



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO.9 OF 2017

REPUBLIC.....PROSECUTION

-VERSUS-

ANTONY LEKUTA OLE TALALA1ST ACCUSED

TOMITO TALALA DOMINIC 2ND ACCUSED

ROSELYN NENDAYA RONGOEI.....3RD ACCUSED

JUDGMENT

1. By an information dated the 25th July 2017 the accused persons, **ANTONY LEKUTA OLE TALALA, TOMITO TALALA DOMINIC** and **ROSELYN NENDAYA RONGOEI** were charged with the offence of murder contrary to *section 203 as read with section 204 of the Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence in the information dated 25th July 2017 are that on the night of 9th and 10th February 2012 at Shartuka Centre in Transmara west sub-county within Narok County jointly with others not before court murdered **LKT**.
2. The prosecution called 7 witnesses, Eliakim Tuno Kukutia (Pw1), Daniel Tobiko Kukuta (Pw2), Philip Masaulo (Pw3), Khishoyian Augustine Lepose (Pw4), Eric Lemayan Paapai (Pw5), Kelvin Laparan Kana (Pw6) and No.62264 CPL Henry Kilonzo (Pw7), in support of its case against the accused persons.
3. Prior to the death of **LKT** ('deceased'), she was suspected to have caused the death of Esther Makolo who was Pw2's wife. There were allegations that Esther Makolo died because she was bewitched by the deceased and that the 1st and 3rd accused persons who were related to Esther Makolo hatched a plan to avenge her death. The plan involved killing the deceased.
4. The evidence emerging from trial in support of the prosecution case was as follows.
5. Pw1 testified that the deceased was his sister. He recalled that on the 8/2/2012 she got a call from the deceased who complained that her life was in danger as it was being alleged by the 1st and 2nd accused persons that she bewitched Esther Makolo. He testified that the deceased came to his home the following day but left to go to her home at 7.00 p.m. On 10/2/2012 he received a call from his brother that they could not find the deceased in her home but found the door broken and a jerrican with blood in the house. They began searching for the deceased at about 4.00p.m and eventually found her naked body lying on top of the hill. The deceased's body had injuries all over her body. Pw1 testified that he did not see the 2nd and 3rd accused persons kill the deceased.
6. Pw2 told court that the deceased was his sister. He testified that on the 21/1/2012 his wife, Esther Makolo, who had been unwell, died. The 3rd accused informed him that the deceased is the one who had bewitched his wife and for those reasons he did not allow the deceased to attend his wife's funeral. He recalled that later on the 3rd accused person invited him to her place where he found all the accused persons drinking chang'aa. The 3rd accused then told him that she would avenge Esther Makolo's death against the deceased who bewitched her sister. The following day he found out that the deceased had been killed. He told court he did not see the accused persons kill the deceased.
7. Pw3 testified that he conducted post mortem on the body of the deceased. The body was identified by Mose Kitugat Seran and Pw1. He told court he conducted the postmortem on the 15/2/2012 at around 1.30 p.m. at Transmara Medical Care Hospital. The deceased was a naked female African lady aged about 24 years with an average height of 160cms. The body had multiple bruises. On the scalp there were multiple bruises and also 10cms by 10 cms bruise on the right side of the chest. The deceased had a bruise on the right side of the abdomen another bruise on the right side of anterior thigh. There was a mark around the neck, swollen eyelids and he also observed redness of the eyes. The spinal cord was broken at cervical bone C7 and C6. He formed the opinion that the cause of death was strangulation using a rope.
8. Pw4 recalled that on the night of 9th February 2012 he was mourning the loss of his sister and he left with his friends (Pw5 and Pw6) to

spend the night at Pw6's house. Pw5 suggested that they first pass by the 3rd accused person's place to get a drink and upon arrival they bought alcohol worth 60/-. They finished their drink and left. As they were walking to Pw6's house they heard screams from the deceased near AP. They found both the 1st and the 2nd accused at the scene and the 2nd accused held the deceased's hands. The 1st accused inquired where they were headed to and they informed him they were from his home heading to Pw6's home. As they talked the deceased set herself free and ran into her house. The persons in the company of the 1st accused person followed the deceased into the house while the 1st accused person asked them to leave and warned them not to talk or else they would know he is "serekali". The following day they heard that the deceased had been murdered.

