



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL CASE NO. 5 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NICKSON CHEPKWONY.....ACCUSED**

**JUDGEMENT**

1. The Accused **P.C. NICKSON CHEPKWONY** 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 the night of 21<sup>st</sup> December 2013 at the G.S.U. Camp Headquarters at Ruaraka within Nairobi County murdered **FELISTER AWINO**.

2. On 13/01/2014 he appeared before Lady Justice Korir when a plea of not guilty was duly entered in his favour and was remanded in custody until 21<sup>st</sup> day of July 2014 when he was released on bond.

**PROSECUTION CASE**

3. To prove its case against him the prosecution called and examined ten (10) witnesses whose evidence was that the accused was an officer with G.S.U. at the G.S.U. Ruaraka Headquarters in Nairobi where he was staying at the staff quarters. The deceased was his wife. On the morning of 22/12/2013 the body of the deceased was found at the camp dumpsite half naked with bruises on the face with the accused missing from his house.

4. **PW1 CORP. JOHN LEOTAI NAULA** was on 22/12/2013 at the main gate of G.S.U. Headquarters together with **PC JOSEPH MURIUKI** and **PC VICTOR MUTHOMI** when at 03.30 hours the accused and the deceased arrived at the gate. It was his evidence that as per the standing orders of the camp all civilian personnel living thereat had to be issued and be in possession of gate pass. The accused who was known to him stated that the deceased was his wife and that her gate pass had expired and was due for renewal and she had left her national identity card in the camp. He noticed that both accused and the deceased seemed drunk, were staggering and smelling of alcohol. He booked them in and noticed that they did not have any physical injuries. He booked them in by entering the deceased's name in the visitor's book against the accused's name as host. He had known the accused since 2002. At 7.00 hours he heard that a body had been found dumped in one of the dumpsite within the camp.

5. **PW2 SSP CHARLES NAIBAI** was an Administrative Officer/Staffing Officer Operations at the camp. On 22/12/2013 at 0047 hours, the camp's Commanding Officer John Boronyo informed him that there was a dead body of a lady at the camp's dump site. He proceeded to the scene where he saw the body half naked with bruises and blood stains on the face. The officers who were at the scene identified the deceased as the wife of the accused who was staying with him. He proceeded to the house of the accused together with police officers from Muthaiga where the scene of crime officers conducted a search and found a trouser wet with blood stains under the bed. There were blood stains on the bed and the identity card and pictures of the accused and deceased were retrieved therefrom. There were blood stains on the pavement outside leading to the accused house. It was his evidence that the accused could not be traced anywhere in the camp and could not be reached on phone and there was no record of his exit from the camp.

6. **PW3 VICTOR MUTHOMI** corroborated the evidence of **PW1** and stated that he was at the gate when the accused arrived with the deceased whom he identified as his wife. It was his evidence that the deceased was wearing a black trouser and white top while the accused was in brown trouser. He was able to see them since there was adequate lighting from electric bulb at the gate. He knew the accused so they let them in and they proceeded to their house. He later heard that a lady had been killed in the camp and the accused was at large. He later saw the accused on his way to Drive-in-camp at the Shopping center on 23<sup>rd</sup> December 2013 and called his in-charge with the information.

7. **PW10 L. BWIRE MULUMBA** was briefed by **CORP. NAULA** whom he had relieved that the deceased had been found dead and the

accused who had gone missing was suspected of the offence. He instructed four (4) police officers to be on the lookout for him. After thirty (30) minutes he received information that **CORP. MUTHOMI** had seen him at Allsops. He gave the information to **PW4** who informed the Commanding Officer who then gave instructions that he be arrested. They proceeded to Ndege Kiosk where they arrested him and escorted him to Muthaiga Police Station.

**8. PW4 INSP. JONES MWAI** was the Duty Officer on 22/12/2013 when he was briefed by the Commanding Officer that a PC had committed an offence and was at large. It was his evidence that when **PW3** left the camp for his residence at G.SU. Drive-in camp, he found the accused and reported back to the main gate commander **CORP. MULUMBA** who gave him the information. With the said information, they mobilized some officers who proceeded to the scene and arrested the accused and took him to Muthaiga Police Station on 23<sup>rd</sup> December 2013 at 0013 hours.

