



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 43 OF 2013

REPUBLIC.....PROSECUTOR

-VS-

EDWARD KIMATHI alias COMMANDO.....ACCUSED

JUDGMENT.

1. **Edward Kimathi** (the accused) is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence are that on the 9th day of May 2013, at Isiolo Township within Isiolo County the accused murdered Agnes Mwirichia. The accused denied the charge with the prosecution calling a total of 3 witnesses.

2. **PW1 Lucy Kanamu** testified that sometimes in the year 2013, she received a call and was informed that her sister (the deceased) had been murdered near Consolidated Bank Isiolo Branch. She proceeded to the scene in the presence of one Mukokinya and Kabirithu and found that the body had been taken by the police. It was her evidence that the deceased was married to the accused with whom they had one child. She further told the court that the accused and the deceased did not relate well at the time.

3. **PW 2 was Everlyn Awoi**. It was her evidence that on 8th May 2013, she was at home with the deceased. That they left with the deceased to Isiolo town where they reached at about 10:00PM. It was her evidence that they were at Genesis bar with the deceased when the accused joined them at about 3:00AM. A fight broke between the accused and the deceased. After that, the deceased went and came back with the child and told the accused to take the kid but the accused refused. A scuffle ensued between the two and the accused left and was followed by the deceased with the child. The next day she learnt that the deceased had been killed. It was her further evidence that the deceased and the accused lived together although they did not relate well.

4. **PW3 Dr. Kilua Steven** a doctor attached to Isiolo hospital produced the postmortem result in respect of the deceased. It was his evidence that there was no internal examination of the body at the request of the relatives. The doctor concluded that the cause of death was blunt trauma to the head with a heavy weapon. In cross examination, he stated that the injury to the forehead could have been as a result of a fall on a raised surface. That the report was not conclusive as to the cause of death.

5. In his sworn statement, the accused stated in his defence that on the material day, at about 9PM, he left his place of work at moonlight hotel and went to watch news at a bar that is behind the hotel. That while watching news, the deceased and PW1 entered the bar with the deceased carrying a child. The two asked him to take the child which he declined because it was night. The deceased then started abusing him whereby he left for home to sleep. The following day at about 4pm, he was arrested by police officers at his place of work and later learnt that the deceased had died. He admitted that the deceased was her girlfriend with whom he had a child but they were not living together.

6. Ms. Nelima for the accused submitted that prosecution had not proved its case beyond reasonable doubt. That there was no direct evidence to prove that it is the accused who inflicted the injuries on the deceased. That the post mortem report was inconclusive as to the cause of death. That the circumstantial evidence did not point at the accused as the one who committed the offence. In conclusion that the investigations officer did not testify to tell the court basis on which the accused was charged.

7. On the other hand, Mr. Namiti for the State submitted that the prosecution had proved its case beyond reasonable doubt. That from the record, it was clear that the evidence of PW1 and 2 was consistent and left no doubt that it was the accused who committed this offence. That the postmortem report showed that there was blunt trauma on the head which was the cause of death and that it was the accused person who hit the deceased person with a stone on the head.

8. I have carefully considered the evidence on record. The issues for determination are whether the accused caused the death of the deceased and if so, whether there was malice aforethought.

9. The accused is facing a charge of murder. Section 203 of the Penal Code defines the offence of murder in the following terms:-

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

10. The burden lies with the prosecution to prove its case against the accused on the standard of proof beyond any reasonable doubt. There was no eye witness to the offence. **PW1 Lucy Kanamu** testified that she received a call about the demise of her sister. She went to the mortuary to identify the body. She told the court that the deceased was married to the accused and that their relationship was not cordial.

11. PW2 testified that the deceased and the accused had a child and that their relationship was not cordial at the time it was her evidence that there was a fight between the accused and the deceased which lasted for about 2 minutes, a struggle ensued and the accused walked out of the bar and was followed by the deceased. The next day she learnt that the deceased had died. She confirmed that the accused did not have any weapon in his hands.

12. While the accused admitted having had a scuffle with the deceased on the material night, he stated that he left and went home. There was no evidence to show that after the deceased followed the accused, she caught up with him and if so where. The prosecution relied on circumstantial evidence in its case against the accused.

13. In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** the Court of Appeal held that:-

“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.”

14. In **SAWE –V- REP [2003] KLR 364** the Court of Appeal held:-

“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 hypotheses than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

15. The accused agreed with the testimony of PW2 that there was a quarrel that was followed with a scuffle between the accused and the deceased. This fact does not necessarily mean that it is the accused who fatally injured the deceased. No one can tell what transpired after the parties left the scene and the accused person only remained a mere suspect. As was held in the Sawe case (supra), suspicion however strong cannot find a conviction. The contention by Mr. Namiti that it was the accused who hit the deceased with a stone has no factual basis as there was no such evidence.

16. Taking into totality all the evidence on record, I find that the evidence tendered by the prosecution in this case is not sufficient to prove and sustain a charge of murder to the required standard. The circumstantial evidence similarly, does not point unerringly at the accused as the one who committed the offence. When considered cumulatively the circumstantial evidence adduced does not form a complete chain to show that it was the accused and no one else who committed the offence. There is doubt as to whether it is the accused who murdered the deceased after they left the bar.

17. In the circumstances, I find the accused not guilty and acquit him of the offence of murder under section 322 of the Criminal Procedure Code.

DATED and **DELIVERED** at Meru this 5th day of April, 2018

A. MABEYA

JUDGE