



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 8 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL WANYONYI WEKESA.....ACCUSED

J U D G M E N T

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence was that **on the night of 2nd and 3rd March 2015 within Trans Nzoia County murdered MN**.

2. The accused pleaded not guilty. The prosecution called 4 witnesses to establish its case. The accused offered unsworn evidence in defending himself.

3. The prosecution evidence can be summarised as hereunder.

PW1 Rebecca Nekesa Simiyu testified that on 2nd March 2015 at 8.30 pm She went to a shop to buy some groceries. He found the accused as well as the deceased there. The accused bought her some soda. The deceased equally bought rice and soap and she left. She however forgot soap and she called her back. The accused gave her remainder of his soda to finish. They thereafter left together towards deceased home. The following day in the morning she heard people screaming and she went to the scene where she saw the deceased body with multiple injuries and blood oozing from the mouth.

4. **PW2 EN** was the deceased mother. She said that she sent her to the shop that evening but she did not come back. She looked for her till around 4.00 am. At around 6.00 am she heard people screaming near the blue gum trees and on rushing to the scene she saw her body. She had been raped and strangled. She said that she went looking for her at the funeral vigil which was at the neighbourhood but all in vain. The police later came and collected the body. She equally attended the post mortem exercise.

5. **PW3 Kennedy Khisa Musogo** testified that he was the shopkeeper where the deceased came to buy some groceries as well as the accused. He said that the accused bought two sodas and began drinking. The deceased "toto" and the accused left together towards direction where there were blue gum trees. Rebecca (PW1) left to her house alone. He did not know where the accused stayed. The following morning he heard of the incident. He saw the deceased body.

6. **PW4 Dr. Faustin Shitote** from Kitale District hospital carried out the postmortem exercise and concluded that the cause of death was fracture of the neck with dislocated right arm and broken hymen.

7. **PW5 Sergeant Peter Kinyua** carried out the investigations and preferred charges against the accused. The substance of his finding were that he had last been seen with the deceased. On cross examination he admitted that he filled the postmortem details which showed that deceased had gone for a funeral vigil.

8. In his unsworn defence the accused stated that he was from work on 1/3/2015 when he decided to go to the shop to get a soda. PW1 requested for soda and he bought for her. The deceased came to the shop and purchased some items and left. He also left after taking the soda.

9. The following day as he went to his place of work he saw many people on the road and then saw the deceased body. He was arrested on a Wednesday and taken to Endebess police station and later charged.

Analysis and Determination

10. I have read the submissions by both counsels for the accused and the State. This is purely a case based on circumstantial evidence. There was no eye witness to the incident. PW1 and PW3 saw both the accused and the deceased at the shop. According to them the

deceased took soda and infact bought for PW1 a bottle.

11. Both maintained that the deceased left with the accused. PW1 on the other hand states that the deceased purchased rice and soap but forgot to take the soap and she called her back. That infact the accused gave her his remaining soda to finish. The last part of the deceased drinking the accused soda was not corroborated by PW3.

12. Even then it appears that the deceased as well as the rest of PW1 and the shopkeeper each left immediately because of darkness.

13. An interesting twist to the evidence was introduced during cross-examination of the witness namely, that there was a funeral vigil (kesha) at the neighbourhood that night. That there was loud music from that scene. In other words even if one was to shout it would have been difficult to hear.

14. Is it then possible that the deceased left for the funeral vigil after leaving the shop.

15. PW5 wrote on the postmortem report as follows:-

“ The deceased left her parents home at [particulars withheld] on 2/3/2015 at 8.00 pm and was found murdered on 3/3/2015 at around 7.00 am. She had allegedly gone to a neighbours home for overnight vigil (kesha)”

16. PW5 however stated that he could not recall who gave him the information.

17. The deceased mother as well stated that she looked for her all the night as far as the funeral (kesha) vigil venue.

18. With the above grey area, can one conclude that

“ exculpatory facts had to be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis but that of guilt-----”?

(See Dhalay Vs Republic (1995 – 1998) 1 EA 29.)

19. Apparently none of the witness was able to state where the accused stayed. All that was pointed out was that the deceased left with the accused towards the direction of the deceased's home.

20. I have anxiously weighed the circumstantial evidence herein and it is very difficult to pinpoint that the accused caused the deceased death. There was no evidence that the accused knew each other with the deceased, although it appears at least from the evidence of PW1 and PW3 that he was a known person.

21. The sum total of this court's finding is that benefit of doubt ought to go to the accused. He is hereby set free under the provisions of Section 215 of the Criminal Procedure Code.

He be set free unless lawfully held.

Delivered, signed and dated at Kitale this 11th day of February, 2019.

H.K. CHEMITEI

JUDGE

11/2/19

In the presence of:

Mr Omoria for the State

Mr Abari for Accused

Accused – present

Court Assistant – Kirong

Judgment read in open court.