**9. PW6 SP. BENARD MURIUKI** was the OCS - Muthaiga. On 22/12/2012 while in the office he received a call from his OCPD with a report of the murder. Together with the in-charge scene of crime **CI OMBENGI** they proceeded to the scene where they found the body of the deceased lying next to a dumpsite. On observation they noticed fresh blood all over with signs of strangulation. There were pair of shoes away from the body, some hair pieces and the face had bruises and was swollen, the lower limb was cut off. They commenced investigations which confirmed that the deceased had entered the camp at 0300 hours after drinking spree with the accused. They were taken to the accused's house where they found blood stained bed sheets and a wet brown trouser with lots of mud and a white blood stained blouse. There were blood stains on the floor which they followed upto the scene where the body was. He collected exhibits which were produced in court.

10. On 23<sup>rd</sup> December 2013 he received a report that the accused had been arrested and when he interrogated him, he stated that he had gone to Lakers Bar for a drink with the deceased who had a fight with another lady and sustained some injuries. He proceeded with her to the camp and since the deceased was drunk and not feeling well, he carried her to his house but on reaching the dumpsite he was unable to carry her further and left her there to go get a jacket. He changed his trouser and put on another and when he went back to check on the deceased, found that she had moved to the dumping site and realized that she was dead. In the resulting confusion he decided to go outside the camp and after consulting a friend who was a State Counsel, he was advised to report to the police which story he did not believe.

**11. PW9 CI. LABTON MBENGI** a scene or crime officer visited the scene and went to the accused house number D9-5 Kongoni Wing where he documented bloods stains underneath the bed, recovered the trouser and shoes believed to had been worn by the deceased, identification card of the deceased and photographs inside the house. They followed the blood trail from the house to the dumpsite where the deceased body was found lying. He then took photographs and blood swabs.

**12. PW7 LAWRENCE KINYUA MUTHURI** a Government analyst received the items collected at the scene with a request to examine them and determine the presence and source of any blood stains. As a result of his examination he found that the cotton wool swabs from the house of the accused and from the scene, the trouser of the accused and the blouse of the deceased generated DNA profile that matched the deceased. **PW8 DR. JOHANSEN ODUOR** conducted post-mortem examination on the body of the deceased which was identified by **PW5 JACKLINE AWUOR RADIDO** and **LEONIDA ATIENO OCHEING** and observed that the body had a green rope tied around the neck, there was a bruise around the neck, bleedings in the eye, fractures of hyoid bone, bruises on the arm, the face, horizontal ligature bruises around the neck and as a result of examination formed opinion that the cause of death was asphyxia due to ligature strangulation. It was his opinion that the bruises on the neck and upper arms means that they were as a result of a struggle and he ruled out the cause of death as due to self strangulation.

## DEFENCE CASE

13. When put on his defence the accused **DW1** gave unsworn statement of defence and stated that on 21/12/2013 he had left with the deceased to a club called Rex at 8.00 p.m. where they were until 3.00 a.m. when he danced with a lady he did not know which made the accused unhappy. He then left the dance floor and fell asleep only to be awoken up by a fight between the deceased and the said lady. He decided to take her to the camp when he noticed that she was bleeding and had no shoe. He went with her to the gate where he spoke with Corp. Lenaula who knew him and since he did not have a gate pass allowed them in. Since it was raining he entered into the compound with the deceased when she told him to go get an umbrella and overcoat from the house. He went to the house to get the said items and when he came back he could not lift up the deceased who was not responding.

