



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL CASE NO. 110 OF 2013**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**PETER LESHAO KATAKA .....ACCUSED**

**JUDGMENT**

1. The accused, **Peter Leshao Kataka**, is charged with murder, contrary to S. 203 as read with S. 204 of the Penal Code, in that on diverse dates between 5<sup>th</sup> and 13<sup>th</sup> October 2013, at Oldonyo Ladar Village Trans-mara West District of Narok County, murdered Philis Nyaboke.

2. The case for the prosecution was based on the following facts:-

On the material date of 13<sup>th</sup> October 2013, at about 11.00 a.m, **Wilson Kakuyia Lonyike (PW 1)**, was alerted by his herdsboy of an item found within his farm in a hole. The two viewed the item and became suspicious. They accordingly notified the area chief, **Kinyamal Wahupar (PW 2)**.

3. The chief proceeded to the scene and found that the suspicious item in the hole was actually a dead body of a humanbeing. He immediately reported the matter to the police. The body was removed to the mortuary by the police and investigations commenced. It was without head and limbs when it was found.

4. Later on the day that followed, the chief mobilized villagers in combing the entire sugar farm in search of the missing body parts. The villagers included, **Dominic Olkonyi Tuno (PW 5)** and **Antony Leimayan Katin (PW 6)**.

The search led to the discovery of the missing head and limbs. Also found at the scene or near the scene were a jacket, a small handbag, a bottle of body lotion and a bible (P.Ex 1 – 3). The bible was buried near the site where the main body was found and the name “Peter Leshao Kataka” was allegedly inscribed on it.

5. The name was linked with the accused. He was traced and arrested at his place of work. Prior to that, he was said to have met his relative **Joshua William Ole Kurau (PW 3)**, while he (accused) was in the company of a lady whose head and face were concealed with a piece of clothing material(lesso) such that she could not be identified by the accused’s said relative.

6. Also, on the 9<sup>th</sup> October 2013, a motor cycle taxi (bod-boda) operator, **Amos Saitoti Nauka (PW 4)**, was said to have been engaged by an unknown lady to take her to the home of the accused. She was charged a fare of Ksh. 50/= and was taken to accused’s homestead where she was allegedly received by the accused. She was at the time said to have been wearing a jacket similar to the one recovered together

with the body parts (i.e P.Ex 2).

7. A clan/village elder within the County of Kisii, **Nelson Manyange Michieka (PW 7)**, was at home on the 8<sup>th</sup> October 2013, with his step daughter when she left in pursuit of her business. She never returned home and on 13<sup>th</sup> October 2013, information was received by the village elder that the dead body of a female had been found at a sugar cane plantation. He was thereafter called by the police to identify the body which he confirmed to be that of his step-daughter (the deceased herein). He also confirmed that she left home wearing a jacket (P. Ex 2 ) and carrying a bag (P. Ex 1 ). He disclosed that the deceased's husband was in Western Province but that she lived with him (PW 7) and his wife.

8. At the material time, **James Onyangorer Ondieki (PW 8)**, was a watchman at Nyangusu Primary School. He identified the body of the deceased while it was at Kilgoris Police Station and confirmed that it was that which was recovered from the sugar cane farm.

9. **Cpl. Joel Abisai (PW 9)**, of CID Transmara, investigated the case and in the process gathered that the accused was the last person seen with the deceased while she was alive. He traced him at his place of work (i.e Transmara Sugar Co.) and arrested him on 14<sup>th</sup> October 2013. He drew a rough sketch plan (P.Ex 4) of the area showing that the sugar company was not far away from the suspected scene of the murder.

10. The investigation officer also obtained a sample of the accused's handwriting and forwarded it to the document examiner for comparison with the handwriting on the bible (P.Ex3). A report (P.MFI 6) said to be positive was compiled by the document examiner.

Eventually, the accused was charged with the present offence.

