



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO.10 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL BEKE MWIRU.....ACCUSED

J U D G M E N T

A. Introduction

The accused herein is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the 10th June 2016, at Kibugu market, Kibugu sub-location within Embu County, the accused murdered one Mary Wanyaga Ndwiga. He pleaded not-guilty to the charge.

2. The prosecution called ten (10) witnesses in support of their case which is summarised herein.

B. Prosecution Case

3. The accused person was certified fit to stand trial by PW4, Dr. Joseph Thuo. PW6, PC Raphael Rotich testified that on the 10/06/2016, the accused, in a drunken state, made a report at Kibugu Police Post, that he had killed the deceased who was his girlfriend. PW7 corroborated the evidence of PW6 on the murder report made by the accused at Kibugu Police Post. PW8, Dr. Phyllis Muhonja carried out the post-mortem on the body of the deceased and concluded that the deceased died as a result of raised intracranial pressure, massive subarachnoid haemorrhage a attendant subdural haematoma, brain oedema following blunt force trauma.

C. Accused's Case

4. It is the accused's testimony that on the 9/06/2016 he visited the deceased who was his mistress in the morning hours and they spent the day together before separating in the evening. The accused said he proceeded to a bar at Kibugu market alone where he stayed until 11.00 pm when he left in the company of a lady with whom he spent the night with.

5. The accused further testifies that he woke up on the morning of 10/6/2016 and proceeded to the deceased's house where he found the deceased unresponsive on the bed with foam oozing out of her mouth. Further he testified that he ran out of the house and subsequently saw a police land rover approaching and informed the officers of what had he had seen. The accused denied killing the deceased or confessing to the police.

D. Accused's Submissions

6. It is submitted that the prosecution evidence is circumstantial and as such it is not enough to sustain a conviction. Further, it was submitted that the testimony of the accused was not shaken by the prosecution and as such the prosecution had failed to prove their case beyond reasonable doubt.

E. Analysis of the Law

7. I have carefully considered the evidence tendered before this court. It is noted that none of the prosecution witnesses witnessed the death of the deceased. PW6, testified that on the 10/06/2016, the accused, in a drunken state, made a report at Kibugu Police Post, that he had killed the deceased who was his girlfriend. PW7, Chief Inspector Salome Ihiga corroborated PW6's testimony on the murder report made by the accused. The accused on his part denied confessing to murdering the deceased.

8. Generally, confessions made by an accused person are not admissible in Kenya unless when they are made strictly under the law. Section 25 of the Evidence Act defines a confession as follows:

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

9. Section 25 of the Evidence Act was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act Section 25A which reads as shown below:

“25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

10. The alleged confession of the accused person was not recorded as required by the law cannot be relied on to convict the accused. However, the court will examine other evidence of the prosecution in this case.

11. The evidence of PW6 a police officer attached to Kibugu police station was that on the 10/06/2016 at around 9.00 am, he was with his colleague PC Mutua when the accused went there and reported that he had killed his girlfriend namely Makena Wanyaga. The accused at the time of reporting the incident was in a drunken state and was crying. He was immediately placed in the cells at the police post pending investigations.

12. PW6 further testified that he called the officer in charge of the police post one Salome Njeri PW7 who interviewed the accused. PW6 and other officers were led by the accused to the house where the deceased’s body was found on a bed. He told the officers that the house belonged to him. The evidence of PW6 was corroborated by that of PW7. PW6 testified that she attended to the scene of crime which is about 300 metres from the police post. PW7 called the scene of crime personnel PW10 who took photographs and produced them in evidence. This was before the body was moved to the mortuary.

15. PW9 a police officer visited the scene of crime after the body was removed. He recovered documents of the accused person namely an identity card No. 22222964, a bank plate for bank account No. 010010378834, an identification badge for Splashers Promotions and a mobile phone make Itel S/No.3558900771586031 with twin sim card which were produced in evidence.

14. In his defence, the accused said he went to the house of the deceased on 10/06/2016 in the morning around 6.00 am after he left the bar where he had spent the whole night. The evidence of PW6 and PW7 is that the accused reported to Kibugu police post at around 9.00 am that he had killed the deceased. At that time, he looked drunk and he had a bottle of Smirnoff alcohol that he was taking.

15. The accused in response to this evidence defended himself that he went to the police to report that he had found the deceased murdered in her house early in the morning and rushed to the police to report he denied that he killed the deceased.

16. As I have said earlier, there is no direct evidence that the accused was seen killing the deceased. The evidence of PW6 and PW7 is as good as direct in that they were told by the accused himself that he had killed the deceased. PW6 went to the house of the deceased led by the accused and found the body of the deceased there. This confirmed the truth of the report by the accused to the police.

