



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 13 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

LOISE CHEBET CHEPKWONY.....1ST ACCUSED

LUKA KHAMISI BUSULA.....2ND ACCUSED

JUDGEMENT

1. The two accused persons herein have been charged with the offence of **Murder contrary to section 203 as read with section 204 of the penal code**. The particulars of the offence are that, **on the 6th December, 2013 at Sergoit area in Uasin Gishu county within the Republic of Kenya jointly murdered Joel Kimeli Biwott**.

2. The accused denied the charge and the prosecution called several witnesses to establish its case. At the conclusion of the same the accused persons were placed in their defence where they each gave unsworn evidence. Before looking at the entire analysis of the same it shall be appropriate to summarise the evidence as presented during trial.

3. PW1 HENRY BIWOTT testified that he was the brother to the deceased whom he met on the 5th December 2013 at Kachibora at his business premises. He said that the deceased was in the company of the 1st accused who was his girlfriend. By then the deceased was playing a game of pool . Later they left together vide the deceased motor vehicle Registration Number KBG 706A heading to the 1st accused home.

4. That was the last time he had conduct with the deceased till he was called and informed of his disappearance. On 27th December 2013 he identified the body at Moi Teaching and Referral hospital. The head had been severed from the body and there was a rope which had tied the hands from the back. He also identified the deceased driving licence and a copy of a sale agreement.

5. PW2 BENJAMIN KIBET BIWOTT is equally the deceased brother. He said that he was called on 9th December and informed about the deceased disappearance. They reported at the local police station. On the 27th Dec 2013 he went to identify the body at Moi Teaching and Referral Hospital mortuary. He further said that the deceased told him that his relationship with the first accused was not good as he had lost some money and he suspected her.

6. PW3 DAVID KIPTOO BIWOTT is also the brother to the deceased. He said that he was given lift by the deceased on 6th December, 2013 and dropped of at kachibora. On the 9th he was informed by pw2 about his disappearance and they reported the matter at Eldoret police station. On the 27th December, 2013 he identified the body at the mortuary.

7. PW4 SHADRACK BIWOTT the brother to the deceased testified that he joined him on the 6th Dec 2013 while he was together with accused 1 his girlfriend. On their way at Kachibora the first accused alighted and he proceeded on with the deceased. On 9th he learned of his disappearance. He identified the body at the hospital.

8. PW5 STELLA CHEROP testified that the deceased was his boyfriend having sired with him a baby girl. That they had been friends for 7 years. She knew accused 1 as a teacher at a local primary school and that they were friends with the deceased. She said that through the sms she received from the first accused she learned the relationship between them. She said that the second accused was her neighbour. She said that she got an sms from the first accused on 5th December 2013 and that she was to meet the deceased on 2nd December, 2013 but it never materialise. She called him on 5th but the call was diverted. The deceased promised to come on the 6th but he did not. On the 9th the 1st accused called her twice but she didn't pick the phone.

9. The deceased brother Kirwa called inquiring about him on the 9th and that his vehicle couldn't be seen. She called the 1st accused twice but she was harsh on her. She thereafter received several messages but did not know their conducts.

10. **PW6 PC GABRIEL WANYAMA** from Moiben police station on the 26th Dec 2013 received a phone call from a member of the public concerning an unknown body which had been seen at Kruger farm. The said body which was decomposing was taken to Moi Teaching and Referral hospital and which was later identified by the relatives to be that of the deceased.

11. **PW7 P. C MICHAEL OLUNGA** the investigating officer in this case told the court that he received instructions from the Deputy DCIO Nzioka to carry out the investigation. The incident had been reported at Cherangany police station. He told the court that the deceased had two lady friends namely the 1st accused and one Stella. The two ladies were not in a good relationship.

12. He went on to state that the deceased spent the night in the 1st accused house and left that morning and was accompanied by his brother and the 1st accused. They used his vehicle which doubled up as a matatu. The said vehicle KBG 706A was never traced.

13. The 1st accused alighted on the way where she teaches and the deceased proceeded to Kachibora. From the phone call traced the deceased last communication was at Talai area where the same was put off. The 1st accused was later arrested at her home.

14. **PW8 DR. MACHARIA BENSON** carried out the post-mortem on the deceased body and opined that the cause of death could not be ascertained. He however concluded that a third party must have been involved considering that the hands had been tied from behind.

15. **PW9 ASP YUSUF NZIOKA** who took over from Owango DCIO Kitale reiterated what pw7 had stated. He produced the phone data from Safaricom which showed phone communications between the deceased number namely 0726992746 and the 1st accused number namely 0712550072. According to him the said communication was traced at Talai area where the deceased was last traced. This was at 09.13 hours.

16. He further stated that within the same time and the same area 1st accused did sms the deceased. Accused 1 thereafter went off air and resurfaced on 9th December 2013 at 8.58 hrs. She thereafter used a different number namely 0714781393. The deceased received sms from phone number 536166617269636 which was communicating with the 1st accused at the same time.

