



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HCCR NO.E002 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

JOHN OKAYO WANDERA.....ACCUSED

J U D G M E N T

[1] The accused, **John Okayo Wandera Alias Victor Okoth**, is charged with murder, contrary to s.203 read with s.204 of the **Penal Code**, in that on the 19th September 2020, at Nasewa Matayos Busia County, murdered Caroline Nabwire.

[2] The case for the prosecution was that on the 21st September 2020, at about 6.00a.m., a farmer **Maximila Nabwire Ochieng (PW 1)** left home for her maize farm with a view to tilling the land. As she progressed with the chore she stumbled on a freshly dug part of the land and became suspicious. She notified the area villagers of her suspicion.

[3] The villagers were unwilling to pursue the suspicion but Maximila continued with her chore before returning home. At about 1.00p.m, a neighbour informed her of a dead body having been found buried at the suspicious part of her land. She rushed there and found a crowd of people. The dead body was removed from the hole in which it was buried and found to be that of the deceased, a local village girl.

[4] Prior to that date, on the 19th September 2020, the deceased had gone to the home of **Annette Rhoda Nafula (PW 2)** while in the company of the accused and another. The third person left them and went away. The deceased and the accused remained behind but they later left together. Earlier on the same day, the deceased informed her sister, **Florence Auma Aketch (PW 3)**, that she was going to meet her boyfriend who was the accused. She (**PW 3**) later spotted the two of them and others at a local market and on 21st September 2020, she identified the dead body found in the maize farm to be that of her sister. **Cpl Douglas Wamalwa (PW 7)** took photographs of the dead body of the deceased (**P.Ex 2**).

[5] In the month of October 2020, or September 2020, **Anastacia Akinyi (PW 4)** was at a beach within Port Victoria when two people called Vicky and Ras came to her home with the intention of borrowing 500/= from her mother, **Caroline Adhiambo Ojwang (PW 5)**. She gave them the money and they in turn deposited with her a mobile phone as security for repayment. She later used the phone (**P.Ex 3 (a)**) with her sim card before handing it over to her aunty called Mary to use it.

[6] Mary was a sister to Caroline (**PW5**) and so was one Mercy. These two, Mary and Mercy, also used the phone and so did Caroline. Later, in January 2021 police officers traced the phone to Caroline and she led them to Mary and one Wycliff or Wicky.

P.C Samuel Nyongesa Khaemba, (PW 8) investigated the case and in the process traced and recovered the mobile phone (**P.Ex 3 (a)**) which actually belonged to the deceased and was in her possession when she was seen with the accused.

[7] **P.C Khaemba (PW 8)** found that the phone was switched off on 19th September 2020 at about 8.30p.m and was switched on on the 22nd September 2020, after which it was traced to Caroline (**PW 5**) and eventually to the accused who had used it with his own sim card, before selling it to the relative of Caroline and disappearing from the scene. He was later traced at Port Victoria using the name Victor Okoth instead of his actual name. All the sim cards used on the phone (**P.Ex 3 b – d**) including the two belonging to the accused were recovered.

[8] **Dr. Edward Kibochi (PW 6)**, carried out an autopsy on the body of the deceased and prepared the necessary report (**P.Ex 1**) showing that the cause of death was severe head injury due to blunt trauma.

After necessary investigations, the accused was charged with the present offence.

[9] In his defence, the accused denied the offence and stated that the deceased was his girlfriend and did visit him at his fishing base at Port Victoria where she informed him of problems in her family. They left for her village in Matayos on 19th September 2020, where he took her to see an assistant chief whom they did not find. They then proceeded to a “**changaa**” den and left at 8.00p.m for the market area where she

boarded a motor cycle taxi (**boda boda**) and went to her home. He remained behind and proceeded to Port Victoria on the following day where he was later arrested on allegation that he had killed the deceased. He contended that he did not kill the deceased and actually intended to marry her. He purchased a sewing machine for her and allowed her to use his phone.

