexual intercourse with the deceased prior to departing from the bar is not convincing since his colleagues who included Pw1 and Pw2 confirmed that no such thing took place as the accused was then busy trying to befriend the deceased and with whom he later went to his house after he had managed to convince her to have sex with him. Hence, if anything happened to the deceased then the same must be attributed to him. In any event the body of the deceased was found a few metres from his house. His defence evidence has not shaken that of the prosecution.

30. In the case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135**, regarding circumstantial evidence the court held that: -

> "*In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt*."

31. The Supreme Court of Nigeria sitting at Abuja in **Tajudeen Iliyasu v The State SC 241 of 2013 (2015) LCN 4388 SC** stated that [the last seen doctrine]

> **"….***creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death.…Thus where an accused person was the last person to be seen in the company of the deceased person, they have the duty to give an explanation relating to how the latter met his or her death. In the absence of such explanation, a trial court …..will be justified in drawing the inference that the accused person killed the deceased person*".

32. The last seen doctrine can be applied when the accused was the last person to be seen with the accused but there is no other circumstantial evidence. See **Rabi Ismail v The State (2011) MSJC 20, 77, (2011) 17 NWLR (PT.1277) 601** quoted in **Criminal Evidence in Nigeria by Jide Bodede 2nd Edition.**

33. As noted above, the accused and the deceased were dropped at his house on the material night and hence the last seen doctrine is applicable in the circumstances and which left no doubt and pointed to him as the perpetrator of the crime. The evidence of accused's colleagues in their testimonies clearly dislodged the version of events by the accused. Defence counsel sought to claim that the accused's colleagues had been left scot free by the police who had the accused made as the fall guy. Indeed, accused's colleagues just like him went into hiding upon the discovery of the body of the deceased but upon a thorough scrutiny of their statements absolved them from blame as can be attested from their testimonies herein. It was natural for them to be afraid as they had been in company of the deceased the previous night. The two witnesses were steady in their testimonies and were unshaken on cross examination regarding the fact that the accused who had befriended the deceased as his lady of the night was duly dropped together with the deceased at his house. The deceased was examined and found to have been strangled and raped before she died. I am satisfied that the prosecution has proved its case against the accused beyond any reasonable doubt. I find the accused had the requisite malice aforethought since from the injuries inflicted it can be discerned that the assailant intended to achieve the desired result namely death of the deceased. If the deceased had been his lover for the night, then the safety of the deceased during the night in question remained with him. It was ironical that the body of the deceased was found near his house the following morning and that he was nowhere as he had gone into hiding several kilometres away in Matuu. The accused had to be enticed from his hideout by his brother (Pw1) and promptly arrested. Such kind of conduct betrayed his claim to innocence and hence his alibi is not convincing.

34. In the result it is my finding that the charge of murder has been proved against the accused beyond reasonable doubt. I find him guilty for the offence of murder and is accordingly convicted therefor.

It is so ordered.

Dated and delivered at Machakos this 3rd day of February, 2021.

D. K. Kemei

Judge