17. The evidence of other witnesses is circumstantial and will be subjected to the test regarding such evidence to assess whether it qualifies being used to convict the accused of the offence of murder.

18. In the case of **NDURYA VS REPUBLIC [2008] KLR 135** was held in regard to circumstantial evidence: -

1. Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person’s guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did no to dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.

2. In the circumstances of this case, even if there had been sufficient evidence that it was the appellant who had caused the death of the deceased, the court should have considered Section 210 of the Penal Code (which defined the offence of infanticide – where a mother caused the death of her child while the balance of her mind was disturbed by her not having recovered from the effect of childbirth, or the effect of lactation – an offence which was dealt with and punished in the same manner as the offence of manslaughter.)

19. Similarly, in the case of **WAMBUA & 3 OTHERS VS REPUBLIC [2008] KLR 142** the court held: -

1. In order to justify an inference of guilt from circumstantial evidence, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of this inference is always on the prosecution which is required to establish its case beyond reasonable doubt.

2. It is also necessary, before drawing the inference of the accused's guilt from circumstantial evidence, to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

20. The court in the **Wambua** case relied on the case of **KIPKERING ARAP KOSKEI & ANOTHER [1949] XVI EACA 135** in which the Court of Appeal made similar findings.

21. From the circumstantial evidence of PW6, PW7 and PW9, the following inculpatory facts can be deduced: -

a. That the accused was an intimate friend of the deceased for over three (3) months before the incident.

b. That the accused in his defence said he visited the house of the deceased regularly about two days in a week.

c. That on the material day, the accused was in the house of the deceased early in the morning from around 6.00 am to 9.00 am when he left for the police station.

d. That the accused surrendered to the police and the report was recorded in the Occurrence Book (OB) that he had reported that he had killed his girlfriend the deceased.

e. That PW1 who shared the house with the deceased was absent that night having gone to her rural home within Kibugu sub-location to visit her parents.

f. That PW1 went to the rural area within Kibugu location with the deceased who was her neighbour, had supper at PW1's parents home before the deceased left to go to her parents home.

g. After leaving her parent's home, the deceased said she was returning to her house at Kibugu market at around 7.00 pm as was confirmed by her mother PW2.

h. It is the following morning that the deceased was found dead in her house which death was reported to police that morning by the accused in form of a confession although the investigating officer did not have it recorded as required by the law.

i. That the accused told PW7 that the deceased had troubled him a lot upon being asked the reason for killing her.

j. That PW9 recovered crucial documents of the accused from the house of the deceased that included a bank plate, an identity card and a mobile phone.

k. That in his defence, the accused did not address the issue of his documents and phone that were recovered in the house of the deceased.

l. That the documents recovered from the house, the phone and the evidence of the witnesses placed him at the scene of crime at the period the deceased is said to have died.

22. The evidence of PW4 Dr. Muhonja was that the cause of death was severe head injuries including a skull fracture and blunt force trauma.

23. The accused was found mentally fit to plead according to the evidence of the doctor PW4.

24. The evidence of PW6 and PW7 was tested in cross-examination and found to be credible and reliable.

25. This evidence together with the foregoing inculpatory facts in my considered opinion point guilt at no other person but the accused. If he did not kill, the deceased he would not have surrendered to the police, escorted them to where the deceased's body was or even told PW7 the reason for killing her. The police would not have known there was an incident of murder that called for their attention if the accused never told them.

26. I am satisfied that the prosecution have proved that the death of the deceased occurred and was caused by the unlawful act of the accused.

27. I find that *actus reus* has been proved against the accused.

28. The prosecution must prove that the accused had malice aforethought when he committed the unlawful act.

29. For the court to determine the existence of malice aforethought, it is required that his conduct before and after the incident be considered the severity of injuries inflicted on the deceased and any other relevant evidence.

30. The postmortem report revealed that the deceased sustained the left occipital skull fracture, subarachnoid massive haemorrhage, subdural

haematoma, occipital brain oedema.

31. These injuries were by any standards very severe and must have been intended to cause grievous bodily harm on the deceased or to bring her life to an end. The description and assessment of the injuries fall squarely under the situation envisaged in Section 206(a) of the Penal Code.

32. The evidence of PW7 that the accused told her that the deceased had troubled her too much and thus the reason for killing her. This was several hours after the incident and demonstrates the motive of the killing is as well as evidence of planned brutality that was executed to severely to punish or kill the deceased.

33. It is my finding that the foregoing analysis demonstrates and proves that the accused had the intention to kill the deceased through an unlawful act.

34. Consequently, I find that the prosecution have proved the offence of murder contrary to Section 203 and 204 of the Penal Code.

35. I hereby find him guilty of the offence and convict him accordingly.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Momanyi for Accused

Ms. Mati for State

Accused present