



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 4 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MARY CHEMTAI.....1ST ACCUSED

KENNEDY WANJALA JUMA ALIAS MREFU.....2ND ACCUSED

J U D G M E N T

1. The accused were jointly charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence was that **on the 4th day of February 2015 at Sango village Kinyoro location within Trans Nzoia County jointly with others not before court murdered Sarah Wanjiku Mwangi**.
2. They denied the offence. The prosecution called a total of 6 witnesses to prove its case. Ultimately they were placed on their defences where they each gave unsworn evidence denying the charge. The summary of the evidence as presented is as hereunder.
3. **PW1 Dr Geoffrey Wamukoya** from Kitale District hospital produced the report on behalf of Dr Odhiambo who opined that the cause of death was Asphyxia by strangulation and the deceased body was in the decomposing process.
4. **PW2 Benedict Jumba Sioyi** a farmer decided to go to the neighbour's home (deceased) at around 12.00 noon. He found the deceased's mother who told him that the deceased had not been seen since morning and her phone went unanswered. They tried looking for her within the compound in vain. The deceased mother told him that she had taken the house keys from the domestic worker.
5. He went back the following day but were unable to trace the deceased. Apparently on the first day he saw a young man running away and entered the sugarcane plantation. He did not however see him very well.
6. **PW3 Felix Makokha** testified that he purchased beans from two people riding on a motor cycle and one of them was the 2nd accused. Three days thereafter he was arrested and placed in custody concerning the same but was later released. He did not know that the beans were stolen.
7. **PW4 Reuben Wafula** equally purchased beans on 5th February 2015 from a motor cycle rider who was with a passenger. He purchased beans worth kshs 100. Later the chief in company of police officers arrested him and was taken to the station where he was released after recording statements. He knew the 2nd accused as a boda boda rider.
8. **PW2 Siprose Simiyu Makokha** equally purchased beans on 5th February 2015 from two motorcyclists who included the 2nd accused. He knew the 2nd accused as a neighbour and did boda boda business. He was equally arrested after 3 days and questioned but later released after recording statements.
9. **PW6 P.C. Sammy Kimanzi** from Kitale police station carried out the investigations. He said that he was instructed on 8th February 2015 to take the 1st accused to Cherengany police station. On the way she told her the probability of where the deceased body would be. She brought her back midway to Cherengany. As a result of her statements to him, the body was searched and eventually traced within her compound. By then the 1st accused was in custody. He said that one Edwin who sold the beans was still at large. On cross-examination he said that he got information from accused 1 but it was not however a confession.
10. When placed on her defence the 1st accused gave unsworn evidence. She said that the deceased had given her work of cleaning clothes on a Friday. She did not go back on a Monday. She was arrested by 2 people at the market and taken to the forest and assaulted. They wanted her to confess.

11. Accused 2 equally gave unsworn evidence. He said that he does boda boda business. He said that on 5th February 2012 he was approached by some customers who had beans to sell. He was paid Kshs 300 and he took them round. He was told to hoot for customers who came and purchased the beans. The process went on very well. Infact he conceded that PW5 purchased the beans.

12. After 3 days the police came and arrested him concerning the beans. He took him to the places where prosecution witnesses were. He was thereafter taken to Kitale police station where the charges were preferred against him.

Analysis and Determination

13. The court has critically perused the proceedings herein as well as the submissions by the counsel on record. What is evidently clear is that there was no primary witness to the incident. The same is therefore based on circumstantial evidence.

14. There was no evidence to suggest that the 2nd accused worked for the deceased or was seen at the deceased's homestead. Infact it was the 1st accused in her unsworn evidence that she stated that she was washing clothes for the deceased.

15. Apparently the mother to the deceased did not testify. It becomes therefore difficult to corroborate what PW2 stated. None of the witness saw the 1st accused work for the deceased.

16. The only person who came close to probably identifying the culprit or suspect was PW2 who saw the deceased servant running away. Even then he was not able to see him well or even describe him.

17. The rest of the witnesses who purchased beans from the 2nd accused did acknowledge that he was known a motor cycle rider famously called "boda boda". He was however not the one selling. PW3 stated that;

"The passenger who negotiated the sale of the beans is not in court." The 2nd accused was the rider of the motorcycle.

18. PW4 gave the same version of information regarding the fact that accused 2 was a motorcycle rider.

19. PW5 stated that ;

"----- The boda boda rider was shouting out that they were selling beans."

"----- The 2nd accused (identified) was the boda boda rider. I knew the 2nd accused as a neighbour."

20. Clearly from the evidence of the witnesses who purchased beans the same ties up with the unsworn evidence of the 2nd accused that he was ferrying customers who were selling the beans.

21. What puzzles the court however is whose beans were being sold. There was no evidence to suggest that the deceased had beans or that the same were stolen from her home. I do not find the beans purchased by the witnesses connected to the deceased. Perhaps her mother would have testified on this.

22. As regards the 1st accused it was the evidence of PW6 that zeroed in on her. The same however did not amount to a confession. If it is true she confessed to her then there was nothing difficult in recording such a confession. For now, if it is true, then the same clearly remained a chatt between the two as she was being taken to Cherengany.

23. The law as regards the standard of proof that need to be met in circumstantial evidence was settled in the decision of ***Dhalay Vs Republic (1995 – 1998) EA 29*** where the court rendered itself, thus;

" In order for circumstantial evidence to justify the inference of guilt two tests had to be satisfied. Firstly, the exculpatory facts had to be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis but that of guilt and, secondly it was necessary that there be no other co-existing circumstances which would weaken or destroy the inference of guilt."

24. In the matter at hand I do not find sufficient evidence to convict the two accused persons on the offence based on the circumstantial evidence. The same was never proved. Even though they gave unsworn evidence which does not have much probative value I find that the evidence as presented by the prosecution did not meet the threshold set by the aforementioned authority.

25. The accused are consequently set free unless lawfully held under Section 215 of the Criminal Procedure Code. The sureties are hereby discharged.

Orders accordingly.

Delivered, signed and dated at Kitale on this 17th day of December, 2018.

H.K. CHEMITEI

JUDGE

17/12/18

In the presence of:

Mr Kakoi for the State

Bungei for Accused

Accused – present

Court Assistant – Kirong

Judgment read in open court.