14. It was his evidence that he made no report neither did he take her to the clinic which was 100 meters away. Since he was in a state of confusion he went out of the compound and was later on advised by his relatives to make a report to the police where **PW6** recorded his statement. He confirmed that **PW3** saw him and was later on arrested. He confirmed that the blood stains on his trouser were from the deceased. He denied killing the deceased. **DW2 JAMES MUTHURI MURAGE** corroborated his evidence that the accused was his customer, and were together on the material day at Rex Bar when on the way they found two ladies fighting and people trying to separate them. He then realized that it was the accused's girlfriend known as Mama Mercy. He stated that the accused was drunk. The deceased according to his evidence had injuries on the lip and had mud on the body and hands. He left the accused and the deceased at the scene. In cross-examination he confirmed that he did not see the accused for two months from the time the deceased died.

## SUBMISSIONS

15. At the close of the defence case the state opted not to make any submissions while the accused filed written submissions in which it was submitted that there was no direct evidence identifying the accused as the perpetrator of the offence and that the case was purely based on circumstantial evidence and suspicion. It was submitted further that the body of the deceased had been interfered with during investigations, when the evidence of **Dr. Oduor** is contrasted with the evidence of other prosecution witnesses and in particular as regards a green rope on her neck. It was submitted that there was no witnesses called by the prosecution who heard any commotion in the house of the accused and that if the accused had assaulted the deceased before strangling her, any of the police officers who lived in the said block would have heard or seen him carry the body to the dumpsite.

16. It was submitted that the presence of blood stains on the accused's trouser was explained in his defence. It was stated that the accused did

not have any guilty mind since he reported to Muthaiga Police Station on the night of 22<sup>nd</sup> and 23<sup>rd</sup> December 2013 and he did not go into hiding as alleged. It was contended that the prosecution did not prove *mens rea* on the part of the accused and therefore the case was not proved beyond reasonable doubt.

#### **ANALYSIS AND DETERMINATION**

17. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code** the prosecution is required to prove beyond reasonable doubt the following elements of the offence:-

**a. The fact and cause of death.**

**b. That the death was caused by unlawful act of omission or commission on the part of the accused person.**

**c. That it was committed with malice aforethought - mens rea on the part of the accused as defined in Section 206 of the Penal Code.**

18. The fact and cause of death of the deceased is not disputed. The accused in his defence confirmed that he was with the deceased when he left her at the dumpsite only to come back and find her dead. **PW2 SSP CHARLES NAIBAI** proceeded to the scene where he found the dead body of the deceased. **PW5 JACKLINE AWUOR RADIDO** her cousin who was with her in their rural area where she left her on 20<sup>th</sup> December confirmed that the deceased was coming back on 22<sup>nd</sup> of December. She was later on called with information on her death and proceeded to the city mortuary where she found her dead and identified her body for purpose of post-mortem examination. **PW6 SP. B. MURIUKI** confirmed her death at the scene which was corroborated by **PW9 CI. LABTON MBENGI** who took photographs of the body of the scene. The cause of death was proved through the evidence of **PW8 DR. JOHANSEN ODUOR** who performed post examination thereon and formed an opinion that the cause of death was asphyxia due to ligature strangulation. I therefore find and hold that the fact and cause of death was proved beyond any reasonable doubt.

19. On whether the said death was caused by unlawful act of omission or commission on the part of the accused person:- as submitted by the defence, the prosecution case against the accused is based solely on circumstantial evidence. There is no eye witness who saw the accused strangle the deceased or cause injuries on the same. The law on circumstantial evidence in Kenya as in the rest of the Commonwealth is well settled along the following principles as stated by SIR ALFRED WILLS in "**WILLS ON CIRCUMSTANTIAL EVIDENCE**":-

**"The following rules are to be specifically observed relating to circumstantial evidence:-**

**"(1) The facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;**

**(2) The burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;**

**(3) In all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;**

**(4) In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt;**

**(5) If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".**

20. The Court of Appeal in **SAWE v REPUBLIC [2003] KLR 364** had this to say on circumstantial evidence:-

**"1. In order to justify on circumstantial evidence the inference of guilt; the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.**

**2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

**3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

....

