



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 57 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

BENIGNO KUBASU ANGASA.....ACCUSED

JUDGMENT

1. The accused **BENIGNO KUBASU ANGASA** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on 2nd day of July 2014 at 9.00 p.m. at Kariobangi South 56 stage within Nairobi County murdered **SARAH KERUBO**.

2. On 14/7/2014 he appeared before Muchemi J. for plea taking when he pleaded not guilty to the charges and his trial fixed for 23rd and 24th March 2015. In the meantime on 31/7/2014 he appeared before the Judge for the hearing of an application for bail when the Judge (Muchemi J.) ordered for Pre-bail report on his suitability to be released on bond. On 10/10/2014 the file was placed before Lesiit J. for directions since Muchemi J. had proceeded on transfer and by a Ruling dated 30th October 2014 declined to grant the accused bail but with liberty to review the application at a later stage.

3. After several Mentions, on 27/4/2015 the accused went back before Justice Lesiit for review of the order on bail and by a Ruling dated 4th June 2015 the said application was rejected. The accused has therefore been in custody throughout the period of this trial.

4. On 30/11/2015 the trial commenced before me and the same proceeded with adjournment in between upto the 29/11/2018 when the parties herein made their final submissions. At the close of the trial herein I heard the evidence of nine (9) prosecution witnesses and the accused defence.

PROSECUTION CASE

5. The prosecution case was that the accused and the deceased were married in a come-we-stay (Common law) marriage with one child. The accused was working as a matatu driver while the deceased who had been admitted for Early Childhood Training, had secured Scholarship to go to Germany for one year and was in the process of putting her documents together for the said purpose. During the period of their short union they lived at Morlem but at the time of her death moved to a flat next to the parents of the deceased and as shown through evidence tendered in court, the accused wanted his wife to be a house wife while he works which I assume following the biblical principles that the husband should be the bread winner while the wife the home maker.

6. Their marriage seemed not to had been a happy one, characterized with domestic violence leading to the deceased going back to her parents and back to the accused from time to time and allegations from the accused that the mother-in-law was interfering with the union leading to the deceased transferring their child to a school next to her mother's house and that is what led the duo on 1/6/2014 to move next to the parents where they were living as at the time of the death of the same.

7. That the marriage was characterized with violence and domestic abuse was confirmed by **PW4 SIPORA MORAA NYASAYE** the mother of the deceased whose evidence was that in the year 2009 the accused had beaten the deceased causing injuries on her face and eye for which she took her to a clinic in Buruburu but the deceased as a loving wife declined to make a report to the police. In the year 2011 there was a further allegation that the accused had assaulted the deceased and thrown her out of the house unconscious for which she was admitted at St. Mary's Hospital Nairobi for a period of five (5) days and upon the matter being reported to the police, the deceased once again went back to the accused whom she considered the father of her child. In the year 2012 the deceased left the accused for her parents' home after he had once again assaulted her causing her loss of teeth. This evidence was corroborated by **PW9 BENARD OMWENGA** a Clinical Officer at St. Veronica Health Clinic Buruburu who attended to the deceased who was taken to the clinic by **PW4** on allegation of having been assaulted by a boyfriend using kicks and blows and having been drugged on a rough road sustaining injuries to the cheeks, neck, stomach, legs and head. He prepared a summary for her to go with and seek legal address from the police. He produced medical records to

support the allegations of assault on 12/9/2009.

8. It was **PW4's** evidence that the deceased who had been staying with them for one year was on 1st July 2014 called by the accused on phone and left for his house. On 2/7/2014 at 6.00 a.m. she went back to her house and took the child to school and was with her until 7.00 p.m. when she went back to the deceased house. When she left **PW4**, the deceased was in good health and that was the last time she saw her alive as she did not return the next day to take her child to school until the accused reported that she had died and body taken to the mortuary which raised her suspicion as the accused said that the deceased had died together with another lady as a result of drinking alcohol with poison "kumi kumi". He gave the name of the dead lady as Lulu who was alive and confirmed that she had seen the deceased on the 2nd buying food at Korogocho and she went with the witness to the accused house to confirm that she was alive but found that he had left the house.

