



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE (MURDER) NO. 18 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ZACHARIA KIPSIELE RONO.....1ST ACCUSED

ROSALINE CHEPNGETICH TUNUI.....2ND ACCUSED

JUDGMENT

1. The two accused persons Zacharia Kipsiele Rono and Rosaline Chepngetich Tanui were on the 31st March 2016 charged with the offence of Murder of one Esther Chepkoech Langat on the 28th March 2016 at Karandit village in Kuresoi District within Nakuru County.

At the close of the prosecution case **the 2nd accused was acquitted under Section 306(1)** of the Criminal Procedure Code.

The 1st accused was placed on his defence.

2. The offence of murder, contrary to **Section 203** as read with **Section 204 of the Penal Code**, to be proved, the intention to cause the death must be proved. The intention known as “malice aforethought” is defined under **Section 206 of the Penal Code as**

(a) An intention to cause the death 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 or grievous harm to some person although such knowledge is accompanied with indifference whether death or grievous bodily harm is caused or not or by a wish that it may not happen.

(c) An intent to commit a felony

3. The prosecution called four witnesses.

PW1 Collins Kiprotich Siele is the deceased’s son. His evidence was that he heard the two accused persons quarrelling at a neighbour’s home when they were taking alcohol and that his mother (deceased) went to check on them then together they came to their house where the deceased and the 2nd accused continued quarrelling. It was his further evidence that the deceased went outside shouting while the accused remained inside the house, but suddenly stopped shouting. He testified that with his other brother Kipkemoi they went out, only to find their mother lying down face downwards and bleeding from the eye, and not talking. It was his evidence that next to where the mother lay there was an iron rod.

4. On cross examination, **PW1** testified that he did not see the accused holding any iron rod nor did he know how the deceased sustained the eye injury or how she died.

5. **PW2 Hillary Kipkemboi** a younger bother to **PW1** heard the parents quarrelling in the kitchen and when they went outside they found the deceased, who told them to go back to sleep.

He testified that when he came out, he found the accused standing over the deceased who was not talking, and had an iron rod in his hands. He testified to have seen blood coming from the deceased’s mouth. On cross examination, testified that he did not know what had happened to their mother, the deceased.

6. On cross examination **PW2** stated that he found the accused standing on the deceased holding the iron rod but it did not have blood stains.

7. **PW3** Dr. George Biketi who examined the deceased body and prepared a postmortem report. He concluded that the cause of death was due to severe head injury due to massive blunt force trauma.

8. **PW4** the investigating officer visited the scene of crime. His evidence was that he found the deceased's body with blood coming from the nose and right eye.

9. The 1st accused was placed on his defence. He gave an unsworn statement, and called no witnesses. His evidence was that on the material day, he had gone home with his girlfriend and together with his wife, drunk at a neighbour's home upto about 9.00p.m. It was his testimony that later, his wife went to a neighbour's house, but later his children – **PW1** and **PW2** – called him to tell him that their mother had fallen outside the house, upon which he went outside the house and found the deceased lying down with saliva from her mouth.

10. In cross examination, he stated that he did not see any injuries or blood on the deceased.

He agreed with his children's evidence (PW1 and PW2) that he did not quarrel with his wife.

He denied having murdered the deceased nor there having been any iron rods in his house, but bamboo posts used for building houses. On cross examination, he stated that he found the deceased body outside the house in the morning, and took it inside the house then called neighbours, who called the police.

11. The accused denied a suggestion that one of his sons saw him holding a metal rod yet they were together. The investigating officer produced scene of crime photographs as PExt 2, a, b, c, d, e and f.

12. None of the parties filed submissions leaving the court to make its findings on the evidence on record.

13. Analysis of Evidence and Findings

Evidence adduced by the prosecution is not direct as none of the prosecution witnesses saw the accused or any other person hit the deceased or kill her. It is therefore circumstantial.

