



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 10 OF 2019

REPUBLIC. PROSECUTOR

VERSUS

ELIUD TABALIA WAFULA.....ACCUSED

J U D G M E N T

The Accused **Eliud Tabalia Wafula** is 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 on the night of the 26th January, 2019 at Kibisi village, Maeni sub location in Kimilili sub- county within Bungoma county murdered **Mercy Chemtai**.

The prosecution case is that **PW1 Priscilla Nanjala** the mother was informed that the deceased had been killed and buried by a man she was staying with. She had not known that deceased was staying with a man. She went there and saw the body. She saw one arm was missing. **PW2 Jamia Khisa** was herding cattle on 2.2.2019 at 9 a.m. when he saw a dog removing soil from place at the neighbours farm. He went close and saw a human arm which was partially in the soil. He informed the chief who came with police officers and dug up the body.

PW3 James Masai received a report on 2.2.2019 that deceased had been killed and buried at Mukulima. He went there and found many people. On 3.2.2019 he accompanied police officers to the house of the deceased. The shallow grave from where the body had been removed was 10 meters from the house. Police officers broke into the house. In the house they found a blood stained mattress and under the bed was a panga.

PW4 Simiyu Shaban a community policing agent received information from Jamia (PW2) that he had seen a human arm protruding from a shallow grave. He went to the scene and confirmed. He informed the chief. The scene was near a house occupied by accused Eliud and his brother Titus. Titus came and when asked referred them to accused who would know. They went and brought the accused. They asked accused who was buried there and he told them it was Mercy his wife. They made him remove the solid. Police came and body was removed and taken to the mortuary.

PW8 No.78872 Copl Paul Ngesa was at Kimilili police station on 2.2.2019 when they received information that the body of a female had been found at Mireri area. He and colleagues visited the scene, at the house of Mabunde. They found the body of a female in a shallow grave which had started decomposing. At the scene they arrested accused and Wycliff Makokha as suspect. On being interrogated the accused said deceased was his wife and were staying together in one of the houses at the homestead where accused was a caretaker. The grave was 60-70 meters from the house. The next day they went to the house with accused which they broke into and searched. It was a single room house. On observing they saw a blood stained mattress and under the bed found a panga. On investigation he found accused and deceased were last seen together at the home of PW7 Margaret Nanjala.

PW7 Margaret Nanjala who sells busaa testified that on 26.1.2019 she was at her home when she saw the accused come with a girlfriend. She was wearing a full dress and tied herself with a kikoy. They drank and went away. On a Saturday that followed the girl came with 2 girls and other men other than accused. She had the same Kikoy on. The next time accused and his brother Titus came and drank. Later Eliud came and informed her that accused had killed a person. She later went to the scene and saw it was the same girl who was with accused and had the Kikoy on. He found the accused and his brother present at the scene.

PW5 Dr. Edward Vilendo produced a post mortem performed by Dr. Muyendo on the body of the deceased. He found a wound on left side of the head, deep and penetrating stab wound on left side of the neck, and on the anterior aspect. The spinal cord was severed. He formed opinion that cause of death was spinal shock as a result of the injury to the spine.

The accused gave sworn evidence in his defence. He testified that on 26.1.2019 he was at the home of Margaret Mulati drinking busaa with

one Shaban. He then went with Shaban to his home where he found the body of a female at the home of mzee Magunde who is their neighbor. Police came and took the body. He was then taken to Kimilili police station where he was detained. He denied that he knew deceased or that she was his wife.

The accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code which provides.

203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person convicted of murder shall be sentenced to death.

The prosecution in a case of murder must prove to the court beyond reasonable doubt the ingredients of the offence. These are:

- 1) The fact and cause of death**
- 2) The unlawful act or omission causing the death**
- 3) The existence of malice aforethought**
- 4) That it is accused who inflicted the injuries that caused the death of the deceased.**

PW5 Dr. Edward Milubwa, produced a post mortem report prepared by Dr. Miyendo who performed the post mortem on the body of deceased. He found that the right elbow joint had been disjointed; stab wound on left side of the neck which was deep and penetrating. Stab wound on neck affecting spine bones C3, C4 and spinal cord was severed on the front. He formed opinion that cause of death was due to spinal shock due to injury on spine. This witness therefore proved that the deceased died due to injury on the spine and stab wounds. The unlawful act that caused the death therefore was the infliction of the stab wounds.

PW7 Margaret Nanjala who sells busaa testified that on 26.1.2019 the accused went there to drink busaa with a girl who was wearing a full dress and tied herself with a kikoy. They drank and went away. On the following, Saturday she saw the lady again in same attire but with other girls. They drank busaa and left. She later was informed by one Shaban that it was alleged accused had killed the wife. She went to the scene and recognized from the clothes that the deceased is the girl who had come with accused.

