



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRC NO. 124B OF 2017

REPUBLICPROSECUTION

-VERSUS-

BERNARD KELI KITHOME ACCUSED

RULING

1. **Bernard Keli Kithome** is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on the night of 9th day of September, 2017 at Kavungwa village, Kitengei sub-location in Kibwezi sub-county within Makueni county murdered **Benedetta Mutena Nguya**.

2. The prosecution closed its case after calling a total of eight (8) witnesses. None of the parties filed or made any submissions. The matter is now before me for determination on whether the prosecution has established a prima facie case against the accused for him to make a defence or not.

3. The fact and cause of death are not disputed as has been established by Pw1 and Pw2 who identified the body for postmortem. The deceased's only son Pw4 also confirmed the deceased's death. Pw8 **Doctor Josephine Mueni Maitha** vide a postmortem produced on behalf of **Doctor Makali** said the cause of death was respiratory arrest caused by asphyxia due to strangulation (*postmortem report EXB9*).

4. The deceased who was a wife to **Pw1 Nguya Mbore Keli** lived alone at her home in Kavungwa village, Kitengei sub-location. Pw1 lived with his second wife and had last seen the deceased a month prior to her demise on the night of 9th and 10th September 2017. **Pw4 John Mutua Nguya** the deceased's only son had last seen the mother a week before her demise. They had however talked on phone on 9th September, 2017 between 6:00pm – 7:00 pm. She was not apprehensive about anything.

5. The evidence adduced by the then assistant chief, **Pw6 Dorcas Mutinda** is that on 10th September, 2017 at 3:00 pm she was informed by residents of Kavungwa village that the deceased's house had not been opened that day. Further that on further peeping through the window they had seen the deceased lying down. She rushed to the scene and confirmed the report. She then called the OCS who sent officers there.

6. The house was broken into and she entered with the police officers. They found the deceased lying down with a rope around her neck and another one hanging on the roof. The body was then taken to the mortuary at Kibwezi funeral home.

7. When **Pw4 John Mutua Nguya** arrived home he discovered a number of items missing from his house which his mother occupied. The following items were missing: solar panel battery, red cross type bag, cooking oil and tee-shirt. He later found these items at the police station and identified them among others.

8. In cross examination he said the deceased used to live with the accused's sister Kamene who was a daytime worker. The deceased had prior to her death terminated Kamene's employment.

9. **Pw3 Mbulwa Ndambuki** testified that on 16th September, 2017 at 5:00 pm one Kamene Kithome came to her home to pick wheat flour and also wanted to buy cooking oil from Kavungwa. She requested her to escort her which she did, but she did not get the cooking oil. Pw3 offered to give her some from her home. They went back and on the way Kamene picked two children of her sister Ndila, who told her that the accused had taken a plastic bottle and gone to the bush. Pw3 gave Kamene the cooking oil and they parted.

10. Early morning of the next day, Kamene reported to him that the accused had come home with a bottle containing cooking oil. The accused, Kamene and Ndila lived in one home. The witness inquired from Ndunge Mutungwa the shopkeeper whether she had sold any cooking oil to the deceased and she denied.

11. The witness then tried to trace the accused's footsteps into the bush in vain. She however found a hole which had footmarks, around it, with anthills. She removed the soil and saw a bag buried thereunder. On opening the bag, she found a packet of jogoo unga, car battery, tee-shirt, omo and cooking oil.

12. She placed them back in the bag and called the headman and Ademta committee school member. They came alongside teachers of the school plus their head teacher. Police were alerted and the accused was arrested. Mutua (Pw4) did not identify any of the recovered items.

13. **Pw7 Corporal Kennedy Otieno** was one of the officers who went to the scene after a report had been made at the station. He was also present during the postmortem. On 18th September, 2017 they received a report from Pw6 of an intended burning of the accused and another. Officers ran to the scene and took away the accused to Mtito Andei police station. The next day he was taken to Kibwezi police station for purposes of recording a confession.

14. He said footmarks had led them to recoveries of EXB1-7 in a hole. Two days after the incident the accused had led them to the recovery of the lessa (EXB8) used to strangle the deceased. That the lessa was in the deceased's house. He further stated that the accused had been found in possession of items stolen from the deceased's house.

15. In cross examination he said the items were recovered by members of the public. The lessa (EXB8) was never taken for any forensic investigation.

