



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 47 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

HOSEA YANO.....ACCUSED

JUDGMENT

1. HOSEA YANO (the accused) is charged with murder Contrary to **Section 203** as read with **204** of the **Penal Code**, the particulars being that on 26th June 2015 at **KAMOI** village in **ENDUL** Sub-location **ELGEYO MARAKWET** County, he murdered **FELISTER JEROP TUM** (deceased).

The accused denied the charge.

2. The accused and the deceased were said to be lovers, and according to PW4 (**TULA KITUM**) the deceased's mother, her daughter had been married but returned to her parents' home, and soon became lovers with the accused.

The deceased used to visit the accused's home, and sometimes they would go to the trading center together. One time (she being elderly could not recall the dates), the deceased left home and never returned home. After three days, her family became anxious and a search was mounted for her.

3. The evidence of **DAVID KEMOI RUTO** (PW1) who is a nephew to the deceased, he was not aware of any disagreement between the accused and the deceased. He told this court that the deceased left home on 26.06.2015 and upon realizing that she seemed to have disappeared without trace, a search was mounted. PW1 got suspicious about the accused.

- (1) Deceased used to go to the accused's house in the evenings and return home the next day i.e she would spend the nights at the accused's home.
- (2) After her disappearance, he noticed that the accused kept going to his house, and leaving at a rather odd frequency.
- (3) He noticed that the pit latrine in the accused's compound, and which had been in use was now covered with soil.
- (4) The search led to recovery of deceased's body from the pit latrine.

He was thus convinced that the accused had a hand in her death. It was his evidence that the deceased left home on 26.06.2015 which was a Friday – that was the last time he saw her in the company of the accused. When she did not return home, everyone assumed she was at the accused's residence, but when calls made to her went unanswered, her family became alarmed. PW1 stated;

“The deceased was married to DAVID KIPKEMOI and they had 6 children. The deceased had disagreed with her husband and returned to her parent's home. After they disagreed and deceased returned home, I have never seen deceased and her estranged husband together ... I did not see accused and deceased together on the day she disappeared.”

After her disappearance PW1 and **MUSA YATOR** (PW2) went to the accused's house to look for the deceased.

4. PW2, a brother to the deceased upon getting news about his sister's disappearance joined the search party. He confirmed going to the accused's home to look for the deceased, as she used to frequent the home. While inside that compound, PW2 noticed that the pit latrine had a peep hole on both sides of the wall. The toilet's pit was covered with soil, and upon digging up, they recovered the deceased's naked body. He noticed that her right eye was popping out, and the occiput was dented. The left breast had a stab injury.

Police were called, and they collected the body.

He too confirmed that the accused and deceased were lovers, and the deceased frequently went and spent the night at the accused's home.

5. On cross examination PW2 explained that the accused had a wife and children, but he chased his wife away, two months before the incident.)

He also clarified that ever since disagreeing with her husband, the estranged husband had never been to their home.

BENJAMIN ROTICH KIPKORE (PW3) an Assistant Chief and resident of **KAMOI**, was at his home when the accused's father and other clan members approached him and said that the accused's lover had disappeared. He too joined part of the search party. PW3 explained that although the accused had two wives, as at the date of the incident, none of the wives was present. He confirmed that the toilet within accused's compound, had its pit covered, and the deceased's body was recovered from that covered pit.

When the search was being conducted the accused was not within his compound.

6. On cross examination PW3 stated that on the initial search on 30.06.15 at the accused's homestead, no recovery was made, and infact the toilet wall had not been interfered with and the door was intact.

They got into the pit latrine and even dipped inside the pit but did not find anything significant.

7. According to him, on 1st July, he was not part of the search team, but learnt that PW1 and PW2 wanted to cross check the accused, homestead again. The two then called him to say they had noticed that the latrine walls had holes – so he rushed to the scene. He had also noted that from 26th June, the accused disappeared and was eventually arrested in **TOT** region.

PW3 explained that accused and deceased's affair lasted about 6 months – the accused's wives had disapproved of the relationship but the accused was stubborn and could not leave the deceased, so the women left. He never heard of any argument between the accused and the deceased, and their affair was public knowledge – this much was confirmed by the deceased's mother who stated:-

“My daughter never complained about her relationship with accused. I never heard of any differences. Wherever deceased was not at home, it was predictable that she would be at the accused's home where she would even spend nights. They were really in love.”

8. She too confirmed that the deceased's husband never contacted her daughter after their breakup.

9. PW5 (**JOEL TOROITICH CHEBO**) who joined in the search confirmed that the latrine's pit had been covered with soil, and the body was eventually fished from the pit.

He observed that the hair had been forcefully plucked, and the back of the neck and genitalia had injuries.

