



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR. NO. 103 OF 2017

REPUBLIC.....PELLANT

-VERSUS-

DANIEL KITSAO.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The accused is charged with offence of Murder contrary to Section 203 as read together with 204 of the Penal Code.
2. The particulars of the offence being that on 27th day of January 2013, at annex Makuti Bar and Restaurant Lodgings in Mtito Andei Township, Kibwezi District within Makueni County murdered Monicha Matheka.
3. He pleaded not guilty and matter went into full trial. The prosecution case/evidence.

PROSECUTION EVIDENCE

4. The prosecution called a total of 8 witnesses in support of their case.
5. PW1 Dorcas Katunge Mutule testified on oath that on 27/01/2013 at about 3.00 a.m. she was in her house sleeping in Mtito Andei, then she heard a woman screaming.
6. She went outside and found the watchman and the girl who rents the houses where they stay outside. The girl and the watchman were standing outside the guest house that is in their neighborhood. The girl is known as Alice. She inquired what was wrong.
7. They said that a woman had been screaming in the rooms at the guest house but had now kept quiet. Many people had come out of their rooms after being awoken by the screams. She told the watchman to break into the room. This is because they knocked at the door but there was no response but when they peeped through the window they could see young man inside standing there and a girl on the bed.
8. It was further evidence that she told the young man to open the door. They entered the room and saw a naked body on the bed. The young man was standing next to the bed. She telephoned the police. That is because the naked girl was not responsive and appeared dead and the young man was not saying anything.
9. Police officers came to the scene. They lifted the naked body of the girl. The body had a stab wound on the stomach. She saw blood the young man was beaten by the OCS and a knife found hidden in his underwear. The body of the girl was taken to mortuary and the young man escorted to the police station.
10. The accused (identified) is the young man had talked about. She did not know the accused before.
11. On cross-examination by advocate of the accused, she testified that she did not see the girl being stabbed. She checked through the window and saw the accused and the girl's body that her statement does not mention that she peeped through the window and she did not describe the appearance of the accused.
12. That she saw the boots the accused was wearing and she also noted his face. She did not mention the electricity lights in the presence. That in her statement she only testified to the questions the police officer asked.

