



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 15 OF 2012

REPUBLIC.....DPP

VERSUS

WYCLIFF MUTISO MAVUI.....ACCUSED

JUDGMENT

Introduction

1. The accused was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code (Cap 63) laws of Kenya. The particulars of the offence are that on the night of 18th and 19th March, 2009 at Kamwalani village, Miani Sub-location, Mukaa location in Mukaa District within Makueni County murdered Jennifer Nundu Lazarus. The prosecution called 8 witnesses to prove their case and at the close of the prosecution's case the accused person was put on his defence where he elected to give unsworn evidence and did not call any witnesses.

The Prosecution's Case

2. PW1 Ruth Mwikali Lazaro testified that she lived in Kilome and works as a hawker selling vegetables. On the 18th of March, 2009, she was at the market at 4:00 pm when the accused person Mutua, and her daughter Jennifer Nundu, arrived at the market. Jennifer brought her maize flour and they left. Jennifer was married to the accused person, they had cohabited for 10 years and had a child who was in class 6. Jennifer later returned and brought her sugar and tea leaves. She told PW1 that the following day they would go to Salama to buy school uniform for their child and that was the last time PW1 saw her daughter. It was her testimony that her daughter used to stay at her home and would also go to the accused person's home. PW1 was the one staying with her daughter's child. Jennifer was married to another person, she separated with him and started living with the accused person. She stated that the relationship between the accused person and the deceased was not good as accused person used to assault the deceased. PW1 used to intervene at times, the deceased and the accused person had been staying together for 2 months prior to her death. The deceased started staying with PW1 after she separated with her husband in 1996. On 19th March, 2009 at 11:00 am one Ndana told PW1 that Jennifer had been found in a thicket having been killed. Jennifer's father had been called and he had taken the body to the mortuary.

3. PW2 Lazaro Nzau Ndambuki, testified that on the 30th day of August, 2008 at 3:30 pm he was at the market with his wife PW1 who was selling vegetables. The accused person came to see them, at that time he was staying with their daughter Jennifer Nundu as his lover. The deceased and accused person had cohabited for 10 years and had a child by the name of M M. According to him the accused person used to assault the deceased quite often. PW2 stated that he told his daughter to separate from the accused person. On 15th March, 2009 the deceased left home going to the accused person's place. He did not see her on the 16th of March, 2009. On the 19th of March, 2009 at 8:00 am Lazaro Silas told him that his daughter was found dead. He went to the scene and found her body. The deceased lay facing upwards. Her sandals and headscarf had been put beside her. They were reddish sandals. The deceased had clothes on, there were wounds on her body and on the leg; the blood was dry on the right leg. There were pieces of mattress sponge yellow in colour, they were soaked with blood. At the neck the skin had come off, there were lacerations, the forehead was swollen, the neck was injured, and there were no signs of a struggle. He went to report at Kilome Police Station, the police visited the scene, they carried out investigations and they took away the body to the mortuary. PW2 was able to identify the head scarf, red in colour (MFI 1) and a pair of sandals (MFI 2), he did not see the accused person.

4. PW3 Mutindi Lazarus testified that he sells vegetables as a hawker. On 30th April, 2012 he was at the market, he went to Nyuki village at his friend Mumo Waru's place he saw Mutiso the accused person; he rung his mother PW1 and asked her to get two men, he wanted them to arrest the accused as he was **suspected** of killing his sister in 2008. The accused had disappeared from the village when it happened. Muindi and Rizuki came and they arrested the accused person. They took him to the police station. He did not know where the accused had come from. He knew him as his sister's friend.

5. PW4 Dennis Justus Ngiki, testified that he lived in Njiru, Kathonzweni location since 2010, he had a shop at Enzai Market. On the 30th day of November, 2008 at 3:00 pm he heard a noise outside and he went outside the shop and found Wycliffe insulting Nundu's parents. On 17th of March, 2012, he met Wycliffe and Nundu coming from Kilome market. He talked to them, they told him that they were going home,

they had a goat. Two days later Lazarus Ndambuki rung him and told him that Nundu had died. The body had been taken to the mortuary. Lazarus was his brother-in-law. On 6th of April, 2012 he was summoned and recorded his statement. He saw the body of the deceased while at the mortuary.

