



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM; R. MWONGO, J.

CRIMINAL CASE NO. 18 OF 2017

REPUBLIC.....COMPLAINANT

VS

JOHN GITHENYE KAMAU.....RESPONDENT

JUDGMENT

1. The accused is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. According to the charge sheet, the particulars of the offence are that on the 1st day of October, 2017, at an unknown time at central Ndadabi village, in Naivasha sub-county within Nakuru County, he murdered Teresia Njoki Nganga. On arraignment, the accused pleaded not guilty. The matter went into hearing with the prosecution calling 4 witness. The accused was found to have a case to answer and gave sworn evidence.

2. For a conviction to succeed under **section 204** of the **Penal Code** the prosecution must avail evidence to prove the death of the deceased; that such death was caused by the accused; that such death was caused by an unlawful act or omission of the accused person; and that the death was caused through malice aforethought.

3. The facts of the case are fairly straightforward. PW1, Dr. Titus Ngulungu is the Government pathologist who performed the post mortem on the deceased's body. He testified that the deceased's death was caused by manual strangulation. He premised his conclusion on the nature of injuries he saw on the neck and blood collection in the brain. Medically, he described it as "*asphyxia following cord pressure to the neck in keeping with manual strangulation homicide*". The death is not disputed.

4. PW2, Peris Wangari Nganga, is a niece of the deceased. She testified that the accused lived merely twenty meters away from her house, and that the accused and deceased were living there as husband and wife. That on the fateful day, the deceased came to her house to get a phone charger to charge her phone, which she gave her. At about noon, and again at 1.00pm the accused came to her house asking if she had seen the deceased. PW2 explained that the deceased had taken a charger and gone home. At about 5.00pm and again at 8.00pm the accused came again to her house and asked if the deceased had come home. On each occasion PW2 said the deceased had not come home.

5. At about 10.30 pm that night, PW2 and her neighbors decided to report to the area Chief and do a search for the deceased. They called accused to accompany them to the chief which he did. The Chief asked them to wait for 24hrs before they could start looking for the deceased, so on their way back, the accused suggested that they get motorbikes to go look for her in the maize plantation. One of the group suggested that it was better if they started their search with the houses where the deceased would most likely be since she had a separate house and would mostly be either in her house or the deceased house. They proceeded to the deceased house. The accused asked PW2 for the keys to the house as he had left them with her, and searched inside, but she wasn't there. The party then proceeded to the accused's house. On reaching there, the accused started taking out the key but looked hesitant. He opened the door and PW3 went in to search. After a moment's search he found the body of the deceased under the bed covered with sheets.

6. A watchman in Ndadabi Trading Centre, Moses Gacheru, gave evidence as PW3. He testified that he was patrolling on the fateful night and saw a group of people walking around at 11.00pm. He knew the people and they said they were searching for their landlord. They went to report to the area Chief, and then went to search at the deceased's house. They did not find the deceased there. Thereafter, they went to the accused's rental house. The accused opened the door and PW3 went in. He checked inside and under one bed, he saw legs sticking out: it was the deceased. After the discovery of the body, they called the police.

7. In cross examination, PW3 stated that: he was from the area having lived there for almost twenty years; that he had been employed as a security guard by the wananchi in the area for about three months; that he knew the accused very well for about two years as he had come to buy a plot there to build and they were friends; that the accused had lived with the deceased as husband and wife, although he didn't know if they were actually husband and wife, and didn't know if they slept in the same room. Finally, when asked if the accused had panicked when he was asked to open his house he said he did not understand what that meant. However, he stated that when the accused was opening the door he "*stukad*" translated to mean that he panicked.