13. That she was about 100 metres away from the bar where the screams came from and was, at 3.00 a.m. it was dark but there was light in the house. As the owner of the guest house she keeps records of the people who take up the rooms.
14. Monica Matheka the deceased is the one who had rented the room but had not come with the said records to court and she don't know why the deceased was screaming. She was present when the accused was arrested at the guest house and the accused is a stranger.
15. PW2 Everlyne Muange stated that on 26/01/2013 was working at Annex Makuti Bar and Lodging in Mtito Andei and was on duty on 26/01/2013 at 6.00 p.m. as usual.
16. At 8.30 p.m. one client by the name Mueni Mwendu who is a customer came and asked for a room. She gave her a room, she paid Kshs.150/= to her and gave her the key to the room No. 105. At about 2.00 a.m., all the rooms were full so she went to rest there she just sat at the reception desk.
17. At about 3.00 a.m. she heard screams coming from the door. She heard many people knocking at room No. 105 asking that the door be opened. She immediately went to room No. 105 where she found many people at the door knocking.
18. She ran and called the watchman who came to the scene. The watchman knocked at the door but nobody opened the same. The owner of the premises Dorcas Katunge (PW1) arrived and told the watchman to knock at the door.
19. It is her further evidence that the watchman said that they should break into the room because nobody was opening the door. The door was opened from inside by a young man. She saw the deceased Mueni Mwendu on the bed and heard the watchman saying the deceased was dead.
20. She was scared and left the scene. Police officers were called to the scene. The police officers came and commenced investigations. She went to serve other clients. The accused (identified) was the young man who opened the door.
21. On cross examination by Mutinda Kimeu for accused, she told the court that she recorded her statement on 26/01/2013.
22. The date 26/01/2013 is reflected in her statement as the material date and she issued the deceased with a receipt but she has not shown the court and she has no documents to show the existence of the bar she has mentioned.
23. She found many people at the scene and it was not dark at the scene as there were electricity lights and has known the deceased for about two weeks as a customer and the deceased never used to drink at the bar.
24. It was her evidence that her statement does not give a description of the accused that when the door was opened, **she did not see the young man who was inside and cannot therefore tell if the accused was the one who was in the room.** The lodging in question is still in existence. The room where the death occurred was on the first floor and she doesn't know why the people at the door were making noise.
25. PW3 Athman Mulwa told court that on 27/01/2013 he was working in the same bar. He reported on duty at 6.00 p.m., at about 2.30 a.m. saw Mueni the deceased and young man i.e. The accused (passing). There was electricity light at the building he could see.
26. He was there when the deceased had taken a room so he knew they were going to the room. At about 3.00 a.m. he was called by Everlyne (PW2) who informed him of some noise upstairs. He went upstairs to room No. 105 and knocked at the door.
27. There was no response. He went to the window and he peeped inside and found the body of the deceased on the bed and the accused standing next to the bed. **The lights were not on in room No. 105.** He went back in room No. 105 and knocked at the door together with others.
28. The owner of the guest house, Katunge Mutile (PW1) came and said they break into the room. The young man inside room No. 105 then opened the door. He entered and switched on the electricity lights in the room. The girl was naked lying down. He asked the young man what was happening. The young man did not reply. He called for a rope and tied the young man's hands and told him to sit down.
29. It was his further evidence that he questioned the young man but he did not respond. Police officers came in and took over the matter. He then went downstairs. The accused (identified) is the young man he had talked about.
30. He did not know the accused before. When police officers came in they said that deceased was dead. His duties as a watchman were to keep security.
31. On cross-examination, he stated that he was the first to enter the room after it was opened. He told the police that he saw accused and the deceased passing and he do not know how to read and write. He told the policemen what happened and they recorded. (Court-statement read out to him see that he saw the accused and the deceased passing).
32. **His statement says he found a man inside the room but did not describe the man he found in the room to the police.** The police did not ask him to give a description of the accused and he moved the accused. The accused was wearing boots and did bring the torch that he was using while on duty that day. The rope he used to tie the accused is not in court. There was electricity light at the scene so he could see.
33. He told court that he does not know the relationship between the deceased and the man she was with. He stay positioned at the entrance to the guest house so he can see those going in and out. Everlyne (PW2) told him that the deceased had taken a room in the guesthouse.

34. PW4 Daniel Matheka Kaluu testified that on 27/01/2013 at about 1.00 p.m., he received a telephone call informing him of a problem with Monicah Matheka the deceased who was his daughter.

35. The following day he proceeded to Mtito Andei police station where he was informed of the death of the deceased. The deceased had been stabbed with a knife.

36. He then proceeded to Makindu Hospital Mortuary where he identified the body of the deceased. The deceased had been stabbed at the side of the stomach but has never seen the accused (identified) and he don't know the accused.

37. PW5 Julius Kinuthia testified that on 01/02/2013 he was at Makindu District Hospital where he witnessed the post mortem being carried out on the body of Monica Matheka (the deceased).

38. The deceased used to be his wife up to the year 1995 when they separated. He was with the father and brother of the deceased and police officer. He identified the body of the deceased to the doctor who performed the post mortem and later recorded his statement.

39. PW6 Shadrack Mulinge Matheka told the court that on 01/02/2013 he was at Makindu District Hospital where he witnessed the post mortem being carried out on the body of his sister, Monicah Matheka (deceased). He identified the body of the deceased to the doctor and the post mortem was carried out. He was with his father and the cousin plus Kinuthia (PW5) and a police officer.

40. PW7 No. 47490 sergeant David Gaduve testified that he is stationed at Mtito Andei police station as the in-charge of police lines.