9. **PW2 MILILCENT AKINYI NDISIO** was a neighbour of the accused at a flat at Kariobangi on 3rd floor door number 8 while the accused was in door number 9. Her evidence was that on 2/7/2014 at about 7.30 p.m. the deceased came into the flat and she opened for her the gate (grill) and at 9.30 p.m. the accused followed, shortly thereafter she heard commotion coming from their room with the deceased asking the accused not to hurt her leg and pleading for her phone. She heard the deceased produce a sound of being strangled and heard her plead with the accused not to strangle her. She decided to seek help from her neighbours on the ground floor and **PW1** responded with another man called **Nganga** and when they came back to the third floor they found the noise from the room had stopped. The accused opened the door slightly and informed them that there was no problem before banging it closed. At 4.00 a.m. she heard the grill being opened and the accused left the house. At 5.00 a.m. as a good neighbour she went to check on the deceased but found the door locked with a padlock. On 3rd 2014 at about 7.00 p.m. when she came back from work she found police men at the flat who inquired from her what had happened. She confirmed that there was a gate (grill) to each floor with key for each tenant and they were only two on the 3rd floor. She confirmed having seen the deceased open the door.

10. **PW1 JOSEPH WANGONDU WAMUGUNDA** confirmed having been called by **PW1** with information of a fight going on in the accused's house. He sought the company of his neighbour called **Nganga**. He did not know the people staying in door number 9 on 3rd floor but when they responded to the distress call a gentleman opened the door and asked them what the issue was before closing the door. The next day at 10.00 p.m. the police men went to the house and recorded a statement from him. He confirmed that 3rd floor was occupied only by the accused and **PW2**.

11. **PW6 PC AARON KOECH** stated that he was on duty on 3rd July 2014 at the report office when the accused came with a report that his wife the deceased had been drinking alcohol and died at home as a result of alcohol. He had with him a letter from Community Health Care Hospital dated 3/7/2014. He then issued him with an admission letter to the mortuary. Later in the evening the family of the deceased went to the station with a complaint that the accused had murdered the deceased. **PW7 PC SAMSON MUTINDA** accompanied the OCS and other police officers to Kariobangi South Area where they arrested the accused who led them to his house which they found ransacked and recovered a blood stained bed sheet. They then took the accused to Buruburu Police Station. It was his evidence that the accused was identified by the relatives of the deceased at the point of his arrest at the stage.

12. **PW3 DR. CHARLES MUTURI** performed post-mortem examination on the body of the deceased on 4/7/2014 which had the following injuries:-

- Multiple bruises and abrasion on the neck and face with nail marks on the neck.
- Abrasions on the left knee and back.
- Right eye lid swollen
- Bruises on the left rib cage.
- Bruising of the small gut.
- Multiple bruises beneath the scalp.

As a result of the said examination he formed an opinion that the cause of death was Asphyxia following manual strangulation. He further took the whole stomach contents, blood, whole kidney and liver fragment as Toxicology specimens. The body of the deceased was identified by **PW5 REBECAA KWAMBOKA NYASAYE** her sister.

13. **PW8 CORP. HEZBON OTIENO** the investigating officer testified that on 3/7/2014 at 1345 hours **PW4** reported to Buruburu Police Station that the deceased had left home on 2/7/2014 to her husband's place and did not come back home on 3rd July to take their child to school only to later meet the accused who informed her that the same had died and body taken to the mortuary which raised suspicion since he did not call them when taking the body to the mortuary. When he checked the OB he noted a report thereon made by the accused to the effect that the deceased had died out of heavy alcohol consumption and was pronounced dead on arrival at the hospital. As part of their investigations he proceeded to the scene together with the **OCS, PC MUTINDA, PC KIPSANG** and **PC MUTHOKA** and interviewed the witnesses. He later visited Community Nursing Home where the deceased had been taken by the accused on 3rd July 2014 at 5.00 a.m. which confirmed that the deceased was dead on arrival.

14. It was his further evidence that the accused was subsequently arrested and taken for mental assessment where he was found fit to stand trial. He confirmed that the body of the deceased was first taken to Total Nursing Home before the body was taken to the city mortuary. He stated that the specimen taken to the government chemist for Toxicology produced negative results. He confirmed in cross-examination that the accused was arrested in his house where blood stains were traced on the bed sheet and that he recorded statements from one **DAVID**

KABURU a friend of the accused who was with him when the news of the death of the deceased was given to the mother who said that the accused feared giving the information of death to his mother-in-law but without giving him reason. He further stated that the accused said upon arrest that the deceased was alcoholic and they used to quarrel and assault each other but used to solve their issues and resume their relationship.