8. PC John Kibet, PW4, is the Investigating Officer. He received instructions from the Chief Inspector Benson Orandi to go to Ndabibi trading centre. At about 1.00am on 2nd October, 2017, he went with the Police driver, PC Godana, Charles Muthoka and the OCS to the scene. There, they found the area chief who confirmed that there was a body of a woman that was found under the bed of the accused's house. He took photographs of the body and the scene and took the body to the mortuary. He confirmed that they did not recover any items used for that murder,

9. That closed the prosecution case.

10. The Accused gave sworn evidence as DW1. He testified that he was a businessman in the line of tailoring, and that he knew the deceased as his landlady. He had rented a house at the deceased's plot for business and would at times stay there when there was a lot of work but officially lived with his family in Bahati. The deceased wanted to learn how to sew and he trained her and gave her a sewing machine and a key to his businesses premises to allow her to practice and to open the shop when he was late.

11. Further, he testified that one day he heard a commotion at the plot and thought it was normal as the plot was in a trading centre and a main road passed right outside it. He said the commotion however continued for a long while and when he went out to check what was happening he saw a man by the name John Kizito in a verbal exchange with the deceased in the presence of other people. On asking the deceased what Kizito wanted, the deceased said she did not know what Kizito was up to. On the following day he heard women talking about how Kizito and deceased were friends but the deceased left him.

12. He further testified that on 1st Oct, 2017, he went to church with his wife, then at about 1.30pm he went to KAG Manyatta to take clothes measurements. Thereafter he went to his shop in the "evening" to transfer the measurements to his book. He first stopped at a shop to get a soda then went to his shop. There, he saw the door open and no one was inside. However, he saw the keys and the padlock on a table together with deceased's phone and so he assumed that the deceased was around and had shortly stepped out.

13. Accused further testified that after completing with recording measurements, he went to check for the deceased in her house at around 4.30pm, but she wasn't there. Thus, he went to PW2's house to ask where her aunty was, and she told him that she had been with her in the morning and had asked for a phone charger. PW2 checked at a neighbour's (mama Tabitha) but deceased wasn't there. Accused waited to see if deceased would return but she did not. So he left the phone and keys with PW2 since the deceased had a house elsewhere where she stayed with her family. He then asked PW2 to call them and ask whether she was there but she wasn't. The accused then decided to go home

14. Whilst at a friend's house, the accused was called out by PW2 and three men who told him they were going to report that the deceased was missing. They went to chief's place but he wasn't in so they called Gicheru who is an askari, who told them a missing person's report can only be made after 24 hours. On their way back they met PW3 who joined them and they all proceeded to the plot where they found a group of about 10 people deliberating on the disappearance of the deceased. They searched several houses where she could have been but she wasn't there. One Kizito suggested they search the accused's premises. The accused agreed and opened the door to let the people in to allow the search and the deceased was found under the bed, dead. The accused was attacked by the people and he lost consciousness and woke up in hospital. He denies any involvement in the deceased's death.

Issue of circumstantial evidence

15. In light of the evidence, the key issue that arises concerns the application of circumstantial evidence. No one witnessed the murder neither were any weapons or tools recovered from the accused proving that he was the murderer. This case therefore falls within the scope of circumstantial evidence and the doctrine of "last seen" which placed a statutory burden upon the accused to discharge a rebuttable presumption that the body of the deceased having been found in his premises, he should explain how she died

16. **Sections 111 (1) and 119** of the **Evidence Act** deal with circumstantial evidence and provide as follows:

"111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if it satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

Section 119:

"The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of the natural events, human conduct and public or private business in their relationship to the facts of the particular case"

17. The defence submitted that the accused's sworn testimony was not shaken in cross examination; that the burden of proof cannot be shifted merely because the deceased's body was found under a bed said to be used by the deceased and sometimes by the accused. Counsel submitted that the circumstantial evidence must be very strong for a conviction to follow, and that suspicion, no matter how strong cannot be evidence of commission of an offence. On these propositions, counsel referred to **Eldoret CA No 58 of 2017 Rashid Siyoi Chesholei & Another v Republic** and **Sawe v Republic (2003) KLR 364**.