6. PW5 Wambua Geoffrey Lazarus testified that he lived in Nairobi, and works at the coca cola Nairobi branch. On the 19th of March, 2009 at 6:30 am he was at home in Mukaa, Machakos when his sister's son Nyamai Nundu, called and told him that his sister had been found dead. He went to his father's house and they went to where the body was. It was 400 meters away from his house on a footpath. He proceeded to Kilome Police Station to report. The deceased had injuries, there were blood clots on the neck, the left leg had a cut wound, and the blood was dry. He was accompanied by the OCS and other officers to the scene. The body was collected and taken to Kilome Nursing Home Mortuary. He stated that his sister was married but the marriage was never formalised her husband was Mutiso Mutua, the accused person. They went to look for the accused and found him having gone to the market, the police decided to look for him at dawn. I was called at 3:00 pm by one of the officers, they all went to Mutiso's house but did not find him. Police officers decided to break open the door of the house, the accused person was not inside, there was water in a basin and some blood stains on the mattress. It was his testimony that the relationship between the accused person and the deceased was not good they would always have differences. The deceased would go back home and stay for a while, he got information that the accused person was in Mombasa, He went with the police officers but they did not find him. The following day they went to Karerubera market, he saw a person who came out of a shop running, he alerted the police; they chased after him and he disappeared in the thicket. He witnessed the post-mortem of the deceased at Kilome Nursing Home. Three years later the accused person was arrested.

7. PW6, Philip Mutua Katungwa, testified that he lives in Mukaa and works as a butcher, he knew the accused in his capacity as a village elder. On the 3rd of October, 2009, at 3:00 pm, he had just come from church and met the accused person insulting the parents of the deceased who were nearby, the accused person threatened that he could kill the deceased. The accused person then left, the issue was sorted out in Kilungu law courts.

8. PW7 NO 59137 Sgt Alfred Ogutu testified that he was the OCS khumusalaba police post, Khwisero. Formerly in charge of crime in Kilome Police Station. On 19th March, 2009 at 9:20 am he was in the office when Lazarus Ndambuki father of the deceased, his son Lazarus Ndambuki and a step-father of the deceased went to the office to report that the deceased had been found within Kilome Mukaa location dead. They reported that the deceased had injuries in the legs, and several bruises on the face. He instructed report office personnel P.C Gishan Wonyele to book the report in the occurrence book, he informed the OCS and proceeded to the scene. On arrival at the scene they found the deceased, the head with deep cuts on the legs, fingers and multiple bruises on the face and neck. There were sandals red in colour and a scarf. They appeared to have been placed at the scene. There were no signs of struggle. The body did not have fresh cuts, there were blood clots that were drying. Upon interrogation of the deceased's father, he indicated that he suspected the deceased's husband as they had marital differences. The body was removed from the scene and taken to Kilome funeral home to await post mortem examination. We subsequently went to the house of the accused, we did not find him, as his sister told them that the accused had just left. They continued with investigations, on the 19th day of March, 2009 at 3:00 am they visited the house of the accused person but he was not there. On 24th of March, 2009 Lazarus Wambua went to his office and told him that he had information that the suspect had been sighted at Makindu area in Nzau. They boarded a taxi, together with Lazarus and other officers and went to Nzau market. An informer told them that the accused person was within the market. Lazarus Wambua saw the accused person run at a distance. They gave chase but he disappeared in the thicket, they were unable to trace him. PW7 was transferred to Mwingi division in the month of November, 2009 and handed over the file. On 10th of May, 2012 he was informed by the OCS Kilome that members of the public had arrested the accused person and was later charged with the offence of murder, as per his investigations the accused person was involved because upon seeing us he ran away and also during the deceased's burial he was at large.

9. During cross-examination, PW7 stated that when they went to the accused person's house, the household items of the accused person were scattered but they got nothing that related to the offence. Further, the mattress did not have blood stains. At the scene where the deceased's body was found there were no pieces of mattress.