PW7 Copl Paul Ngesa, acting on report of the discovery of a body proceeded to the scene. At the scene he arrested the accused and Wycliffe Makokha as suspect. Upon investigation he found that deceased was staying with accused as his wife. In a house about 60-70 meters from the grave. They took accused to the police station. The next day accused led them to his house where they found the mattress was blood stained, they also recovered a panga, slasher and hammer. He confirmed that they did not recover any personal item of the deceased in the house.

The accused in his defence denied knowing the deceased, or that she was his wife. However, when cross-examined by Thuo for the state on this issue he stated:

“I saw her last in 2019 but can’t remember the month. I met her when I was going to the market. I had even bought her busaa. She had not visited my home. I only met her on the home of Margaret Mulati. It is not true that I left with her to my home. It is not true that I was running away and was apprehended by people.”

The contention therefore that the accused evidence that the deceased was found in a shallow grave which was 60-70 meters away from the house where accused was staying.

The body was discovered on 26.1.2019 accused had been seen with deceased on 2.2.2019 8 days later the body was recovered. The body had been buried and had started decomposing. The accused on being arrested he led the police officers led by Copl Paul Ngesi, who testified.

“The next day we visited the house with accused. Accused had told us he had locked the house. When we reached the scene he said he did not have the key. We broke into the house. It was a single room house. It had a bed and mattress. We searched. In the house we recovered a panga slasher. On checking the mattress, we found it was blood stained. We took the mattress, panga slasher and hammer as exhibits. This is the mattress Exh 1. Panga Exh .2. He said the panga and slasher were his and that he had seen the blood stains that day.

On investigations I found accused and deceased were staying together and were last seen together at home of PW7 where traditional liquor was sold. The person I arrested is accused on the screen.”

The accused is the one who led police to the house where a blood stained mattress, panga and slasher from his house. When asked about the blood stains, accused said he had seen it on that day. It was however confirmed by the witness that the one roomed house is where accused was staying.

The prosecution did not produce any eye witness who saw the accused inflict injury on the deceased. The prosecution was therefore relying on circumstantial evidence to prove the charge of murder against the accused.

The Kenyan courts since ***Kipkering arap Koskei & Another [1949]16 EACA 135*** have set out the parameter for determining whether

circumstantial evidence adduced can be relied on a basis of a conviction. These parameters were reinforced in *Abanga alias Onyango –vs- Republic HCC 1990* where the court of appeal stated:

- a) *The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.*
- b) *The circumstances should be of a definite tendency unerringly pointing toward the guilt of the accused,*
- c) *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused*

There was no eye witness of the incident. The prosecution is relying on circumstantial evidence to prove the charge against the accused in this case. The Court of Appeal set out the test of determining whether the prosecution has established its case against an accused based on circumstantial evidence in the case of *Abanga alias Onyango vs- Republic CRA No. 32 of 1990(UR)* in the following terms:

- a) *The circumstances from which an inference of guilt is sought should be drawn and must be cogently and firmly established.*
- b) *The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person.*
- c) *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused.*

The Court of Appeal differently constituted – Omolo, Tunoi, JJA, Ringera Ag JA in *Charles Mathenge Mwangi –vs- Republic C.A 72 of 1997* on the same issue stated:

“ The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge –see for example Re- vs- Kipkering arap Koskei & Another [1949]16 EACA 135.

The circumstances the prosecution sought to establish are that the accused and deceased had wife/or girlfriend relationship; that the accused had been seen at a changaa drinking place with accused where he bought her changaa. That 8 days later the body of the deceased was found buried in a shallow grave a few meters from accused’s house and that when police visited accused in his presence a blood stained mattress, panga and harmer were recovered. On being asked about the blood-stains he denied knowledge and it was confirmed that he was the only one staying in that house.

The accused’s defence is that he did not know the deceased, was not his wife or that he killed her. The court from the evidence, found that accused knew the deceased and he even admitted on being cross-examined. Prosecution established accused was seen with and was his girlfriend; and that the body was recovered next to his house and when police visited his home they recovered the blood stained items and murder weapon.

I am satisfied from the evidence that the prosecution has established facts from which this court irresistably finds that it is accused and no other who murdered the deceased and buried her in the shallow grove next to his house where the body was recovered.

I therefore find accused guilty of the offence of murder contrary to section 203 of the Penal Code and convict him accordingly.

DATED, DELIVERED and SIGNED at Bungoma this 3rd day November, 2021

S N RIECHI

JUDGE