



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 26 OF 2014

REPUBLIC.....STATE

VERSUS

MARY WANGOI WAWERU.....ACCUSED PERSON

JUDGMENT

1. The Accused Person, Mary Wangoi Waweru, faces the charge of murder. It is alleged that on the 1st day of February, 2014 at Kasarani Estate, Elburgon in Molo District within Nakuru County, the Accused Person murdered Simon Ng'ang'a.

2. The Accused Person pleaded not guilty and the case proceeded for full trial. The Prosecution called eight witnesses. The Learned Lady Justice Odero heard all of them and at the conclusion of the Prosecution case found that the Prosecution had established a prima facie case and placed the Accused Person on her defence. The Learned Judge was, however, transferred out of the station before she could complete trial. It fell upon me to preside over the defence hearing. The Accused Person gave an unsworn statement and called no witnesses.

3. Curiously, most of the evidence adduced at the trial was uncontested. The following evidence emerged through the witnesses.

4. The Deceased was a common-law husband to the Accused Person.

“Common-law” husband because the Deceased was married to another woman – Jane Wanjeri Ng'ang'a (PW3) – who was considered by the accounts of the other witnesses, the “first” wife. The Deceased was last seen in good health by Susan Kabura Njoroge, his daughter with Jane (PW3).

5. Susan testified as PW2. She recalled seeing her father on 01/02/2014 – a Saturday. It was around 3:00pm when he took a shower, dressed up in green trousers; checked shirt; and a black jumper and left home. He did not return home that evening; and the next one. The next time Susan saw the father was on 03/02/2014 late in the night. She heard her mother (PW3) crying outside their house. When she went out to check what was going on, she found an ambulance outside their house. Her father, the Deceased was inside, accompanied by two other people – a man and a woman. The Deceased was visibly unwell. Susan told the Court that the man, whom he did not recognize at the time, told him that he had found the Deceased lying at Elburgon DEB Primary School and decided to take him to hospital.

6. Jane, the other wife to the Deceased and mother to Susan, testified as PW3. She told the Court that she left the Deceased at home on 02/02/2014; that her children told her that the Deceased left home later that day; that the Deceased never came home that evening; that she called his phone at around 10:00pm to check on him but it did not go through. Jane testified that the Deceased did not come home the following day as well and she was worried. Later that night, a “doctor” by the name Hellen came in an ambulance to her house.

Inside the ambulance was her husband (the Deceased) and two other people she did not recognize.

7. Jane testified that Hellen told her that her husband had been “beaten.” She and Susan (PW2) got into the ambulance and headed to Nakuru PGH Hospital where the Deceased was admitted. He unfortunately passed on the following day. Jane said that in the ambulance, the man and the woman told them that they had found the Deceased lying in a ditch and that they recognized him and decided to take him to the hospital.

8. John Njoroge Gitau is a Community Policing Officer in the Elburgon Area. He testified as PW4. He told the Court that on 02/12/2014, he got a call from a Leah Wanjiru, the daughter to the Accused Person. The caller informed him that there was a problem at their home. John went to their home and found the Deceased lying in a chair seemingly unconscious. He knew the Deceased to be a husband to both the

Accused Person and Jane (PW3). On seeing the condition of the Deceased, John said he instructed the Accused Person to call for a taxi. She did so and one came. Together, they took the Deceased to Elburgon Hospital. The medical personnel at Elburgon Hospital advised them that the Deceased needed to be taken for specialized treatment at Nakuru PGH Hospital in an ambulance. He instructed the ambulance to pass by the house of Jane, PW2, so that she can accompany them to the hospital.

9. John testified that he saw nothing suspicious at the home of the Accused Person when he got there. He did not see any blood or weapons and neither did he see any visible injuries on the Deceased.

10. The taxi driver who was summoned by the Accused Person at the instructions of John on the night of 02/02/2014 was Duncan Mwangi Muthomi. He testified as PW1. He testified that he got a call from the Accused Person and was told that there was a sick person to be ferried to the hospital. He went by the home of the Accused Person where he found her and another person. They put the sick person on to the taxi and he drove to Elburgon Hospital. They paid him Kshs. 1000/-. He waited for about ten minutes then left.