DEFENCE CASE

15. When put on his defence the accused gave unsworn statement of defence and stated that he met the deceased in 2007 and were blessed with a son in the year 2008 soon after which the mother-in-law started to mistreat the deceased causing her to move in with the accused which did not please **PW4**. In earlier 2010 **PW4** called the deceased to visit her together with their child and he expected them to return after two days but they did not, only to be told that they had been sent to Kisii their rural home and told him to forget about the deceased and their son. It was until 2013 when the deceased called him and asked for fare to return back to the city which he sent to her. He stated that in December 2013 **PW4** caused the deceased to be arrested and when called to the station the OCS told him that **PW4** wanted both families to meet and the deceased was released upon agreement on the meeting.

16. It was his evidence that in 2014 the deceased got for their child a play school next to her mother's place and on 1st of June 2014 they moved into a house next to **PW4's** house. On 2nd of July he woke up at 9.00 a.m. and went for an interview in town where he was shortlisted and he gave the information to the deceased. Then he was to start working on 4th July 2014. He then informed her that he was going for a party for one of his workmates in Juja when he called the deceased to join them. She stated she was going to meet a friend of hers called Lulu and her boyfriend Ken at Red Pub and at 9.00 p.m. she called him with information that Ken was trying to hit on her making her uncomfortable so she decided to go home. She called him at 9.30 to confirm that she reached home and then her phone went off so he thought that she was asleep being drunk. He got home at 5.30 a.m. and when he pushed open the door which was not locked found everything in the house upside down as if there was a fight in the bedroom and found the same lying on the bed unresponsive. He then went for a taxi and took the same to Total Nursing Home where she was pronounced dead.

17. He was then given a letter to Buruburu Police Station and was allowed to take the body to the mortuary. He then called her two friends to help him break the news to the parents of the deceased. He called Lulu who told him that she had not seen **Ken** since he escorted the deceased home. He was thereafter arrested and charged for an offence he did not commit. He stated that he did not kill the deceased even though they had normal relationship problems which they used to resolve as couples do.

SUBMISSIONS

18. At the close of the defence case it was submitted that the prosecution had failed to establish the motive (*mens rea*) or the act itself. It was submitted that **PW2's** evidence on the noise from the house of the accused was hearsay. It was submitted that the accused was not identified as the man who was in the house. It was submitted that according to **PW3** the deceased died of Asphyxia as a result of manual strangulation but there was no evidence to link the accused with the same. It was submitted that the murder was not properly investigated. On the issue of identification it was submitted that **PW2** could not have identified the accused since he was new to the flat for which the case of **ANJONONI v REPUBLIC** was submitted and that the accused was only arrested on the basis of suspicion which cannot be a ground for conviction.

19. It was further submitted that the prosecution case was based on circumstantial evidence which was not proved to the required standard, neither did the prosecution prove the doctrine of the last seen for which the following cases were submitted:-

- a. **MWANGI v REPUBLIC [1983] KLR 75.**
- b. **REPUBLIC v SAMSON LATUKEI LOITASIA [2017] eKLR.**
- c. **REPUBLIC v ELIZABETH ONYANGO OJWANG [2017] eKLR.**

20. It was submitted further that the accused raised an alibi defence which the prosecution had the burden of proving for which the cases of **WANGOMBE v REPUBLIC [1976-80] 1KLR 1683** and **SSENTALE V UGANDA [1968] EA 36** were submitted. It was submitted that the bad blood between the accused and **PW4** was eminent during the trial. The prosecution submitted that the accused admitted knowing the deceased who died in his house and therefore based on the evidence on record the case against him was proved beyond reasonable doubt.

ANALYSIS AND DETERMINATION

21. Once again the court is faced with a case where the deceased a young girl and a mother of one met her death in her house or the house of her common law husband where she was expected to find refugee comfort, and safety. The said husband is now charged with her murder and the life and future of their child stands unknown as at the time of this judgement.

