



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NUMBER 42 OF 2011

REPUBLIC.....PROSECUTOR

VERSES

ABRAHAM WAFULA WEKESA.....1ST ACCUSED

JANE SLYVIA WAFULA.....2ND ACCUSED

JUDGEMENT

1. The two accused persons were jointly charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge was that **on diverse dates between 16th July, 2011 and 19th July, 2011 at Gatua village within Trans Nzoia County, jointly with others murdered ZEBENZIA ODA**.

2. They both denied the charge and the prosecution called a number of witnesses to established its case. When they were put on their defence each of them gave unsworn evidence. At this juncture and before analysing the evidence it shall be worthwhile to summarised the evidence as presented by various witnesses.

3. **PW1 REUBEN SHIKUKU** testified that the deceased was his tenant and he knew the accused persons to be her son in law as well as her daughter respectively. He said that on 18th July 2011 accused one told him that his mother had died at Mukumu hospital and he was going to get a death certificate. At midnight he came with the deceased body which he carried on a motorcycle. He asked for the keys to the house which he did not have but were with one Caro who gave him. He left the body in the house and came with the second accused the following day and they brought a coffin. The members of the public suspected the two and decided to beat them up but were rescued by the police who came to the scene.

4. **PW2 CAROLINE WAFULA NYONGESA** testified that she knew both accused persons and their relationship with the deceased. She said that she was awakened at midnight on 18th July, 2011 by pw1 who asked him to give the key to the deceased house to the 1st accused. While handing the key to him she saw the deceased body lying outside the house. The following morning he came back with the second accused and the latter was wailing. The members of public suspected them and were beaten but rescued by the police who came and arrested them.

5. On cross examination she said that the deceased was in good health when she left her home on 17th July, 2011. She told her that she was going to visit her daughter the 2nd accused.

6. **PW3 NICHOLAS IMBOA NACHOLI** testified that the deceased was his cousin. He said that he met the first accused who told him that the deceased was unwell and was at Mukumu hospital. On 19th he heard that she was dead and the body was at her home. He went there and found a group of people beating the accused. He saw a coffin on top of a motorcycle. The police arrived and arrested them.

7. **PW4 JEMIMAH ONDISA** testified that the deceased was her sister in law and on 22nd July, 2011 she identified the body at the mortuary during the post-mortem exercise.

8. **PW5 P.C PAUL KAMAU MWANGI** said that he was the initial investigating officer in the matter. He said that he went to Gatua the scene of the incident on the 19th July, 2011 in the company of other scenes of crimes officer. At the scene they photographed the body which had visible injuries including one eye which had been plucked out. There was also a coffin which was 70 metres away. The two suspects had been held.

9. He began his investigation and recorded witness statements who told him that the first accused had brought the body in the night using a motorcycle.

10. On 19th they interviewed a young boy David Wanyonyi who told them that on the 16th July, 2011 he was at the house of accused one and he saw blood stains on the floor and upon asking him, he was told to cover it using cow dung.

11. He then proceeded to scrap the floor and took samples for analysis. They also recovered a sweater which had blood stains and sent it for analysis. The same was found at a pit latrine within the first accused homestead. The results from the government chemist concluded that the blood samples matched those of the deceased.

12. He also recorded statements from one Ben Tali who had purchased land from the deceased. They recovered the sale documents. The witness did produce the exhibit memos from the government chemist. According to him the accused gave varying versions of evidence but he was convinced that the deceased was killed at the accused's home.

13. **PW6 DR. BLUSTUS KAGUNDU** from Makueni County Referral Hospital performed post mortem on the deceased body and concluded that the cause of death was cardiopulmonary injury due to blunt trauma.

14. **PW7 LAWRENCE MUTHURI** a Government Analyst examined the soil samples and the sweater and concluded that the blood samples found therein matched that of the deceased.

15. **PW8, BEN NAMASAKA TALI** testified that he purchased the land from the deceased as she wanted to give the money to the 1st accused to travel abroad. He paid part of the money but was frustrated as the land was not transferred to him. He said that later the deceased told him that she would only add him the land as long as he pays more money. He said that all along the first accused kept on demanding for the balance without the knowledge of his mother in law.