10. PW8 Dr. Peter Kavoo Kilonzo testified on behalf of Dr. Anthony Mutheka who performed the Post-mortem examination on the body of the deceased on 26/3/2009. From the post-mortem report which was produced as Exhibit 3 indicated the cause of the death of the deceased was cardiac respiratory arrest due to internal haemorrhage in the brain, right lung due to severe head and chest injuries due to assault.

Defence Case

11. The accused person gave an unsworn evidence and stated that he had been in civil jail in 2008 as a result of a court case he had with the deceased's father. He went to Nairobi and in the year 2009 he was called by a person from his home and was told that he was with the deceased in his home. He returned home in April, 2012, he was shortly arrested and brought to court on murder charges.

Issues for determination

12. Whether there is evidence, direct or circumstantial that establish the commission of the offence of murder against the accused person.

The Law

13. The offence of murder is defined as follows by section 203 of the Penal Code:

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

This definition gives rise to four (4) ingredients of the offence of murder which must be proved beyond reasonable doubt:

- The fact of the death of the deceased.
- The cause of such death.
- Proof that the deceased met her death as a result of an, unlawful act or omission on the part of the accused person, and lastly
- Proof that said unlawful act or omission was committed with malice aforethought

Fact of Death

14. From the evidence on record nearly all the prosecution witnesses were informed or had seen the body of the deceased person after it was found in a thicket on 19th March 2009. PW2 stated that he was called and was informed that his daughter's dead body was found in a thicket. He went to the scene and confirmed that it was his daughter Jennifer Nundu. He subsequently went to Kilome Police Station and reported the incident. He later went to the scene in the company of PW7 and other officers who collected the body and took it to the mortuary. PW1 also stated that she received information of her daughter's demise from PW1. PW4 also testified that he saw the body of the deceased at the mortuary. The fact of death was sufficiently proved.

Cause of Death

15. PW8 Dr Peter Kavoo Kilonzo testified and produced the Post Mortem Report on behalf of Dr. Matheka as exhibit 3 which was carried out on the 26th of March, 2009.

The external injuries noted on the body of the deceased were;

- Body had numerous antemortem injuries and bruises all over it.
- Head had serious injuries and bruises in the face, around the eyes, at vertex and temporal areas.
- Deep cuts (as of finger nails) in the neck laterally and anteriorly and bruises
- Very extensive bruises in the right chest and breast area 3-5cm diameter and deep to all skin and subcutaneous tissues
- Left chest extensive bruises and injuries around left breast and precordium.
- Severe bruises on the whole back from the shoulders to the buttocks, some are blunt injuries
- Numerous superficial and deep injuries and bruises in the arms and legs, especially the thighs both anteriorly, laterally and medially.
- Both legs had blunt injuries going deep to the muscles of the thighs
- 3 cut wounds in the right leg 2 cm deep, and 3 cm long, rugged edges and the other 2 smaller 1 cm deep 2-2,1/2 cm long,

The internal injuries noted on the body of the deceased;

- Right lung collapsed and punctured
- Fracture of the rib number 5 which is spiral and penetrating
- Cranium has small crack and scalp injury to the skull
- Brain has blood coming oozing and clot in the sub arachnoid space

16. From this examination, Dr. Matheka (now deceased) formed the opinion that the cause of death was cardiac respiratory arrest due to internal haemorrhage in the brain and the right lung due to severe head and chest injuries due to assault. From the medical findings above the cause of death of the deceased was proved.

Evidence that the deceased met her death as a result of an unlawful act or omission on the part of the accused person

17. There was no eyewitness to the attack. No witness saw the deceased person being assaulted and or attacked by any person. The evidence upon which the prosecution seeks to rely on in this case is purely circumstantial. Circumstantial evidence is that evidence which conclusively links the accused person to the commission of an offence without leaving room for any other possible hypothesis.

18. In considering circumstantial evidence as basis of conviction strict guidelines have been developed by the courts. In the case of *Mwangi v. Republic* [1983] KLR 75, the Kenya Court of Appeal sitting in Nairobi held:

“In a case depending exclusively on circumstantial evidence, **the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.** It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

19. The only evidence that links the accused person to the deceased was that of PW1 and PW2. PW1 stated that she last saw the deceased on the 18th of March, 2009 at 4:00 pm, while in the company of the accused person and they left together. It was also the testimony of PW2 that the deceased left home on the 15th of March, 2009 and went to the accused person's house. However there was no evidence that PW2 saw the deceased in the accused person's house. This evidence is not corroborated by any eyewitness account. The possibility that the deceased never went to the accused person's house cannot be ruled out.