22. For the State to sustain a conviction on a charge of murder, they are under legal duty to prove beyond any reasonable doubt the following ingredients of the offence:-

- a) **The fact and the cause of death.**
- b) **That the said death was caused by unlawful act of omission or commission on the part of the accused person.**
- c) **That accused acted with malice aforethought.**

23. The fact and cause of death of the deceased is not in issue. The fact of death was confirmed through the evidence of the accused who took her to Total Nursing Home where she was confirmed dead on arrival. The accused gave the likely cause of death as over consumption of alcohol at unknown bar. He was issued with a letter from Burubru Police Station to admit the body at the city mortuary on the ground that she had died of sickness. **PW4** her mother and **PW5** her sister both confirmed her death. The cause of death was proved through the evidence of **PW3 DR. MUTURI** who performed post-mortem examination there and confirmed the cause of death as Asphyxia following manual strangulation. He produced post-mortem report to support his said findings. There being no any evidence produced before me that the deceased rose thereafter from the dead, I am satisfied that the fact and cause of death was proved beyond reasonable doubt.

24. On whether the said death was caused by unlawful act on the part of the accused person, the following evidence tendered before me stands unchallenged:- The accused had moved into a flat where he was sharing a floor with **PW2 MILLICENT AKINYI NDISIO**. **PW1 JOSEPH WANGONDU WAMUNGUNDA** was also living in the same flat but on the ground floor. The deceased who had been living with her mother on the material day informed her that she was going to the accused house and **PW2** confirmed having opened the gate or burglar proofing of the floor at 7.30 p.m. for her. **PW4** the mother confirmed having spoken to her while at the stalls buying provisions for her house. The accused confirmed having moved into the said block. It is also not disputed that the accused took the deceased to Total Nursing Home where she was confirmed dead on arrival having found her in the house unresponsive.

25. The fact that somebody came into room 9 where the deceased was is confirmed by **PW2** whose evidence was that it was the accused who did so. Shortly upon his arrival she heard commotion and noise with the deceased stating that she was being strangled. **PW1** confirmed that **PW2** sought his assistance to enable them contain the situation when the accused opened the door and closed it thereafter. **PW1** described the person who had opened the door as a tall man. In the morning **PW2** confirmed that the door of room 9 was locked from outside though at 4.00 a.m. she heard the accused get out from the room. The accused in his defence confirmed having been in the said room at 5.30 a.m. when he found the deceased on bed unresponsive. This is contradicted by the evidence of **PW2** who found the door locked at 5.00 a.m. I am therefore not persuaded by the accused account that he was not in his house on the night of the death of the deceased.

26. The accused having been placed at the house by **PW2** and **PW1** and having taken into account the evidence of **PW2** that she heard the deceased state that she was being strangled which was confirmed through the scientific evidence of **PW3 DR. MUTURI** and the circumstantial evidence as analyzed herein under, I am satisfied that the death of the deceased was caused by the accused.

27. It was submitted by the accused that the prosecution case was primarily hinged upon circumstantial evidence based on the fact that the accuse was the last person to had been seen with the deceased and that the prosecution witnesses were not precise as to whether he was at the premises on the material day and further that the conditions prevailing were not suitable for his identification. I have however taken into account the following circumstantial evidence joining the accused to the commission of the offence herein:- the deceased had told **PW4** that she was going to see the accused who had recently moved into a flat next to her house which according to his testimony was to enable him stay next to his son. The accused and the deceased had been living apart for a period of over one year before the said date.

28. There is no evidence tendered to show that apart from **PW4** any other person knew that the accused had moved into his new flat and that the deceased was going to meet with him on the fateful night which therefore eliminates the possibility of the involvement of a third party. **PW2** whose testimony I find very credible opened for the deceased the burglar proof door to their floor at 7.30 p.m. thereby corroborating the evidence of **PW4** putting the deceased at the house of the accused on the a material day which evidence was confirmed by the accused in his defence. **PW2's** evidence putting the accused at the scene was further corroborated by that of **PW1**. **PW2** was clear in her evidence that the person who opened the door was the accused who she knew and therefore discount the accused's contention of a possibility of a third party involvement. The account is displaced by the evidence of **PW4** which I find credible that she got in touch with one **Lulu** who was alleged to had been with the deceased and **Ken** who stated that the last time she saw the deceased was while she was at the market on her way to the accused house.