16. I have considered the evidence on record and the only issue for determination is whether the prosecution has established a prima facie case to warrant the accused being placed on his defence. What then is a prima facie case? The test of this was settled in the case of **Bhatt – vs- Republic (1957) E.A 332** where the Court of Appeal expressed itself 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 is made out if at the close of the prosecution case it is merely one which 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 “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”

17. As stated earlier the evidence relied on by the prosecution is purely circumstantial as there was no eye witness. For such evidence to found a conviction it must adhere to certain standards. The same were set out in the case of **R –vs- Kipkering Arap Koske & Anor (1949) 16 EACA 135**.

18. This was followed in the case of **Sawe –vs- R (2003) KLR 364** where the Court of Appeal held as follows:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, this burden always remains with the prosecution and never shifts to the accused.

4. The existence of any general custom, which the court intends to rely on must be proved by evidence.

5. The circumstantial evidence in the instant case did not irresistibly point to the Appellant to the exclusion of all others so as to justify conviction.

19. Being guided by the above decisions, I now wish to examine the evidence that has been adduced herein. There has been mention of a person called Kamene Kithome who gave out some information to **Pw6 Mbulwa Ndambuki**. The said Kamene used to work for the deceased during the day. She had been relieved of her duties just before this incident. The said Kamene is a sister to the accused and lived together with the accused and their sister Ndila. Would she not have been a crucial witness or suspect in this case? Nothing has been said of her whereabouts.

20. Pw6 who was an assistant chief at the time of incident but now a chief stated this during her evidence in chief:

“After the burial on 18thSeptember, 2017, I was called by residents of Kavungwa who said some domestic items were found in a hole near Kavungwa primary school. It was in a bush. I also received a call saying the accused had been sighted walking near the hole with the items. The items belonged to the deceased hence the suspicion. We proceeded to the scene near the school”.

21. From this statement two issues clearly come out. These are:

- That the accused had been sighted walking near the hole carrying the items (EXB1-7).
- The said items were identified as belonging to the deceased.

There is no witness who testified as having seen the accused with EXB1-7 while walking near the hole discovered by Pw3. Pw6 did not reveal who had called her. This is crucial evidence that was omitted. Secondly besides Pw8 producing EXB1-8 as recovered items, there was no identification of the said items by the witnesses to confirm that they belonged to the deceased.

22. Pw4 who is the son of the deceased and who could have identified the items never did. When he testified on 4th June 2018 as Pw4 the prosecuting counsel promised to recall him later for purposes of identifying the items. It was never done. Even Pw3 confirmed that Mutua (Pw4) never identified the recovered items.

23. Pw8 the investigating officer alluded to the fact that there were things the accused told them and he sent him to Kibwezi police station for purposes of recording a confession. There is no evidence on record to confirm whether any confession was recorded from the accused. In any event, had any confession been taken it would have formed part of this evidence by being produced and admitted if properly taken.

24. Pw8 also talked of a lessa (EXB8) used to strangle the deceased which was recovered two days after the incident and upon the accused leading them to the deceased's house. From the evidence on record this assertion by Pw8 cannot be true. This incident is said to have occurred on the night of 9th September, 2017.

25. Two days thereafter would be after 11th September 2017 night. The accused was only apprehended on 18th September, 2017 after the burial and taken to the police station. It is therefore not clear where Pw8 found the accused two days after the incident for him to be taken to the deceased's house for the recovery. He was not even a suspect by then, so how could he have been taken to the deceased's house to give the police a lessa?

26. The only evidence the prosecution is relying on to prove their case is the recovery of the items EXB1-7. The evidence has failed to prove that EXB1-7 were with the accused and that it is him who placed them in the hole. The said exhibits (EXB1-7) were never identified as belonging to the deceased as to create a link between the accused and the deceased's death.

27. After analyzing the evidence and the several loopholes pointed out above, I do find the prosecution case to fall short of what is required to establish a prima facie case. The suspicion is there but there has to be more to it. See **Sawe –vs- R** (supra). The evidence adduced cannot stand alone to form the basis of a conviction.

28. For my part I find the accused not guilty and acquit him under section 306 (1) Criminal Procedure Code. He shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 3rd day of April 2020, in open court at Makueni.

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H. I. Ong'udi

Judge