16. He further went on to state that at some point the beacons to the land were removed. He texted her later and told her that the issue of the deceased was over and he needed the money as she was sick at Kakamega.

17. He later went to the chief office and paid her Ksh. 50,000 and added her Ksh.1000 as his contribution for the funeral. He learned the following day that the accused had been arrested. He produced the agreement done at the chief's office.

18. When placed on his defence the first accused said that he was a pastor by profession. In his unsworn evidence he said that the deceased was always a sickly person and she had gone to Kakamega for drugs and specifically Mukumu hospital for treatment where she died. He said that he was called and told that she had died in the house. They then prepared for the funeral before the neighbours got to know but instead THEY WERE attacked.

19. The second accused and the daughter of the deceased gave unsworn evidence and a long explanation concerning the sale of the land which was to benefit accused one to travel abroad. She said that the deceased was not given the money and was pressurised to add a portion to PW8.

20. She spoke at length about the first accused violence including the day they came together after the death of her mother.

ANALYSIS AND DETERMINATION

21. The court has perused the entire evidence on record as well as the submissions by the parties' counsels on record. What is clear is that the deceased and the accused were relatives and that it seems that the genesis of the disputes herein has to do with the sale of the land.

22. Where then does the accused person come in? Where is their culpability?

23. There is no eye witness to the incident and thus the only option is for this court to rely on the circumstantial evidence as advanced by the prosecution. The deceased seemed to have left her home to visit the home of the accused. The last time she was seen was when her body was brought by the first accused at night as per the evidence of PW1 and 2.

24. The line of evidence by the two witnesses was not counteracted by the accused persons especially the first. In his evidence though unsworn he did not deny that he brought the body that night using a motor cycle.

25. According to what he said and told the neighbours the deceased had gone to Mukumu hospital where she died. There was no evidence of such and neither was any iota of evidence that the body was brought from the said hospital.

26. More importantly the nature of injuries suffered by the deceased was not consistent with somebody who was merely sick. There were blunt trauma including the missing eye as was found by the doctor during the post-mortem exercise. Surely she must have been assaulted.

27. The evidence of the investigation officer and the government analyst found that the blood samples from the soil collected from the accused house as well as from the deceased sweater found inside the pit latrine at the accused house matched that of the deceased. Although the sweater was not produced there was nothing to suggest that it did not belong to the deceased.

28. What then did each of them play in the offence? I find the evidence against the second accused not very strong considering the obtaining circumstances. The evidence by PW1 and 2 shows that she was not at the scene that night. She came the following day and her screaming and wailing attracted the neighbours.

29. It is also worthy to note that the second accused was not involved in the procuring of the coffin. Although it is not clear where the

deceased met her death I find that there was not much evidence circumstantially to link her.

30. As regards the first accused I find that his movements and specifically the sale of the land as well as receiving the sale proceeds speaks volumes. It appears that her differences with the deceased and the second accused stemmed from this.

31. Under the provisions of Section 107 of the Evidence Act the accused was bound to explain what happened to the deceased and where did she get her body. Why did he decide to bring it at night using a motorcycle and on the following day went for the coffin.

32. Why for example did he plan to bury her alone without for example the involvement of other family members or at worst the neighbours?

33. The sum total of all these questions is that I find the first accused culpable. He must have organised her death so that he could get the cash from pw8 which he actually did after her death.

34. In the premises I find that the prosecution has proved its case against the first accused Abraham Wafula beyond any shadow of doubt and I proceed to convict him under the provision of Section 203 of the Penal Code.

35. The second accused is granted the benefit of doubt and is acquitted under the provisions of Section 215 of the Criminal Procedure Code unless lawfully held. The sureties are hereby discharged.

Dated, signed and delivered at Kitale this 17th day of June, 2019.

H.K.CHEMITEI

JUDGE

17/6/19

In the presence of:-

Mr Omooria for State

Accused 1 – Absent

Accused 2 - present

Court Assistant – Kirong

Judgment delivered in respect to the 2nd Accused in open court.