[10] From all the foregoing evidential facts no dispute arose with regard to the fact that the deceased was murdered and her body buried in a hole inside a maize plantation. The post mortem report revealed that the body had severe injuries on the head and this was exactly what caused the death of the deceased.

The degree of injury and the manner in which the body was buried in a hole was sufficient evidence that the assailant or assailants had a clear intention to kill the deceased and did actually kill her.

[11] Suffice for this court to hold that the necessary ingredients of the charge of murder were clearly established by the prosecution evidence without dispute from the defence.

The only issue for determination was the identification of the accused as the person responsible for assaulting and fatally injuring the deceased.

In that regard, there was no direct evidence against the accused. The prosecution therefore relied on circumstantial evidence on the basis that the accused was the last person to be seen with the deceased before she died, that he was the person in possession of her mobile phone which she was using immediately before her demise, that he disposed off the phone by selling it to innocent buyers before disappearing from the scene of the offence.

[12] This chain of inculpatory evidence was credibly established through the evidence of Annette Nafula (**PW2**), a sister to the deceased (**PW 3**), Anastacia Akinyi, (**PW 4**), Caroline Adhiambo (**PW 5**) and the investigations officer (**PW 8**). Annette (**PW 2**) and Florence (**PW 3**) led sufficient evidence proving that the accused was the last person to be seen with the deceased prior to her demise. This was on the 19th September 2020, and two days thereafter on the 21st September 2020, the dead body of the deceased was found buried in a hole or shallow grave inside a maize plantation.

[13] The accused did not dispute that he was with the deceased on 19th September 2020 but attempted to indicate that a motor cycle taxi operator (**boda boda**) going by the name "**Deno**" was the last person in the company of the deceased prior to her demise. The indication was however disapproved by Annette and Florence. The name "**Deno**" was seemingly floated in an attempt to divert attention from the accused and was in fact a "**red herring**"

[14] The evidence by Anastacia (**PW 4**), Caroline (**PW 5**) and the investigations officer (**PW 8**) did credibly establish that the mobile phone (**P.Ex 3 (a)**) in possession of the deceased prior and after her death was used by the accused before it landed on Anastacia and her relatives including her mother, Caroline (**PW 5**) through persons known as Vicky and Ras. The phone was traced and recovered from Caroline after it had been used by her sister called Mary. It was Mary who was initially arrested by the police after it transpired that the phone was used by her after being used by her sister Mercy, said to be the wife of the person called Ras.

[15] Investigations revealed that the phone was used by several people after the body of the deceased was recovered. Most of these people were at Port Victoria away from the scene of the offence. Most importantly evidence showed that the phone was switched off on 19th September 2020, the date the deceased was lastly seen in the company of the accused and was switched on again on 22nd September 2020, a day after the recovery of the body of the deceased. The phone landed in Port Victoria seemingly after the 22nd September 2020.

[16] The evidence by the prosecution established that between the 19th September 2020 and 22nd September 2020, the phone was in the possession of the accused and he was most probably the person who switched it off on 19th September 2020 and switched it on on the 22nd September 2020, after the recovery of the body of the deceased. He actually did not dispute the fact and stated that the phone belonged to him and that he gave it to the deceased to use it. It was not therefore a coincidence that the phone was recovered at Port Victoria with third parties as that was the place the accused disappeared to after the murder of the deceased and recovery of her body.

[17] All the foregoing inculpatory facts were sufficiently and credibly established by the prosecution against the accused. This therefore, rendered the accused's defence incompatible with his innocence as the inculpatory facts proved by the prosecution are incapable of explanation upon any other reasonable hypothesis than that of guilt.

Thus, the prosecution evidence was sufficient enough for this court to draw an inference of guilt against the accused and hold that he was actually the person who assaulted and fatally injured the deceased after which he buried her dead body in a maize plantation belonging to Maximila Nabwire Ochieng (**PW 1**).

[18] In sum, the prosecution discharged its burden of proof by establishing beyond reasonable doubt that the accused was the offender in the murder of the deceased. He is therefore found guilty as charged and is hereby convicted.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 9TH DAY OF NOVEMBER, 2021]