41. On 27/01/2013, he was on duty as the duty officer at the aforesaid police station when he was summoned by the OCS, C. I. Njeru to accompany the Deputy OCS, I.P Dickson to a scene of alleged murder at Annex Restaurant in Mtito Andei Township.

42. Also in their company were the late Yator and P.C Peterson Ngara. They proceeded to the scene at about 3.00 a.m. They were in a government motor vehicle. They found members of public gathered at the scene both at downstairs and upstairs part of the restaurant. The proprietor, Dorcas Katunge (PW1) was also at the scene.

43. PW1 led them upstairs in a room No. 105. Inside the room were the accused (identified) and a body of a lady lying on the bed facing downwards. The head was facing the floor, while hanging out of the bed. The room was lit by electricity light. The proprietor of the restaurant informed them that the accused and the deceased had booked the same room. The name of the deceased was Monicah Matheka.

44. It was further evidence that he learnt the deceased's home from the relatives. The accused had his hands and legs tied with a rope and was being guarded by the watchman of the restaurant. They searched the accused and recovered a blood stained knife hidden at the pubic area of his body. It is a penknife (MFI). The knife was being supported by the inner wear.

45. The room was bloody especially the bed sheets and the pair of long trousers the accused was wearing. This is the blood stained pair of jeans trousers (MFI 2). This is the stained bed sheets (MFI 2) it is one bed sheet. They took the accused and the exhibits to Mtito Andei police station and removed the body of the deceased to Makindu District Hospital Mortuary.

46. Investigations were taken over by I.P. Dickson Herbat. The body of the deceased had 7 stabs wound on the upper side of the body on the left. He found the deceased already dead. On 01/02/2013 he attended the Makindu Hospital Mortuary where the post mortem was carried out on the body of the deceased. The doctor gave him a sample of blood from the deceased which was in a plastic bottle.

47. He labeled the blood sample with the name of the deceased. He had also obtained from other doctors who had obtained the same from the accused. He took the blood samples both the blood samples from the deceased and from the accused from the refrigeration at Makindu Hospital on 04/02/2013 and escorted all the exhibits to the government chemist Nairobi for analysis.

48. He prepared the exhibit memo form (MFI.4) and cover of which he escorted all the exhibits to the government chemist. The exhibit memo form is dated 04/02/2013. He escorted the exhibits to the government chemist on the same.

49. Cross examination, he told the court that he does not know who arrested the accused by name but it was the watchman of the hotel. He had no documents to show that the accused had booked the room. He did not recover the keys as he found the room open. He did not see any receipt for the payment of the room.

50. He did not obtain any document of license for the restaurant or any certificate of registration. No photos were taken to his knowledge. May be investigation officer may have arranged for the taking of the photos. He found more than 30 members of public at the scene. He did not take the rope that had tied the accused as an exhibit.

51. His statement to the police does not mention any lights and did not get any eye witness and did not fill in any recovery or inventory form as he is not the investigating officer. His statement does not mention the blood stained jeans trouser. He left the blood samples to the government chemist. His statement does not mention that he obtained blood samples from the accused.

52. He did not record his statement from the person who recorded his statement from the accused. One of the nurses from Mtito Andei Hospital obtained the blood samples of the accused. His statement to the police does not mention the bed sheet and the accused was not dressed the way he is today. When he arrested him he wore a yellow t-shirt and beige trousers and they did not have the accused photographed at the scene.

53. PW8 No. 60545 I.P Dickson Herbart testified that he is based at Mtito Andei police station. On 27/01/2013 he was at the same police station when the officer on crime stand by P.C. Jacob Yator informed him of an incident at Annex Bar and Restaurant and Lodgings in Mtito Andei Township.

54. In the company of P.C. Yator and the OCS and other police officers they proceeded to the scene and found the owner of the business premises, Dorcas Katunge PW1) with the members at the scene. Dorcas lead them to room No. 105 at the lodgings. The room was locked from outside. The watchmen at the premises unlocked the room in question.

