



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL CASE NO. 5 OF 2015**

**REPUBLIC.....STATE**

**VERSUS**

**DANIEL IMONJE SHIMOLI.....ACCUSED**

**RULING**

1. **Daniel ImonjeShimoli** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the night of 25<sup>th</sup> December, 2014 at Musunguluti village, Ivakale sub- location, Kamiri location in Kakamega East district murdered Christine Mmbone.
2. He pleaded not guilty to the charge on 22<sup>nd</sup> January, 2015. The first witness testified on 2<sup>nd</sup> September, 2019. The prosecution called a total of two witnesses, and closed its case.
3. PW1 **Mudi Rose Muhotoa** village elder in Shianderema sub location testified the accused hails from her area of administration known as Imusunguluti. She also knew the deceased whose husband had died and was remarried by the accused.
4. It was her evidence that on 1<sup>st</sup> November, 2013 she had received a report in respect to the deceased who had been injured and was lying at a bush with 8 stab wounds. She went to the scene and found her and managed to take her to Kambiri hospital for treatment and she was treated. The witness reported the matter at Kambiri AP Post but when she asked the deceased to do the same the latter declined saying her attacker was her husband.
5. On this day she observed that the deceased had injuries on her private parts. The deceased picked up well and even visited her (PW1) on 25<sup>th</sup> December, 2013 as she had recovered.
6. She was at a neighbour's on 25<sup>th</sup> December, 2014 when she received a call from mzee John. He informed her that the deceased had died. She went to the deceased's home and confirmed the death. She found many people at the home. The deceased was wearing no clothes, was bleeding from her nostrils and had defecated on herself. The body was taken away by police from Mukhonje who had come to the scene. She did not know how the deceased had died.
7. PW2 No. 51306 **Sgt Joseph Ruto** was the investigating officer in this matter. He testified that on 26<sup>th</sup> December, 2014, 9 am – 9.30 am he had received a call from the I/C Kambiri AP camp in his capacity as the officer I/C of Mukhonje Police Post. The call was informing him of a murder of a woman by her husband.
8. He rushed to the scene with his colleague, and found the suspect (the accused herein) already arrested by members of the public. They also found the body of a woman lying on the floor of a grass thatched house. There were utensils thrown all over. They noticed a piece of roasted meat on one of the plates. Photographs of the entire scene were taken and he produced them as EXB 2a – R.
9. The body was taken to the mortuary and he went ahead to record and witness statements. Two of his witnesses died before testifying. PW2 with the consent of the defence counsel Mr. Munyendo produced the post mortem report( EXB 3). The report showed that the deceased died as a result of extensive soft tissue injuries subsequent to an assault.
10. It was his evidence that the accused was a boyfriend to the deceased. Further that the murder weapon was never recovered, from the house which belonged to the accused person. In further examination the witness said he had been informed of the death of his witnesses by inspector Ogotu the officer I/C of KambiriAp camp.
11. The prosecution closed its case after the testimony of PW2. Murder is defined under section 203 of the Penal Code as follows:-

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder?”***

12. The ingredients which must be proved are the following:

- i. the fact of death
- ii. the act of killing which is the actus reus
- iii. The intention to kill ... mensrea

### **The fact of death**

13. The two prosecution witnesses PW1 and PW2 have confirmed having gone upto the scene and found the deceased's body lying on the floor of the house belonging to the accused. Photographs were taken of the body and of the house(EXB2 a -k).

14. The photos show the deceased's body with the lower part covered with a blanket. The post mortem report (EXB3) shows that the body had extensive injuries as a result of blunt force trauma following an assault. I am therefore satisfied that the fact of death has been established.

### **The act of killing .... actusreus**

15. The accused is before court as a suspect of the killing. According to PW1 the deceased who was a widow had been remarried by the accused. The investigating officer on the other hand said he established that, the accused and deceased were in a boyfriend and girlfriend relationship. In other words they were not married.

16. The **issue** is whether it is the accused who inflicted the injuries that caused the deceased's death. What PW1 referred to as injuries suffered by the deceased on 1<sup>st</sup> November, 2013 are not the subject of this charge of murder. The deceased had healed from those injuries and even visited PW1 on 25<sup>th</sup> December, 2013.

17. PW2 testified of an issue to do with meat and chicken as the cause of what led to the incident of 25<sup>th</sup> December, 2014. In the photos 9 EXBZ( a-k) there are pieces of meat seen. He did not however avail any witness to speak to this scenario. It's not clear whether the witnesses who had this evidence are the ones who died before testifying. What would be expected especially when it takes over five(5) years for even a single witness to testify? A lot takes place and no one has control over it. Therefore what PW2 told the court about meat and chicken is uncorroborated hearsay evidence.

18. PW1 who is the village elder of the accused's area of residence told the court that she had no idea about the person responsible for the deceased's death. Those who arrested him and handed him over to the police should have been availed to explain why they arrested him. None appeared to testify.

19. Without any tangible evidence presented to this court I find this to be a case founded on very weak circumstantial evidence based on suspicion. The evidence of the two witnesses cannot be a basis for a conviction.

20. In the case of **Sawe V R ( 2003) KLR 364** the court of Appeal while dealing with such evidence had this to say:

**1. In order to justify on circumstances 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 hypotheses 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 hypotheses of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

**4. The circumstantial evidence in the instant case did not irresistibly point to the appellant to the exclusion of all others so as justify conviction.**

**5. The evidence used to convict the appellant did not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant.**

**6. Suspicion, however strong, cannot provide the basis of inferring guilt which must be prove by evidence beyond reasonable doubt.**

21. Applying the **Sawe case** to the circumstances herein its clear that the prosecution has not presented any evidence before this court to connect the accused with the murder herein save to say there was a love relationship between the accused and the deceased. That is not sufficient evidence to make this court,place the accused on his defence.

22. In the circumstances I find no prima facie case proved against the accused who I hereby acquit under section 306(1) of the Criminal Procedure Code.

23. The accused shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed and dated this 10<sup>th</sup> day September, 2019 in open court at Kakamega.**

**H. I. ONG'UDI**

**JUDGE**