



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 1 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

LINET NASIMIYU.....ACCUSED

RULING

1. Linet Nasimiyu, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of this offence are that on the night of 11th December 2017 in Mukuru Kwa Reuben Slums in Industrial Area within Nairobi County she murdered Margaret Nyaboke.

2. The accused pleaded not guilty to this charge. She is represented by Mr. Manases John Obetto, learned counsel.

3. The prosecution has closed its case after calling six (6) witnesses. The duty of the court at this stage is to determine whether the evidence of these six witnesses establishes a *prima facie* case against the accused to warrant his being called upon to make his defence. I will narrow down my consideration and analysis to the evidence of Dr. Charles Muturi (PW4), the pathologist, Mr. Stephen Maginde (PW5), the Government Analyst and PC Moses Maina (PW6) the Investigating Officer.

4. The other witnesses are Alex Muthui Ngui (PW1) the landlord who had rented his house to the accused. He did not know anything about the death of the deceased until police summoned him to record a statement. Jerusha Muthoni (PW2) was the chairlady of *Nyumba Kumi* in the area. She learned of the death of the deceased from Sylvester (not a witness) the overall chairman of *Nyumba Kumi* at Mukuru Kwa Reuben Slums. He went to the scene and met members of the public carrying the body of the deceased. She was told that Night, whom she identified as the accused before court, had killed the deceased.

5. There is also CPL Joel Makori (PW3) who went to the scene in company of PW2. They met the members of public carrying the body of the deceased. CPL Makori and Jerusha Muthoni testified that among the people carrying the body of the deceased was a young man who claimed that the deceased was his girlfriend and that she had been assaulted by her employer over missing money and that her employer had assaulted the deceased.

6. Dr. Muturi examined the body of the deceased. He found few abrasions on the right arm and elbow. He found no obvious bruises or fractures and few contusions on the right fronto-and right temporo-parietal regions measuring 4 x 3cm and 2 x 2cm. He found that the deceased had no obvious skull fractures. Her brain appeared swollen and congested with features of increased intracranial pressure. The doctor concluded that the deceased died as a result of head injury following blunt force trauma. The doctor took samples of stomach, blood, liver and kidney for analysis. These findings are recorded in the Post Mortem Report produced as (Ex. 1).

7. The specimens were examined by Stephen Matinde Joel Weibe (PW5). His findings are recorded in a report produced as Ex. 2. PW5 detected methanol, a highly toxic industrial alcohol at a concentration of 24.7mg per 100ml and ethyl alcohol at a concentration of 820mg per 100ml. PW5 testified that the ethyl alcohol blood concentration is known to be fatal to human and that in combination with the methanol as was detected in the blood sample of the deceased could have contributed to the death of the deceased.

8. PC Moses Maina (PW6) doubled as the Investigating Officer as well as the scenes of crime officer. He took photographs of the body during post mortem. He testified as follows:

“It was alleged that on 11th December 2017 the deceased Margaret Kemunto quarreled with Linet Nasimiyu the accused and her employer. The reason for the quarrel was that the deceased had failed to account for the sales of 10th g a December 2017. The accused was operating a Pub at Kwa Reuben Slums. The accused started beating the deceased with another employee Damaris Moraa. The latter escaped. She was being beaten with a stick..... At around 21.40hrs the boyfriend to the deceased, Victor, went home and found the deceased in bed unconscious. Victor raised alarm. Deceased was rushed to hospital but she died on the way.”

9. This is the information as given to PC Maina by witnesses. Evidence shows that Damaris, said to be colleague of deceased and Victor, said to be boyfriend to the deceased are some of the people who gave police this information. PC Maina told the court that Damaris Moraa has passed on and therefore could not testify.

10. I have carefully examined all the evidence. For this court to make a finding that the accused has a case to answer, it must have evidence that makes a case upon which this court can convict even if the accused were to remain silent (see *Ramanlal Trambaklal Bhatt v. R (1957) E. A 332*).

11. It is clear to me that there is no witness who testified as to the assault on the deceased by the accused. What PC Maina told this court as told to him by Victor amounts to hearsay evidence and is not admissible. The truth of that information cannot be verified. Victor did not testify. Damaris also did not testify.

12. In addition to lack of evidence on what really happened, there is also inconclusive evidence on the cause of death. Dr. Muturi attributed the death of the deceased to head injury due to blunt force trauma. Below his conclusion as to the cause of death are the word "pending toxicology" put in brackets. To my mind, it seems that the findings of the doctor are not conclusive in that there was toxicology results awaited.

13. On the other hand, there is the report of the Government Analyst to the effect that the ethyl alcohol blood concentration in the blood of the deceased is known to be fatal to human and in combination with the methanol as detected in the blood sample in this case, could have contributed to the death of the deceased.

14. It is not clear to this court whether the death of the deceased was caused purely by the head injury or alcohol concentration in her blood could also have contributed to her death as testified by PW5. Even if this court were to take it that the death of the deceased was caused by the head injury, the next question would be, who caused that head injury? This is because there is no evidence on record, based on eye witness account, as to who must have caused that injury.

15. There is no evidence, other than hearsay evidence, that connects the accused and the deceased. This leaves this court with no option than to make a finding that the evidence against the accused person is weak if not non-existence. It was be failure of justice on my part as the arbiter if I were to place the accused on her defence on evidence like the one before this court. She is not under any obligation to prove her innocence nor can she be expected to fill in the gaps left by the prosecution case.

16. In conclusion therefore it is the finding of this court, and I so hold, that the prosecution has not made out a case against the accused to warrant her being placed on her defence. In compliance with section 306 (1) of the Criminal Procedure Code I hereby record a finding of not guilty and acquit the accused, Linet Nasimiyu, forthwith. She is free to go home unless for any other lawful reason she is held in custody. It is so ordered.

Dated, signed and delivered this 6th day of June 2019.

S. N. Mutuku

Judge