**7. Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

21. In **ABANGA alias ONYANGO v REPUBLIC, CRIMINAL APPLICATION NO. 32 OF 1990 (UR)** the Court of Appeal had set out the following principles:-

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-**

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused**
- iii. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

22. In this case the accused and the deceased reported to the gate of G.S.U. Ruaraka Headquarters at 3.00 a.m. and were allowed into the camp by **PW1 JOHN L. NAULA**, and **PW3 PC VICTOR MUTHOMI** both who testified that though they both seemed drunk, the deceased was in good health without any physical injuries. This evidence contradicted that of the accused and **DW2** whose evidence was that the deceased had earlier fought with another lady at the club where they were placed together by **DW2**. If the deceased had injuries as alleged by the accused, both **PW1** and **PW3** who were at the gate would have noticed. They had time with the accused and the deceased as they were signing them into the camp with the deceased having no gate pass.

23. The clothes of the deceased with blood stains and the trouser of accused were found in the accused’s house under the bed. There were blood stains in the room and there was a trail of blood from the house of the accused to the dumpsite where the body of the deceased was found, thereby contradicting the accused’s account that he carried the deceased and left her at the dumpsite to go get an umbrella and overcoat. The circumstantial evidence presented before me confirmed the prosecution theory that the deceased was killed in the house before the body was dumped at the dumpsite as there was blood trail from the house to the dumpsite.

24. There were only the accused and the deceased at the accused house on the material night/morning thereby eliminating any other person rather than the accused as the perpetrator. The accused having been the last person seen with the deceased while alive brought himself within the scope of the doctrine of last seen which is that the law presumes that it is the person who was last seen with the deceased who would have killed her and the burden to rebut the same lies with the accused to prove that they had departed. Undoubtedly the last seen theory is an important event in the chain of circumstances that would completely establish and or could point to the guilty of the accused with certainty.

25. In attempting to discharge this burden, the accused called **DW2**, but according to his evidence other than an injury to the lip, the deceased had no physical injury thereby discounting the fact that the deceased would have died as a result of an alleged fight at the club. **PW1** and **PW3** put both of them at the gate and they walked together from the gate when she was last seen alive. The fact that none of the neighbors of the accused heard any commotion in his house does not eliminate the fact that the accused and the deceased were together when she was last seen alive.

26. I have also taken into account the conduct of the accused who left the camp without following the procedure and find and hold that the death of the deceased which had been confirmed by Dr. Oduor to be as a result of strangulation was caused by unlawful act on the part of the accused person and any inconsistencies on the evidence of the prosecution witnesses on what was observed on the body of the deceased was of a minor nature which did not affect the prosecution case. I have taken into account that the blood collected from the accused’s person house, the blood trail from the house to the dumpsite, the blood stains on the trouser of the accused and the clothes of the deceased having matched the DNA profiles of the deceased, put the deceased and the accused in the house of the accused together and therefore find and hold that the accused defence is not believable.

27. The final issue for determination is whether the said death was caused with malice aforethought – *mens rea*. **Section 206 of the Penal Code** defines malice aforethought as follows:-

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-**

**“(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.”**

28. Whereas there is no direct evidence on the motive of the death of the deceased, I have taken into account the evidence of the accused who admitted having danced with another woman at the club which displeased the deceased and as corroborated with that of **DW2** and the fact that the deceased had just arrived from Kisumu on the material day as per the evidence of **PW5** coupled with the post-mortem report which indicated that the cause of death was asphyxia due to ligature strangulation, the doctor having ruled out self strangulation, and find and hold that the prosecution has proved beyond any reasonable doubt that the accused had the intention to cause and succeeded in causing the death of the deceased with malice aforethought which has been proved by the prosecution.

29. This offence was committed in the confines of the privacy of the house shared by the accused and the deceased and it is high time the court starts to make a rebuttable presumption against the living spouse.

30. In the final analysis, I find and hold that the prosecution has proved beyond any reasonable doubt all the elements of the offence of

murder contrary to **Section 203** of the **Penal Code** and accordingly find the same guilty of the murder of **FELISTER AWINO** and convict the same thereof, and it is so ordered.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of September, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

Ms. Gikonyo for the State

Mr. Wakaba for the Accused

Accused present

Court assistant- Karwitha