9. He testified on cross examination that he did not know the deceased before that incident and that he met them for the first time that night. He testified that he was charged with murdering the deceased together with other 3 accused persons but they were discharged. The 1st accused testified as a witness in the said case.

10. Pw5 recalled that on 9/2/2012 they took chang'aa up to 11.00p.m at night before leaving for Pw6's house. Whilst on the way to Pw6's house they heard a woman pleading that they should let her go. He told court that there was moonlight on that night. They went to find out what was happening and saw 3 men and 1 woman. One of the men held the woman but upon seeing them he let the woman go and she entered the house. He testified that he cannot identify the said people as there was only moonlight. He testified that he also did not know the assailants as it was the first time he was seeing them. He testified that he had been charged with the murder of the deceased and the 1st accused testified against them.

11. Pw6 testified that at around 10:00 p.m. while in the company of Pw5 and Pw6 they decided to buy us chang'aa at the 3rd accused person's place. They left at 11.00 p.m. As they were going to Pw4's house they heard screams of a woman near the AP Post saying "leave me". They followed the voice and found the 1st and 2nd accused persons holding the deceased. When the accused persons saw them they released the deceased whereupon she ran into the house. They left after the 1st accused person spoke to them.

12. Pw7 testified that he visited the scene at Shartuka in the company of other officers where the body of the deceased had been found. He told court that after taking photographs they carried the deceased's body to the mortuary at Tansmara Medicare hospital. He testified that at the scene they met the deceased's daughter EN aged 5 years. They learnt that during the murder the deceased had been dragged from her house in the presence of the child they presumed that the deceased was murdered as the child watched. He told court that they recorded statements from different witnesses and on 11th February 2012 they were informed that the 2nd accused person approached the 1st accused person with information regarding the murder. The 2nd accused person confessed to the murder. The 2nd accused person explained that they had been taking chang'aa at the home of the 3rd accused person where the plan to murder the deceased was hatched. It is on the strength of his confession that the 3rd accused person was arrested. The 2nd accused person also mentioned Pw4 and Mwani Karia. He told court that the 4 were charged together. He was thereafter transferred from Transmara. He testified that he didn't know how the decision to charge the 1st accused person was arrived at as he was very resourceful while they conducted their investigations. He testified that based on his investigations he did find not any basis to charge the 1st accused person.

13. The prosecution closed its case and by a ruling of this Court, the accused persons were placed on their defence. The 1st accused person gave sworn testimony while the 2nd and 3rd accused persons gave unsworn testimony. Dw1 testified that on the material day he went with Joseph Barlingo in his home. They ate and had some liquor before sleeping and he did not see the deceased on that day. When he woke up the following day he got an intelligence report that someone had been killed and he proceeded to the deceased home where the body was found by the hill top and later, the accused persons were arrested and charges preferred in High Court Criminal Case No. 30 of 2012 at Kisii. He was later arrested and the accused persons in High Court Criminal Case No. 30 of 2012 at Kisii testified against him. He has received threats from Pw6 who works with the CID. He testified that in any case if the deceased was screaming the police at the police post which is very close nearby would have heard her.

14. Dw2 testified that he was tricked by a girl who told him that she had a patient in hospital that she wanted transferred to Kilgoris. He left with the girl and upon arrival at the hospital he was arrested for killing the deceased. He testified that the officers had assaulted him and falsely accused him of killing the deceased.

15. Dw3 denied committing the offence and testified that the day before the death of the deceased she was at her brother's boma who had lost a child. When she returned home she was informed that the deceased was found dead on the hill.

16. The 1st accused filled written submissions on 2nd March 2020. It was submitted that the witnesses who testified against the 1st accused person had been earlier charged with the murder of the deceased and that the investigating officer was surprised that the 1st accused who was a crucial witness and assisted with investigations was now charged by the prosecution.

17. The 2nd and 3rd accused persons filled their joint submissions on 20th February 2020. They questioned why the prosecution did not avail the deceased's child who was a direct witness to the deceased's murder. It was argued that the prosecution failed to establish the doctrine of common intention on the part of the accused persons.