55. They entered the room. There was a young man in the room whose hands were tied with a rope. The body of a woman was lying on the bed. The accused (identified) is the young man he found in the room. The body of the woman had a wound on the abdomen and blood had spilled on the bed.

56. He instructed Corporal Yator David Daduve (PW4) who was with them to search the accused. The search was carried out in his presence and a knife (MFI 1). The trouser that the accused was wearing had some blood stains. The bed sheets were also blood stained (MFI 3) and the jeans trouser (MFI 2) that the accused was wearing.

57. He continued with the investigations. He prepared an exhibit memo form (MFI 4) and handed the memo form and the exhibits with the blood samples taken from the deceased, the blood samples of the accused, the jeans trouser, the bed sheet and the knife (MFI 1 -3) who escorted the same to the government chemist.

58. CPL Gaduve (PW7) had taken the suspect to Mtito Andei Hospital where his blood sample was taken. PC Jacob Yator who attended the post mortem where the blood samples of the deceased were obtained. The report of the government chemist were ready and forwarded to us.

59. The accused was subsequently charged with the offence herein. He kept custody of the exhibit together with the knife (MFI 1), the jeans trouser (MFI 2), the bed sheet (MFI 3) and the exhibit memo form (MFI 4)) and wish to produce the same as exhibits – (exhibit 1 -4 respectively).

60. On cross examination, he told the court that he is the investigating officer and he recorded his statement. His statement mention the knife. His further statement mentions the jeans trouser, the blood samples of the accused, blood samples of the deceased and a bed sheet.

61. He recorded his statement on 30/01/2013 and the further statement on 04/02/2013. His statement of 04/02/2013 refers to the government chemist this further statement reflects the exhibit collected from the scene on 27/01/2013. He witnessed the recovery form was filled in at the scene.

62. He was not present when the blood samples of the accused or the deceased were collected, the blood samples are not in court. He found the accused locked in a room.

63. With his hands tied with a rope but the rope is not in court. He has not seen document for the ownership of the premises at the scene. The proprietor of the business testified.

64. He did not see any receipt or record to confirm that the accused or the deceased had booked any room. There was no eye witnesses to the offence. His investigations revealed that it was the deceased who had booked the room. Everlyline Lenenyange (PW2) gave them details on who had booked the room.

65. And he is the one who removed the jeans trouser from the accused and there are blood stains on the trouser (point at the spots). It is not true if anybody says that the accused was not wearing the jeans trouser in question. No recovery form was filled but the exhibits recovered are reflected in the statement.

66. PW9 a police officer produced a postmortem report by consent of both parties. The same showed that the deceased body had deep stab wound on the left side of the belly about 6cm long. The cause of death was stated to be cardiopulmonary collapse following severe hemorrhage secondary to severe abdominal trauma.

67. After close of prosecution case, the court found accused had a case to answer and was put on his defense.

68. In his sworn statement, the accused stated on 26/01/2013, he woke up in Kilifi and went to Jomvu work in Mombasa. His boss Moureen had assigned him work of painting. She told him to escort her to Mtito Andei where they (her and husband) were to take luggage to Mandera. They arrived Mtito Andei at 1.00 a.m. They did not meet her husband as he was delayed by traffic. Her husband arrived at 2.00 a.m. on 27/01/2013.

69. He assisted them in loading luggage. He remained up to morning in Mtito Andei. They instructed him to return to Mombasa for some work. While at the Mtito Andei at 2.00 a.m., he heard screams in a building while he was on the road. He went to check. He went inside the building. He was arrested and beaten and tied hands and legs and detained in a room. After two minutes the room was dark. Police came in two minutes time. He did not know those who attacked him or tied him.

70. The police beat him and removed all clothes and took them. The ones he has are from prisons. He was taken to the station. When light was put on there was a bed and there was somebody lying on bed. He had not hired the room. He never had a blood stained knife. He did not see knife or clothes taken in court. He did not see the photos taken.

