

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 60 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PAUL ODHIAMBO OGUNDE.....ACCUSED

RULING

This trial against Paul Odhiambo Ogunde, the accused, is in respect of the murder of Agnes Mwikali Mutua, the deceased, which is alleged to have been committed on the night of 8th and 9th June 2015 at Buruburu Phase 5 Estate within Nairobi County. When the accused was brought to court on 18th June 2015 and the charge was read over to him and all its particulars explained, he denied committing this offence. To support its case, the prosecution called a total of nine (9) witnesses. I wish to correct the record of the court from the outset that the prosecution witnesses were nine (9) not ten (10) as record shows. PW10 CPL Kennedy Cheramboss ought to be PW8 because on 16th January 2018 when he first took the oath as a witness he did not testify because he was stood down because of the absence of an exhibit, iron box, which was not in court. The record ought to have indicated that he was being recalled on 20th March 2018 and sworn in as PW8.

The evidence narrated to the court by these witnesses brings out the circumstances that led to the death of the deceased. I have carefully read and understood this evidence which shows that the accused and the deceased were in a relationship and according to Mary Makau, PW1 and sister to the deceased they had been friends for 4-5 years. Mary told the court that the accused had another family and at the time the deceased died, Mary did not know that the deceased was living with the accused. Mary said that she knew that her sister the deceased lived with her friend Nicholas Odati, PW2.

The deceased spent 8th of June 2015 with Nicholas. She went to see him on that day at his house in Kahawa Sukari. She arrived at Nicholas' house at 11.00am and stayed there until 4.00pm when she left to go home. Among other things the two discussed that day was her intention to return to him. Evidence shows that she had lived with Nicholas from December 2014 to March 2015. They had visited their respective parents. Nicholas told the court that the deceased was his fiancé. However, from the evidence, Nicholas did not know that the deceased lived with the accused all the time thinking that she lived with her sister.

The accused had been with the deceased in the morning of 8th June 2015. He has spent the night with her and had left in the morning to go to work. The deceased lived with Carol Mueni the house girl and baby C. O in Buruburu Phase 5 Estate. Mueni has only worked for the deceased for two weeks prior to the death of the deceased. Mueni told the court that the deceased left home that morning at 11.00am telling Mueni that she was going to her sister's (Mary) place. Mueni told the court further that the accused returned home on 8th June 2015 at 4.00pm and asked her where the deceased was; that the accused picked Mueni's telephone which was lying on the table and left. He returned about 8.30pm with the deceased. Mueni served them dinner and they ate. Mueni told the court that the two were not talking. After cleaning up Mueni went to bed. She said that the accused and the deceased slept with the baby. Mueni told the court that she slept until about 1.00am when police woke her up and asked her where the baby was. She told them that she had left the baby with the parents. She was told to go and get the baby whom she found on the parents' big bed sleeping. She picked the baby and handed her to the accused. Mueni told the court that she did not see the deceased. She went back to her bedroom to sleep until 5.00am when another man she referred to as Ken told her to pick her clothes. She was taken to Mary's home.

Further evidence by Mary shows that the police went to her home and woke her up. They informed her of the death of the deceased. She said the police had the baby and Mueni with them. The baby and Mueni were left at Mary's home while the police took Mary to the home of the deceased where she saw the body of the deceased lying on the floor of the store with an iron box cord round her neck. The deceased was dead. It is clear from the evidence that at the time Mueni went to bed on 8th June 2015, the accused, the deceased, Mueni and the baby were the only people in that house. It was a two bedroomed house with a sitting room and a store. Mueni did not know what happened after she left the deceased and the accused. There is no other evidence about what happened and therefore the evidence of the prosecution is purely circumstantial. In his submissions Mr. Nyaberi for the accused stated that because there is no witness to give an account of how the deceased met her death, this court is left with circumstantial evidence. He stated that the circumstances have not been presented to the court for it to pin the accused down.

I have taken into account the evidence surrounding the death of the deceased. I have considered the submissions by the prosecution that a prima facie case has been made out against the accused and those by the defense that no such a case has been made out. The law on circumstantial evidence is that ***"for the court to convict on circumstantial evidence there must be evidence which points irresistibly to the accused person to the exclusion of any other person. At the same time there must be no co-existing factor or circumstance which may weaken or destroy the inference of guilt of the accused person."*** See ***Neema Mwandoro Ndurya v. Republic [2008] eKLR*** and ***R v. Kipkering Arap Koske (1949) 16 EACA 135***.

I am satisfied that the standards of circumstantial evidence have been met in this case. I consequently find that basing this case on circumstantial evidence, the prosecution has established a prima facie case against the accused person. **Section 306 (2) of the Criminal Procedure Code** provides that:

When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

In compliance to this section I find that the accused has a case to answer and inform him of his right to address this court and to give evidence in his defense. The accused is further informed of his right to address this court in the manner in which he desires to give evidence in his defense and to call witnesses in support of his defense. It is so ordered.

Delivered, dated and signed this 4th October 2018.

S. N. Mutuku

Judge