18. The prosecution relied on the case of **Peter Mugambi v Republic [2017] eKLR** where the Court of Appeal at Nyeri quoted the case of **R. v Taylor Weaver and Donovan [1928] 21 CR.APP. 20**. The **Taylor Weaver** case has been widely cited with approval in our jurisprudence where the principle that circumstantial evidence is often the best evidence of surrounding circumstances, is enunciated.

19. The parameters for considering such evidence were set out in the case of **Kipkering Arap Koske versus R. [1949] 16 EACA 135**, the locus classicus case that propositioned as follows:

(a) *The inculpatory facts must be incompatible with the innocence of the accused.*

(b) *The facts must be capable of no other conclusion or explanation except the guilt of the accused.*

20. Even where the court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. This was the holding in the English case of **Teper v R. [1952] AC 480,489** as approved in **Simon Musoke versus Republic [1958] EA 715**. The court in **Teper** stated that before drawing the inference of the accused's guilt from circumstantial evidence, it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

21. The facts in this case are that the deceased was seen alive on Sunday 1st October, 2017 by PW2 some time before noon. On that day deceased borrowed a charger from PW2 and, saying she was tired, went back home about 20 metres away from PW2s house. The deceased's phone was found by the accused in his shop at about 4.30pm. This evidence is uncontested.

22. PW2 and Accused both agree that the accused came to look for the deceased at PW2s house on the material day. The timings differ on the first visits. PW2 says accused came to ask her about deceased at about noon and again at about 1.00pm. Accused says he was in church up to 1.30 pm and first came to PW2 ask about the deceased at 4.30pm, and again at about 6.00pm. Accused testified that:

“ Since I don't normally open work on Sunday, I stayed around talking to people....

At about 6.00pm I started wondering whether the deceased was as she had left her phone and keys”

23. This is telling evidence. On the one day the accused did not normally work is the day he went to work to allegedly record clothes measurements. And he suggests that he stayed there at the trading centre talking to people he does not name. On that one day is the day the deceased went missing and was found strangled and tucked away under her bed. Further, the accused's failure to challenge the evidence of PW2 that he had been to her house at 12.00 and again at 1.00pm makes his evidence on timings quite unbelievable.

24. The accused testified that the search party had insisted on checking his house after they did not find deceased in her house. One Kizito then suggested that a search should be done at the Pastor's house. He admitted that that: ***“That was my shop. I agreed and I opened the door”***. It was there that the deceased's body was found.

25. The further evidence before the court by PW2 and PW3 is that the accused and the deceased were living as husband and wife or at least that they stayed together. Also in evidence is the fact that the deceased's body was found in the accused's house or shop which was locked from outside and the accused is the one who opened the door using his keys. Although there is no eyewitness to the murder, there is no explanation on what transpired for the deceased's dead body to be found in the accused's house or shop under the deceased's bed with the door locked from outside.

26. It is not in doubt that the accused was the one with the keys to the house and he was in the house prior when he said he was looking for the deceased. This means that he had access to the house before deceased was discovered dead and he is the one who locked the door from outside. All these circumstances taken together, place the accused in an inculpatory situation and are inconsistent with the innocence of the accused.

27. As I see it, the evidence placed before the court placed the accused as the last person who was in most probable contact with the deceased before she was discovered dead by strangling in his house. The prosecution has proved beyond reasonable doubt that the death of the deceased was caused by unlawful act on the part of the accused person as all the circumstantial evidence points to the accused to the exclusion of any other person.

28. However, from the evidence availed by the prosecution, I am unable to see that there was malice aforethought. Accordingly, I convict the accused with the offence of manslaughter.

29. A mitigation and sentencing hearing shall be set.

30. Orders accordingly.

Dated and Delivered at Naivasha this 3rd Day of December, 2019

.....

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Michuki for the State
2. Gachiengo for the Accused
3. Accused - John Githenye Kamau - present
4. Court Clerk - Quinter Ogutu