71. He didn't see report on blood stains which was to be tested. There was no evidence there was a bar. No license of bar was produced.

Nobody witnessed him stab anybody.

72. He doesn't know why he was arrested. It is alleged he committed murder. He never explained to police what he has testified in court. He did not know Monica Matheka, deceased.

73. He never accompanied deceased to hire a room. He never stabbed anybody. He did not know the room he was arrested therein. He prays for court to dismiss case and release him.

ON CROSS EXAMINATION BY MS E. GITAU SC

74. He said that he arrived Mtito Andei at 1.00 a.m. The murder took place while he was at Mtito Andei. He heard screams at 3.00 a.m. He was on the road. He went to the scene. When he went near the building he was arrested and beaten. There were other people.

75. He didn't know the people who arrested him and where they were from where. When he heard screams he was on the road where he was left by boss at 3.00 a.m.

76. At 3.00 a.m. he heard screams. He had stayed for 30 minutes waiting for motor vehicle. He said he was not calling any witness. At the stage there were other people. They went with them to check cause of the screams. Nobody else was arrested.

RE-EXAMINATION

77. He said he was waiting for motor vehicle for Mombasa. He had stayed for thirty minutes. The building which screams came from was along a road. He didn't know why he was arrested.

78. He didn't know why exhibits were not brought. He closed his defence at this stage and sought to rely on his written submissions filed earlier together with authorities.

DEFENCE SUBMISSIONS

79. It is submitted that, none of the said witnesses gave direct evidence to link the accused persons to the alleged crime. PW8 Investigating Officer on cross examination was categorical that there was no eye witnesses to the offence.

80. The prosecution evidence is purely circumstantial, the same can only be a basis of a conviction only if there is no co-existing circumstances weakening the chain of circumstances relied on.

81. The prosecution through the witness had the onus to prove that it was the accused person who caused the death of the deceased by an unlawful act or omission and that he had malice aforethought to do so.

82. PW1, PW2 and PW3 are the key prosecution witnesses who were first to arrive at the scene and when deceased was no more. Each of them confirmed that they saw a young man and it was their first time and at night. Thus identification parade before being arraigned to court was necessary.

83. It is submitted that the evidence on record is insufficient to place the accused at the scene of alleged crime. The evidence as to which room the deceased was found is contradicting and unreliable.

84. PW2, Everlyne Muange said the room was 105 but PW3 Athman Mulwa said the room was No. 10. PW7 said room was 105, PW8 said room was 105 therefore there was need of documentary evidence in form of receipts to be produced for clarity which room.

85. PW8 produced as EXH-1 a knife had blood stains and the trouser that the accused was allegedly wearing which had some blood stains as EXH-2 and the bed sheets which were also allegedly blood stained as EXH-3. There was therefore need to link the accused with the said blood stains.

86. In this regard, blood samples were taken from both the deceased and the accused. The government analyst report was not availed; in court failure to produce the same was deliberate in that the evidence would have gone in favour of the accused.

ISSUES, ANALYSIS AND DETERMINATION

87. After going through the evidence on record and the submissions, I find the issues are;

- *Whether the prosecution proved its case beyond reasonable doubt?*

88. In the case of **REPUBLIC –VS- NICHOLAS ONYANGO NYOLO (2014) eKLR**, the court stated the critical elements of the offence of murder thus:-

- *Proof of the fact and the cause of death of the deceased.*

- *Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused*

which constitutes the “actus reus” of the offence.

- Proof that the said unlawful act or omission was committed with malice after-thought which constitutes the “mens rea” of the offence.

89. PW1 Dorcas Katunge Mutule witnessed the accused open the room he was occupying with the deceased and he was arrested there in while in possession of a bloody knife. PW1 is the one who called the police who recovered the bloody knife in accused possession.

90. The body of the deceased was taken to the mortuary and accused was arrested. Earlier the PW1 had sold a room 105 to the accused who was accompanied by the deceased and they entered the room together.