On cross examination he described the accused as a businessman who engaged in selling maize at different locations. He had never heard of any quarrel accused and the deceased.

10. A post mortem report produced by **DR CHARLES CHEROP** (PW6) recorded that the deceased's body was decomposing – meaning it had been wherever it was for over 48 hours. The left side of the face had a deep cut above the left eye, another cut was on the left side of the cheek. There was hair loos in the middle of the head and a blunt chest injury around the axillar. The left arm also had deep cuts on the anterior, and there was vaginal tear extending towards the public hair line. Internally there was decomposition of the respiratory system making assessment difficult. However the head was intact, and the spinal cord had a fracture of **C1** and **C2**. There were signs of strangulation around the spinal cord.

The cause of death was strangulation and fracture of the neck bones by twisting.

11. On cross examination, the Doctor ruled out the likelihood of the fractures being as a result of a fall because of the twist. However due to the decomposition it was difficult to determine whether strangulation per se led to asphyxia.

12. In his sworn defence, the accused admitted that the deceased was his lover although he had 2 wives. His wives were not happy about the relationship especially because the deceased would visit him at his home and even spend the night.

13. At one time, in anger, his two wives ganged up and beat both him and the deceased – pulling off her hair. The two wives could come on and off create chaos then leave again.

It was his evidence that in April, the deceased's husband confronted him and the deceased in anger, and threatened to burn down his house but people intervened.

He maintained that the relationship between him and the deceased was good, and he had great understanding and love for her.

14. The accused's testimony is that he was last in the company of the deceased on 25.06.2015 when they had breakfast. He then left for

KAPLATEMO in **TOT** division to go and sell maize at the market. He arrived there on 27.06.2015 because of the hostile rough terrain of **Marakwet**. He off-loaded his goods at a store and begun selling until 3rd July 2016 when he was arrested at the store.

He never saw the deceased after 25.06.15 and only got to learn that she had died, and her body recovered in a pit latrine. It was his contention that the pit latrine was open for use by anyone, including his neighbours. It was his evidence that when he left home to go to **TOT**, he gave the deceased Ksh.50,000/- to buy maize, and Kshs.2000/- to pay the workers. He did not know how the deceased's body ended up in his pit latrine saying he was deeply saddened by her death as they were lovers. He left her on 25.06.15 and if she returned to her parents' home then went back on 26.06.2015 he wouldn't know. However the arrangement he had made was that in the absence of his two wives, he would leave the deceased to take care of his home – which is what he did on 25.06.15.

15. No one saw how the deceased met her death. There is great suspicion however that it was the accused because as far as they knew she left her parents' home, and the only place they could think she would have gone to, was the accused's home. It is significant that none of the prosecution witnesses saw the accused and deceased alone together on 26.06.15.

The evidence is purely circumstantial – that since it was her practice to go spend the night at the accused's, and since, following her disappearance, the accused also disappeared, and since the body was eventually recovered buried inside a pit latrine within the accused's compound, then he must be the culprit.

16. The defence counsel has submitted that from the evidence, it is quite clear that a good number of people would have wanted the deceased dead, while not diluting the fact of the deceased's death, the appellants' counsel argues that there was no proof that the deceased had a hand in the death. That all there is, is suspicion - which no matter how strong, cannot be the basis for a conviction – reference was made to **SAWE V R [2993] KLR 364** where the Court of Appeal stated;

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

17. Further, that the prosecution failed to establish any ill motive against the accused and therefore lack of mens rea, which is a critical ingredient in a charge of murder under Section 206 of the Penal Code.

18. It is common ground (from evidence of prosecution, and even the defence), that the accused and the deceased enjoyed a romantic relationship, and there had been no indication of disagreements. Who would have wanted the deceased dead. If the accused and deceased had not disagreed, and were in of the best of terms, why would the accused want to eliminate her?

There are many possible explanations as to why other people may have wanted the deceased dead – which significantly breaks the strands of chains on the web of circumstantial evidence, and swings away the culpability of the accused as the only likely culprit.

It is possible that the deceased could have been murdered by persons who knew the accused was not present and it could be;

- a) **By the former husband from whom she walked away into the deceased's arms.**
- b) **The two wives who were totally opposed to the relationship and had even gone back to their parents**
- c) **One of the workers who may have been aware of the large sum amount of money left for the deceased to keep.**

Whichever way one looks at it, the circumstantial evidence does not point inculpably to the guilt of the accused, and to the exclusion of anyone else. There were so many possibilities.

19. Consequently the accused must benefit from this. I hold and find that the evidence is not enough to warrant a conclusion, so the court returns a finding of **NOT GUILTY** under Section 306 (1) CPC.

The accused shall be set at liberty forthwith unless she is lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF MAY 2019

H. A. OMONDI

JUDGE