29. This offence as per the evidence placed before me took place inside the privacy of the house of the accused who has positively been placed thereat which therefore dislodges his alibi defence to the effect that he was not there until 5.30 a.m. when he came back and found the deceased unconscious as a result of over consumption of alcohol a fact which was only in the knowledge of the accused which raised a burden upon him under the provision of **Section 111 (1)** of the **Evidence Act** to explain how and where the same got drunk which I find he failed to reasonably do which provided an additional link to the circumstances proved against him.

30. The evidence of **PW4** and **PW5** established additional circumstantial evidence that the union between the accused and the deceased was characterized by the accused constantly assaulting her and causing bodily injuries resulting into her attending treatment and the deceased for reason which was not established constantly went back to the accused and did not want to file any charge against him. The fact that the accused had established a pattern of subjecting the deceased to an abuse factored against the fact that **PW2** heard them quarrelling in their house over some issue as regards a mobile phone and money, in a house where the accused resided and the accused having not offered an explanation as to how the deceased sustained the injuries as per the post-mortem report and having found that he failed to established the intoxication state of the deceased, leads me to find that is the accused who was responsible for the commission of the offence charged. In this I find support in the Indian supreme court decision in **NIKA RAM v THE STATE OF HIMACHAL PRADESH AIR 1972 SC 2077** where it was held that:-

“The fact that the accused alone was with Churi deceased in the house when she was murdered there with the Khokhri and the fact that the relations of the accused with the deceased, would be shown hereafter were strained would, in the absence of any cogent explanation by him, point to his guilt.”

31. The accused raised an alibi defence as stated herein and it is not necessary to multiply with authorities the settled principle on alibi defence. Justice Mutuku in the case of **REPUBLIC v GNK [2017] eKLR** had this to say on alibi defence:-

“In respect to the defense of alibi, I am alive to the principle that by setting up an alibi defence, the accused does not assume the burden of proving the alibi (Ssentale v. Uganda [1968] EA 36). The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt (Wang'ombe v. Republic [1976-80] 1 KLR 1683).

However, the accused was required to raise the defence of alibi at the earliest opportunity to enable the prosecution and the investigating officer time to check it out to determine its veracity or lack thereof. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In Republic v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped . . .

In **FESTO ANDROA ASENUA & ANOR v UGANDA, CRIMINAL APPEAL NO.1 Of 1998** the court made the following:-

"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no Statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the U.K. Statute cited above, such belated disclosure must go to the credibility of the defence." (Emphasis added)

32. The plea of alibi is to be proved by a person who raises it. The accused stated in his defence that he was out with his friends drinking throughout the night, had this been so then those who were with the accused who he said were his friend would have said so, but no evidence has been tendered to show that anybody was with the accused after 9.30 p.m. The conduct of the accused refusing to open to his neighbours to assist the deceased and taking the dead body thereafter to the hospital with information that she had died out of over consumption of alcohol, his statement to the mother of the deceased that the same had died together with Lulu which he knew was false and the status of the house as per the evidence of PW7 which corroborated the evidence of PW2 and the information he gave to PW6 PC A. KOECH are inconsistent with his innocence.

33. On whether the said death was caused by malice aforethought which is defined in **Section 206** of the **Penal Code** as:-

"(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony."

The fact that the accused had established a pattern of subjecting the deceased to domestic violence and the fact that the deceased was strangled clearly shows that the accused intended to cause the death and had the necessary malice aforethought to cause the death of the deceased.

34. I have looked at the defence raised by the accused and his attempt to link one Ken with the death of his wife against the information he gave to PW4 to the effect that the deceased had died together with Lulu whom he identified as Ken's girlfriend and a friend of the deceased which turned out not to be true as per the evidence of PW4 together with information he gave to PW6 and PW8 respectively, I find the same an afterthought and unbelievable made up to defeat the cause of justice and is dismissed.

35. The Judge does not preside over criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. See **STIRLAND v DIRECTOR OF PUBLIC PROSECUTION [1944] AC 313**. I therefore find and hold that the prosecution has proved beyond reasonable doubt as against the accused all the ingredients of the offence of murder and find the same guilty and convict him of the murder of his wife SARAH KERUBO on 2nd July 2014 contrary to **Section 203** of the **Penal Code** and order accordingly.

Dated, signed and delivered at Nairobi this 12th day of March, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Mathenge for the Accused

Accused present

Court assistant- Karwitha