17. He went to state that the 1st accused was communicating with one Joseph Blake who had phone number 0713330170 which was traced at Talai area. The true caller showed the name 'Slasher'.

18. The witness obtained the call details from safaricom and he produced the same as exhibits in court.

19. He also produced the rope which had been used to tie the deceased. He concluded that the 1st accused planned for the murder of the deceased because she was not happy with his affairs with Stella. He charged the 2nd accused for the simple reason that he last communicated with the deceased at Talai and that is where his phone went off.

20. When placed on her defence the 1st accused gave unsworn evidence denying the charge. She said that the deceased was a friend to her husband from 1997 and would visit her twice a month. She conceded that he had visited her and they left that morning to Kachibora together with Shadrach the deceased brother. She alighted at Koilel where she was going to see one Roda to get a maid for her mother. The deceased and the brother went ahead on their journey.

21. She further denied that she knew Stella and that she had only seen her in court. She said that she didn't want to marry the deceased but was just a friend. She only went to the deceased home during the funeral.

22. The second accused on the other hand gave unsworn evidence denying the charge. He said that pw3 went to his place on February 2014 and together they went to the police station. He was questioned concerning accused one and he said that she taught her children in school.

ANALYSIS AND DETERMINATION

23. The court has perused the evidence so far presented by both side as well as the submission by the defence counsel. The state apparently did not file the same.

24. What is apparently clear is that there was no eye witness to the incident and all that is there is purely circumstantial evidence. The deceased it was admitted was last seen with the 1st accused and his brother. They travelled that morning and on the way the 1st accused alighted and left him with his brother to go on. She did not deny that they spent the night together in her place.

25. Where then is the nexus between the accused persons and the offence? As stated above the whole matter revolves around circumstantial evidence. It was stated in **Dhalay Verses Republic (1995- 1998) 1 EA 29** as follows:

“In order for circumstantial evidence to justify the inference of guilt the two tests had to be satisfied .Firstly, the exculpatory facts had to be incompatible with the innocence of the accused and incapable of any explanation upon any other reasonable hypothesis but that of guilt and, secondly , it was necessary that there be no other co-existing circumstances which would weaken or destroy the inference of guilt “

26. Taking into account the facts at hand I propose to begin with the issues surrounding the second accused herein. Clearly the only witness who linked him to the offence is pw9 who testified and produced the call data from safaricom.

27. PW9 went on to state that;

“Accused No. 2 communicated with accused 1 on the date .the deceased went missing. He called the deceased that day while at Talai. The deceased phone went off at Talai area”

Beyond that there was nothing else. Can that single communication create sufficient suspicion? I do not think so. There was no much evidence indicating that the deceased was known to accused 2 or for that matter any of his relatives. Even if he communicated with the first accused there was no nexus between the two save when he stated in his defence which was nonetheless unsworn that the 1st accused was a teacher to his children.

28. In my view therefore I do not find the evidence against the second accused whether circumstantial or otherwise very sufficient. Further there was no evidence that he attempted to communicate in any way with the deceased. For the foregoing reasons I find that the prosecution case against the 2nd accused was too weak to have him convicted of the offence.

29. Consequently the 2nd accused is hereby set free under the provisions of section 215 of the Criminal Procedure Code unless otherwise held. The surities are equally discharged.

30. Turning now to the 1st accused I am satisfied that based on the evidence on record and contrary to his denial in her unsworn evidence the two were actually lovers. That explains why the deceased was with her that evening in his bar playing the game of pool in the presence of the deceased brother and later retired together. It is also on record that they left together that morning and she alighted on the way.

31. In her defence she stated that she alighted at Koilel and went to the home of one Roda . Apparently she did not deem it fit to call Roda to verify that. Needless to state that the call data placed her within Talai area that morning and she communicated with him consistently even when he was at Kitale railways area. The accused at no time denied that she was at Talai yet in her defence she choose to ignore that.

32. The evidence of PW5 Stella Cherop was very material to the extent that this court does not believe that the accused did not know pw5 or the liaison between her and the deceased. She testified that she knew her as a primary school teacher and were friends with the deceased. The accused did not deny that she sent an sms to PW5.

33. This court concludes that based on the evidence presented there is every possibility that the 1st accused had a hand in the disappearance and subsequent death of the deceased. Although one Joseph Blake alias “Slasher” was not trace physically sufficient evidence from the phone log showed that he was at Talai area at the time the accused was communicating with the deceased.

34. The exculpatory facts in the premises are incompatible with the deceased innocence. This was a love triangle at its best as demonstrated by the fact that the accused sent threatening messages to PW5. Despite this she denied that she did not know her which was not true.

35. Consequently I find the case against the accused one proved beyond any shadow of doubt and is thus convicted of murdering the deceased under the tenets of section 203 of the Penal code chapter 63 laws of Kenya.

Delivered, signed and dated at Kitale this 7th day of May, 2019.

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H K CHEMITEI

JUDGE

7/5/19

In the presence of:-

Mr Omoria for State

Mr. Bororio for the Accused person

1st & 2nd Accused persons – present

Court Assistant – Kirong

Judgment read in open court.