20. It was also the evidence of PW4 that he together with PW7 and other police officers went to the accused person's house and found some blood stains on the mattress. However, PW7 testified that there were no blood stains on the mattress when they went to search the deceased house. The evidence of both witnesses is contradictory and is not sufficient to place the deceased in the accused person's house at the time the deceased met her death.

21. PW1 also testified that when he found the deceased body there were pieces of mattress at the scene. This evidence was however contradicted by the investigating officer PW7 who testified that there were no pieces of mattress at the scene where the deceased's person's body was found.

22. PW4 also testified he got information of the accused person's whereabouts, he went in the company of the police and he saw a person running from a shop, the police officers chased the person but they could not apprehend him as he disappeared in the thicket. PW7 and PW4 did not clearly testify as to the identity of the person who was running as none of them saw the person's face. It cannot be ascertained that the identity of the said person is the accused person.

23. From the analysis of the evidence that was tabled by the prosecution that links the accused person to how the deceased met her death the same is inconclusive and does not link the accused to the death of the deceased person beyond any reasonable doubt.

Malice Aforethought

24. Malice aforethought is the *mens rea* or the intention to kill another person. Section 206 of the Penal Code defines it as follows;

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

(a) an intention to cause the death of 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 of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

Malice aforethought can take various forms. It can be express, constructive, implied or inferred from the surrounding circumstances. See Court of appeal decisions in *Bonaya Tutu Ipu & Anor. v. R* (2015) eKLR and *NMW v. R* (2018) eKLR.

25. The evidence that was tabled by the prosecution to prove malice aforethought was that of PW1, PW2, and PW3. They all testified that the accused person severally assaulted the deceased person. However this assertion was not corroborated as the instances were not reported to the police station and further there was no medical proof tendered in support of this assertion. The body of the deceased person had bruises and cut wounds as per the post mortem report but none of the injuries were attributed to the accused person.

26. PW5 testified that on the 3rd of October, 2009 at around 3:00 pm he witnessed the accused person threatening PW1 and PW2 that he could kill the deceased who is their daughter. This was not corroborated in the testimony of PW1 and PW2, further there was no evidence that PW1 and PW2 reported the incident to the police. The said evidence raises suspicion that the accused person may have been involved in the death of the deceased person but suspicion alone, no matter how strong cannot form the basis for a conviction. It is therefore unsafe to attribute the same as an intention to cause harm to the deceased.

Conclusion

27. I find that the prosecution did not prove beyond reasonable doubt that the accused's malice aforethought caused the death of Jennifer Nundu Lazarus by an unlawful act or omission.

28. This is another occasion for the application of the principle that *mere suspicion no matter how strong cannot be the basis for a conviction*. The Kenyan Court of Appeal in *Sawe v. Republic* [2003] KLR 364 held that suspicion, however, strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt. See also Nigerian Court of Appeal decision in *Daniel Itodo v. State* CA/B/103C/2009, [2014], *Abieke v. The State* [1975] 9-11 S.C. (Reprint) 60 and *Abacha v. State* [2002] 11 NWLR (779) 437.

29. It was suspected that because the deceased was last seen with the accused, and she shortly before indicated that she was going to the accused's house and the accused had disappeared when thereafter the deceased had been found dead with wounds on her body, the accused must have been the killer given their history as lovers of long cohabitation with a child between them and who constantly had differences and a history of accused's regular assault on the deceased. The matter called for in-depth investigations into the circumstances of the death which took place close to three years before the accused was arrested and arraigned before court.

Orders

30. Accordingly, I find the accused not guilty of the charge of murder contrary to section 203 as read with 204 of the Penal Code, and consequently acquit him.

31. There shall, therefore, be an order of the court directing his release from custody immediately unless he is otherwise lawfully held.

Orders accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 17TH DAY OF MAY 2018.

KEMEI J.

JUDGE

Appearances:

Ms. Mwangangi, Advocate for the Accused.

Mr. Machogu for the DPP.