11. Dr. George Biketi testified as PW5. He testified in place of Dr. Ngulungu who performed an autopsy on the Deceased on 06/12/2014. Dr. Ngulungu was then on strike and the Defence had no objection to Dr. Biketi producing the autopsy report on his behalf since he was familiar with his handwriting.

12. The autopsy report showed that the body had injuries on both the upper and lower limbs. There were bruises on frontal and occipital regions of the scalp. There was blood in the brain indicating trauma to the head. The lungs were collapsed. The Pathologist concluded that the cause of death was Pulmonary Thrombosis Embolism as a result of soft tissue injuries due to multiple blunt force trauma. The autopsy report was produced as an exhibit in the case.

13. The Investigating Officer, PC Charles Ochieng testified as PW8. He took the Court through his investigations from the time a report was made at Elburgon Police Station on 04/02/2014. He visited the home of the Accused Person that evening. Upon search, he testified that he recovered a black metal pipe which he said had blood stains. He took the pipe for analysis together with the clothes of the Deceased which were taken to him by PW3. He produced these items as Exhibits in the case.

14. The final Prosecution Witness was Ms. Anne Wangeche Nderitu, a Government Analyst. She testified on behalf of Mr. H.K. Sang and produced a Report dated 12/11/2015. She testified that she had worked with Mr. Sang for more than 10 years and knew his handwriting. There was no objection to her producing the report. The Report produced indicated that the Police took for analysis a metal pipe; a pair of black trousers; a grey checked shirt; a grey inner wear and a blood sample indicated to be from the Deceased. Upon analysis, the Government Analyst concluded that:

a. The metal pipe had no blood stains.

b. The pair of trousers; shirt; and inner wear were lightly stained with blood which matched the blood of the Deceased leading to the conclusion that the blood stains were from the Deceased.

15. Put on her defence, the Accused Person gave an unsworn statement. She said that on the day of the incident, it was a Sunday. She said she woke up and went to Church. Later on, she went for a fellowship at 5.00pm and left her grand-daughter at home. She said she came home at 6.30pm and found the Deceased lying on the ground outside her house. Her grand-daughter, she said, told her that some people had brought him from his drinking place. She said that the Deceased used to drink a lot and had just been discharged from hospital and had been told to stop drinking.

16. The Accused Person told the Court that upon seeing her husband in that state, she became confused and hysterical. She went to the Chief but only found the wife of the Chief who gave her the Village elder's phone number. She said she called the village elder's phone number and he went to her house. They then called for a vehicle to take the Deceased to the hospital. He was referred to Nakuru PGH Hospital and they took him there where he was admitted and remained until his death.

17. The Accused Person insisted that she did not kill her husband and had no idea who had beaten him if he, indeed, died of multiple force trauma.

18. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

19. Given this definition of murder, for the Prosecution to prevail and obtain a guilty verdict in the case, it needed to tender evidence beyond reasonable doubt of the following three crucial ingredients:

a. That death of the victim occurred (*actus reus*);

b. That the death was caused by an unlawful act or omission by the Accused Person; and

c. The unlawful act or omission was actuated by *malice aforethought*.

20. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not;

b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not;

c. Intent to commit a felony; or

d. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

21. The task of the Court, then, is to decide if on the evidence adduced, the Prosecution has established the three elements of the offence of murder against the Accused Person beyond reasonable doubt.

22. None of the Prosecution witnesses was present and saw any attack on the Deceased. This left the Prosecution to rely on circumstantial evidence to prove its case.

23. It is true that circumstantial evidence is, often, the best evidence. So said the Court of Appeal in *Neema Mwandoro Ndurya v. R [2008] eKLR*, where it cited with approval an English Case, *R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20* where the English Court stated that:

Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.

24. In *Joan Chebichi Sawe versus Republic [2003] eKLR* the principles that guide the Court in evaluating circumstantial evidence were laid out in three tests as follows:-

a. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

b. Those circumstances should be of a definite tendency unerringly pointing towards 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 and none else.