18. The prosecution submitted that they would rely on the evidence on record.

ANALYSIS AND DETERMINATION

19. For the offence of murder under **section 203 of the Penal Code** to be proved, the prosecution must establish the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

20. The fact and cause of the deceased's death is not in issue. Pw3 was the doctor who performed the post mortem testified that the deceased's body had multiple bruises. She had a mark around the neck, had swollen eyelids and redness of the eyes. He told court that the spinal cord was broken at cervical bone C7 and C6 and formed the opinion that the cause of death was strangulation using a rope.

21. The critical question for determination is whether the accused persons caused the unlawful death of the deceased.

22. The only testimony linking the 3rd accused person to the murder is the testimony of Pw1 and Pw2 who testified that the 3rd accused person had threatened the deceased because she believed the deceased bewitched Esther Makolo. The testimony of Pw4, Pw5 and Pw6 was that they did not see the 3rd accused person with the deceased on the material night. According to the testimony of Pw4 and Pw6, they did not see the accused persons kill the deceased but saw the 2nd accused person holding the deceased. The 1st accused person warned them not to say anything about the incident. However the incident Pw4 and Pw6 were referring to happened at night and the only source of light was moonlight. In **Cleophas Otieno Wamunga V. R, (1989) eKLR**, this Court cautioned that;

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery C.J. in the well-known case of R -Vs- Turnbull [1876] 3 ALL ER 549 at page 552 where he said:-

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometime made."

23. Pw4 and Pw6 testified that they saw the 1st and the 2nd accused person because of the moonlight. Pw5 on the other hand testified that he could not identify any of the persons involved in the altercation because there was only moonlight. The evidence of Pw5 suggests that the lighting from the moonlight was not sufficient to identify any of the assailants. I find that the evidence of identification was shaky and identification of the accused persons was not to the required standard.

24. Pw1 testified that the deceased prior to her death feared for her life as the 1st and the 3rd accused persons had accused her of killing Esther Makolo using witchcraft. Pw2 testified that the 3rd accused person believed that the deceased caused the death of Esther Makolo and that she would seek revenge against the deceased person. Pw4, Pw5 and Pw6 testified that they heard the deceased scream as they went to Pw6's home. Pw4 testified that the 1st and 2nd accused persons were amongst the deceased attackers. They left after the deceased had escaped and entered her house. It therefore follows that none of the prosecution witnesses saw the fatal blow that caused the death of the deceased and the prosecution case is largely based on circumstantial evidence.

25. The principles against which these circumstantial facts must be weighed in order to establish whether the prosecution has proved a case against the accused were outlined in the case of **Joan Chebichii Sawe v Republic CA NRB Criminal Appeal No. 2 of 2002 [2003] eKLR** where the Court of Appeal laid down the test to be considered when a court is presented with circumstantial evidence as follows:

“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

26. The accused persons in their defence, denied being in the vicinity when the crime occurred. The accused persons have challenged the credibility of Pw4, Pw5 and Pw6 on the basis that the witnesses had been earlier charged with the offence of murder of the deceased in High Court Criminal Case No 30 of 2012 at Kisii. The prosecution's case lies on credibility of prosecution witnesses. Pw7 who was the investigating officer questioned the prosecutor's decision to charge the 1st accused person. He testified that based on his investigations he did find not any basis to charge the 1st accused person. The evidence of Pw7 who was the investigating officer and independent witness casts doubt in the evidence given by the Pw4, Pw5 and Pw6.

27. The Court of Appeal's decision in **Erick Onyango Odeng' v. Republic [2014] eKLR** cited with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in which it was held as follows:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

In the end I find that the discrepancy caused by the testimony of Pw7 was so fundamental as to cause prejudice to the accused persons (See **Joseph Maina Mwangi v Republic [2000] eKLR**).

28. I have considered the totality of the prosecution's case and it is my view that the prosecution has failed to prove that the charge against the accused beyond reasonable doubt. I therefore acquit **Antony Lekuta Ole Talala, Tomito Talala Dominic and Roselyn Nendaya**

Rongoei for the murder of **LKT** and they are set free unless otherwise lawfully held.

Dated, signed and delivered at Kisii this 21st day of May 2020.

R.E. OUGO

JUDGE

In the presence of;

1st Accused Person Present

2nd Accused Person Present via Zoom in Kisumu GK Prisons

3rd Accused Person Present

Mr. Otieno

Mr. Sagwe For the 2nd and 3rd Accused Persons

Mr. Otieno Senior State Counsel Office of the DPP

Rael Court assistant