It is trite, as stated by the **Court of Appeal in the case Judith Achieng Ochieng –vs- Republic (2009) e KLR** that

“when a case rests entirely on circumstantial evidence such evidence must satisfy three tests:

(1) The circumstances from which the inferences of guilt is sought to be drawn, must be cogently and firmly established.

(2) Those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused.

(3) 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 no one else.”

14. There is ample evidence that **PW1** and **PW2** sons of the deceased saw their mother, the deceased lying outside their house after the parents stopped quarrelling and the deceased being thrown out of the house by the accused where she continued shouting but afterwards she stopped shouting.

The question that begs an answer, in my view, is what happened to the deceased, while outside the house, while the accused was inside that thereafter she stopped shouting and in the morning found dead?

15. There was no evidence of a 3rd party who may have been together with the deceased outside the house. The accused's girlfriend, the 2nd accused had gone to sleep in a neighbour's house.

There is evidence that when the accused was called out by the children, PW1 and PW2, he went out to find the deceased lying outside dead. He was heard asking the deceased to get back into the house but this did not materialize as she was dead.

16. PW1 and PW2 were the only eye witnesses to the events prior to the deceased's death. They gave contradictory evidence as to what may have happened on the fateful night.

PW2 testified to have found the accused lying on the ground while the accused stepped on her with an iron rod in his hands.

PW1 on the other hand testified that when he went out of the house, he found the deceased lying on the ground, but did not see the accused stepping on her nor did he see him holding an iron rod in his hands.

17. The investigating officer, **PW4** did not recover any murder weapon at the scene of crime. He alleged to have found blood oozing from the deceased's mouth. **PW1** and **PW2** did not state that they saw any blood from the deceased's mouth. The accused testified to seeing Saliva from the Deceased's mouth when he was called by PW1 and PW2 to go out check on the deceased.

18. I have stated that there was no direct evidence pointing to the accused as the perpetrator of the crime, or any other person.

The medical report is evident that the deceased may have been assaulted with a blunt object on the head causing severe head injury.

There is no doubt that such head injury must have been exerted by a person upon the deceased with some weapon. No murder weapon or blunt object was exhibited in court. The investigator's evidence was that there was no third party involved.

19. Suspicion alone upon which the investigating officer charged the accused persons is not, and cannot be a basis to infer guilt upon an accused person, however strong it may be.

The inference of guilt must be proved beyond reasonable doubt – **Mary Kamau Wanjiru Guchira –vs- R (1998) e KLR and R –vs- Peter Waweru Kinuthia & Another Nakuru HCCR NO. 11 /2013.**

20. Circumstantial evidence must be cogent, plain and clear and no doubt should be created as to the identity of the accused person or his intentions, the malice aforethought.

21. Prior to the deceased's death, there was evidence that the three parties were drinking together the whole day and went home when some quarrelling erupted which forced the accused to send the deceased outside the house, and he went back to sleep. The children PW1 and PW2 testified to this, but none saw the accused assault the deceased.

22. Suspicion alone that it could have been the accused who may have assaulted the deceased cannot be sufficient to find a conviction.

No malice has been established as to why the accused may have formed the intention to cause death to the deceased.

Likewise no *actus reas* has been established.

None of the prosecution witnesses testified that it was the accused who murdered the deceased – See **Republic –vs- Peterson Njuguna Githui (2011) e KLR.**

23. It is not the duty of an accused person to prove his innocence. That duty lies squarely on the prosecution whose duty is to call sufficient evidence to prove the offence.

In the totality of evidence before the court, I find that the prosecution has fallen short of proving its case beyond reasonable doubt as contradictions and gaps in the evidence were not satisfactorily explained.

24. Cumulatively the prosecution evidence does not form a chain so complete that no escape from the conclusion that with all human probability, the crime was committed by the accused.

For the above reasons, I enter a verdict of NOT GUILTY and proceed to acquit the accused. He is set at liberty forthwith unless otherwise lawfully held.

Delivered, Signed and dated at Nakuru this 3rd Day of October 2019.

J.N. MULWA

JUDGE