25. Earlier on, *Kipkering Arap Koske versus R. [1949] 16 EACA 135*, long considered a *locus classicus* on this issue, had compressed the principles into two thus:

a. The inculpatory facts must be incompatible with the innocence of the accused.

b. The facts must be capable of no other conclusion or explanation except the guilt of the accused.

26. However, as several Courts have pointed out, even where the Court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. As the Court of Appeal remarked in *Simon Musoke versus Republic [1958] EA 715* while citing *Teper versus R. [1952] AC 480,489* before drawing the inference of an Accused Person's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

27. Applying these principles to the present case, can we truly say that the "circumstances taken cumulatively... 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 Persons and none else"?

28. I am not persuaded that this is the case here. I say so for the following reasons.

29. First, the "smoking gun" in the case proved to be a dud. The Investigating Officer recovered what he thought was the murder weapon; supposedly hidden in the Accused Person's bedroom: a metal pipe. The Investigating Officer thought he saw blood stains on the metal pipe and sent it to the Government Analyst for analysis. The verdict was conclusive: there were no blood stains on the metal pipe.

30. Second, there was no evidence linking the Accused Person with the death of the Deceased – not even evidence of opportunity. The Prosecution simply produced no evidence that tended to demonstrate that the Accused Person had the opportunity to kill the Deceased and that she, in fact, did so.

31. Third, the conduct of the Accused Person in the wake of the death of the Deceased seems inconsistent with a guilty mind or a fraudulent mind calculating to create a perception of innocence. It was the Accused Person who called the Village Elder who instructed that they call a taxi; and then they together took the Deceased to Elburgon Hospital. The Accused Person remained in the company of the Deceased as they took him to Nakuru PGH Hospital and visited him the following day. This would be an odd conduct of someone who had just viciously attacked the Deceased.

32. Fourth, considering that there were other people at the home of the Accused Person when the assault allegedly happened, it must be assumed that they were not called to testify because their evidence would have been adverse to the Prosecution. Additionally, the first witnesses to the scene – the Village Elder (PW4) and the Taxi driver (PW1) – testified that they did not witness any scene resembling one

where an assault had taken place and neither did they witness any blood or injuries on the Deceased.

33. Finally, in the circumstances of this case, the Defence theory raises reasonable doubts on the Prosecution narrative even if the narrative was otherwise sufficiently solid. The Accused Person testified that she found the Deceased lying on the ground outside her house and immediately swung into action to get him medical attention. She was, then, surprised to be tarred with the accusation that it was she who had caused the death of the Deceased. This is a probable defence narrative which the Prosecution did nothing to demonstrate was implausible in the circumstances.

34. All in all, the circumstantial evidence adduced in this case was insufficient to establish that the death of the Deceased was a homicide perpetrated by the Accused Person. I will, as the law requires, give her the benefit of doubt established by the facts and circumstances. While there may be a basis to suspect the Accused Person in the circumstances of this case, that is not enough. Our law wisely dictates that suspicions, however strong, cannot take the place of evidence (See **Sawe v R [2003] KLR 364** where the Court of Appeal held that

“suspicion, however strong, cannot provide the basis of inferring guilt *which must be proved by evidence beyond reasonable doubt.*”).

35. In the circumstances of this case I conclude, upon appropriate evaluation of the evidence presented that it can properly be said that the “*inculpatory facts are [not] incompatible with the innocence of the [three Accused Person], and [are] capable of explanation upon ... other reasonable hypothesis than that of [her] guilt*” to paraphrase **R v Kipkering Arap Koske & Another** 16 EACA 135. The available evidence does not compellingly and ineluctably point to their guilt.

36. It is, therefore, my finding that the Prosecution has failed to prove beyond reasonable doubt all the three elements of murder against the Accused Person. Consequently, I find that the Accused Person is not guilty of the offence of murder of Simon Ng’ang’a.

I, accordingly, acquit the Accused Person, Mary Wangoi Waweru under section 322(1) of the Criminal Procedure Code. She shall be set at liberty unless otherwise lawfully held in custody.

37. Orders accordingly.

Dated and delivered at Nakuru this 15th day of October, 2020.

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JOEL NGUGI

JUDGE