91. PW2 Everlyne Muange heard the screams in the room occupied by the accused and the deceased. The accused opened the door of the room and PW2 with other people saw deceased was dead on bed. The police came and arrested the accused and carried the deceased body.

92. PW3 Athman Mulwa, the watchman was called by PW2 after she heard screams in a room which he says was No. 10 though PW1 and PW2 talk of 105.

93. However when the door was opened the accused was found in the room together with the deceased dead. He tied accused with a rope to stop him from escaping. Police officers came and arrested the accused and took the body away.

94. None of the above witnesses' PW1, 2 and 3 knew accused and accused confirms that. No reason has been advanced as to why the said witnesses sat down and conspired to frame him.

95. Further the officer who went to the scene pw7together with deputy OCS found accused and deceased in room 105 and arrested the accused. No reason is advanced as to why the police officer who didn't know accused also framed him.

96. The accused in defence states that, while at the Mtiito Andei at 2.00 a.m., he heard screams in a building while he was on the road. He went to check. He went inside the building.

97. He was arrested and beaten and tied hands and legs and detained in a room. After two minutes the room was dark. Police came in two minutes time. He did not know those who attacked him or tied him.

98. In cross-examination he admitted that he never told police the instant story and he has not said why he never did so. In cross-examination of prosecution witnesses he never raised same issues and he has not said the reason for that.

99. In the court of appeal case of **JOAN CHEBICHII SAWE –VS- REPUBLIC (2003) eKLR (Criminal Appeal No. 2 of 2002)**, the Honourable court laid down principles to guide court where the evidence to be relied on by the prosecution is purely circumstantial evidence thus:-

Ø 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 hypothesis than that of his guilt.

Ø Circumstantial evidence can be a basis of a conviction only if there is no co-existing circumstances weakening the chain of circumstances relied on.

Ø The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

100. The court finds via testimonies of PW1, 2, 3, 7 and 8 that the accused was found in the room with the deceased body which had deep stab wound on the abdomen and that the bloody knife was in the accused trouser. The blood stained trouser, bed sheet and knife recovered in room were produced as exhibits.

101. It was incumbent upon the accused to explain how he found himself in the circumstances. How the deceased died in his hands while they were in the room together. Why and who was screaming in the room they were occupying with deceased. In any case he was seen by PW3 when he and deceased hired room and entered the lodging together at the material time.

102. He was arrested while still in the room together with the deceased lying dead thus no need for identification parade. There was prove of ingredients of offence of murder beyond reasonable doubt.

103. First there is proof of the fact and the cause of death of the deceased via postmortem which showed injuries and cause of death. It stated the body had deep stab wound on abdomen 6cm long and the cause of death was cardiopulmonary collapse due to severe hemorrhage secondary to severe abdominal trauma.

104. Secondly there is proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence. The act of stabbing such huge wound *prima facie* constitutes an unlawful act on part of the accused.

105. And there is proof that the said unlawful act or omission was committed with malice after-thought which constitutes the “mens rea” of the offence.

106. Such unlawful act unless otherwise explained constitutes by inference malice afore thought requisite ingredient for murder.

107. He now belatedly tries to introduce the defence of alibi which was not advanced in the course of trial. The prosecution has discharged its burden of placing via evidence the accused on the scene of crime at the moment and time the deceased was murdered as he did not escape after the act but was found inside room scene of murder.

108. The failure to produce the forensic report on blood stains found on exhibits and the discrepancies on number of the room does not lessen the quality of the prosecution evidence. That in all the circumstances, the circumstantial evidence points to accused as the murderer.

109. In sum the court finds that the prosecution has proved its case beyond reasonable doubt and accordingly convicts the accused with offence of murder.

110. Thus the accused is found guilty of the offence charged and is convicted accordingly.

SIGNED, DATED AND DELIVERED THIS 8TH DAY OF OCTOBER 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE