



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 20 OF 2019 (MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

LUKAS MACHUKI MAISIBA.....1ST ACCUSED

BERNARD KEROSI NYANGARESI.....2ND ACCUSED

JAMES SAPARI.....3RD ACCUSED

RULING

1. **Lukas Machuki Maisiba (Lucas) , Bernard Kerosi Nyangaresi (Bernard) and James Sapari (James)** (hereinafter referred to as the 1st , 2nd and 3rd accused persons respectively) are charged with the offence of murder, contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that on the 15th April 2019, at Kioganyo Sub-location in Kisii Central Sub-county within Kisii County murdered Judy Mokeira Sammy.

2. The case for the prosecution was grounded on the facts presented by a total of eight (8) prosecution witnesses who included the mother of the deceased, Evalene Kemunto Ngare (PW 1), Justus Nyabuto Omari (PW 2), an assistant chief Kioganyo Sub-location, Faith Nyakoira Lubanga (PW 3), an aunty of the deceased, MCA of Bobaracho Ward, Ibrahim Onkubo Mose (PW 4), Silvanus Nyabuto (PW 5), a cousin of the deceased, a pathologist, DR. Benjamin Ndibile (PW 6), DCIO Masaba South Kisii County, Inspector Washington Mwiti (PW 1 Trial within Trial), a government analyst, Richard Kimutai (PW 7) and a police officer attached at DCIO Kitutu Central, PC Michael Cherotich (PW 8).

3. PW 1, Evalene Kemunto Ngare the deceased's mother testified that her daughter disappeared from home on the 14/4/2019. On 15/4/2019 she found her daughter in the forest dead covered with leaves. She knows the three accused persons but did not see them with the deceased.

4. PW 2, Justus Nyabuto Omari testified that, he knows the deceased and the accused persons. That he got a call from the deceased's grandfather on the 15/4/2019 that a girl who has been murdered and left in a shamba at Kari. He went to the scene and found a dead body. He called police who took the body to Kisii Teaching and Referral Hospital mortuary. Lucas was adversely mentioned by villagers that he had a grudge with the deceased. They were class mates. He arrested Lukas and took him to the police station for his safety.

5. PW 3, Faith Nyakoira Lubanga testified that deceased is her niece. She met the deceased on the 14/4/2019. She escorted Judy to get a phone from Brigit at her grandmother's. They parted ways. Judy told her she was taking the phone to Silvanus whom they met. She left Judy with Silvanus. At 8.00 p.m Judy sister told her Judy had not returned. The next day 15/4/2019 she learnt that Judy had been murdered and her body dumped. The 2nd accused is their neighbor. Judy and 2nd accused were school mates. During cross- examined she denied that she was not the last person with deceased. She maintained that she had left Judy with Silvanus.

6. PW 4, Ibrahim Onkubo Mose testified that on 19/4/2021 he got information that people in the village were threatening to burn a murder suspect, the 1st accused. He attended a barasa to calm the situation. He heard that the 1st accused was with the 3rd accused person. He does not know the deceased. He took the suspects to the police and cautioned the police against releasing the accused persons.

7. PW 5, Silvanus Nyabuto testified that he knows the 2nd accused and that on the 14/4/2019 he saw Judy at 4.00 p.m. He did not see Judy again. Judy is their neighbor. He does not know if 2nd accused and deceased knew each other. When he left Judy she was alive and well.

8. PW 6, Dr. Benjamin Ndibile did the post mortem on the deceased after post mortem he formed opinion that the cause of death was asphyxia from manual strangulation. He took specimens for testing to the government chemist i.e. nails and vaginal swab.

9. PW 7, Richard Kimutai a government analyst testified that the samples from Judy tested negative for semen. There was no DNA trace from the accused persons.

10. PW 8, PC Michael Cherotich, instructed to investigate the matter- retrieved body from scene, arrested the accused persons Lukas and James. On 21/5/2019 Bernard was brought to the police station on allegation of confession. He arrested him. On 24/5/2019 Lukas and James were arrested and charged them with murder.

11. I have read the submissions filed by Mr. Magara. It was submitted that accused persons are presumed innocent until proved guilty as per the provisions of Article 50 (2) (a) of the Constitution. That the burden to prove the case wholly lies on the prosecution. That the prosecution failed to connect the accused persons with the death of the deceased and that the court should enter a verdict of not guilty. The prosecution relied on the evidence on record.

ANALYSIS AND DETERMINATION

12. A definition a prima facie case was given in the case of **Bhatt –vs- R [1957] EA 332**, the Court of Appeal expressed itself on this issue as follows:

“Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to suggesting that the Court would not be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true as Wilson J said that the Court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively: That determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case” but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”[Emphasis mine]

13. At the close of the prosecution case a court will evaluate the evidence adduce to determine whether a prima facie case has been established to warrant an accused being put on his defense. I have summarized the prosecution evidence. There is evidence that the deceased died as a result of manual strangulation. She was last seen on the 14/4/2019. The persons who saw her alive testified on their interactions with the deceased. The deceased was found on the 15/4/2019 in a farm. DNA tests done from the samples taken from her nails and vaginal swab did not link any of the accused persons to her murder. The only evidence against the 1st accused is that he had threatened the deceased and that the 1st and 3rd accused persons were seen together. This evidence is scanty. It is evidence of suspicion which does not link the accused persons to the death of the deceased. To put the accused persons on their defense would be asking them to fill the gaps in the prosecution case. I find that there was no direct evidence to link the accused persons to the death of the deceased. They were merely suspects. In the case of **Mary Wanjiru Gichira v Republic Cr. Appeal No. 17 of 1998** the Court of Appeal held that, *suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.*

14. A young life was lost, however I find that the prosecution has failed to adduce sufficient evidence to warrant the accused persons being put on their defence. Each accused person has no case to answer. **LUCAS MACHUKI MAISIBA, BERNARD KEROSI NYANGARESI** and **JAMES SAPARI** are acquitted of the murder of **JUDY MOKEIRA SAMMY** under section 306 of the CPC. Each accused person is free to go unless unlawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 9TH DAY OF NOVEMBER, 2021.

R.E. OUGO

JUDGE

In the presence of:

1st Accused Present

2nd Accused Present

3rd Accused Present

Mr. Magara For the 2nd Accused h/b for Mr. Kerosi for the 1st and 3rd Accused persons

Mr. Kaino State Counsel Office ODDP

Mr. Orwasa C/A