11. The defence raised by the accused was a denial. He indicated that he was at his place of work on 13<sup>th</sup> October 2013, upto about 2.00 pm when he signed out. He was thereafter confronted and arrested by police officers on allegation that he was involved in a land dispute with a certain old man. He was taken to Kilgoris Police Station where he learnt that he was facing a murder charge. He further indicated that he lived with an old man called Ole Meja and that he (accused) had his own family. He said that he never knew the deceased and how she died. He was not even taken to the alleged scene of her murder. He contended that he did not commit the offence.

12. The accused's neighbours, **Gideon Lemiso Sayelel (DW 1)** and the village elder, **Ngolediya Sanak (DW 2)**, confirmed that the accused was never at his home on 13<sup>th</sup> October 2013, but at his place of work.

**Stephen Lepisho Ole Meja (DW 3)**, a teacher by occupation, confirmed that he had been living with the accused in his house for about two months prior to the 13<sup>th</sup> October 2013. The accused was at the time a casual labourer at a local sugar factory but would at times take a break from his work and go to his home which was about fifteen kilometers away.

13. The teacher confirmed that the accused was at his home on 13<sup>th</sup> October 2013, from where he left for work but did not return in the evening as expected. He got concerned and contacted the accused's brother who told him that the accused had been arrested at his place of work on suspicion of murder.

14. From all the foregoing evidence, the issue arising for determination is whether the deceased was murdered and if so, whether the accused was responsible for the offence.

Murder is defined under S.203 of the Penal Code as follows:-

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

15. The evidence has shown that the deceased was actually “slaughtered” such that her body had to be recovered in pieces. The act itself was macabre. It was a gruesome murder which laid bare the assailant’s or assailants’ hatred of the deceased and intention to terminate her life. The puzzle that confronted the prosecution clearly emerged to be the identity of the person or persons responsible for such gruesome murder.

16. In that regard, the burden to establish the accused’s guilt lay with the prosecution and this had to be achieved on a standard of proof which is beyond any reasonable doubt. An accused person shoulders no obligation to prove his innocence (see, **Chemagong Vs. Republic (1984)KLR 611**).

17. In this case, none of the prosecution witnesses had any knowledge on how the offence was committed and by whom. As it were, none of them witnessed the occurrence of the offence and they could not with certainty tell exactly where and when it happened. Their evidence was confined largely to the discovery of pieces of the body of the deceased and the unusual presence of some items at or near the scene.

18. The defence witness, Sanak (**DW 2**), aged 73 years old, opined that the deceased was murdered elsewhere and her body parts dumped in the sugar cane farm. This possibility could not be overruled as there was no mention of blood stains being seen at the scene by any of the witnesses. It was also possible that the person or persons involved in the murder may have intended to dispose of the deceased’s body thereby concealing the offence by burying the body in the sugar cane farm where it was fortunately and for the offenders, unfortunately, discovered.

19. In essence, there was no direct evidence of identification against the accused who vehemently denied being the offender and indicated that he was nowhere near the scene of the offence or the sugarcane farm where the body was found.

He contended that he never knew the deceased and how she was murdered and implied that he may have been a victim of a set up or a frame up.

20. But in an attempt to discredit or dislodge the accused’s defence, reliance was put by the prosecution on circumstantial evidence in the form of the bible (P.Ex 3) which was found at the site of the discovery of the body of the deceased allegedly inscribed with the name of the accused. The inscription was allegedly made by hand.

21. The other circumstantial factor was that the accused was allegedly the last person to have been seen with the deceased while she was alive. He was therefore thought to be the probable murderer thereby implying that his alibi herein was worthless.

Basically, the principles upon which a court may convict a suspect on the basis of circumstantial evidence were clearly set out in the leading case of **Republic Vs. Kipkering Arap Koskei & Another (1949) EACA 135**.

22. Thus, the inculpatory fact would be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

In **Sawe Vs. Republic (2003) KLR 364**, it was stated that circumstantial evidence can be a basis of a conviction only if there are no other existing circumstances weakening the chain of circumstances relied upon by the prosecution.

23. With regard to the bible (P.Ex 3), it was linked to the accused merely because his name was allegedly inscribed on it and because it was found at the site where the body of the deceased was discovered, the accused was suspected of having murdered the deceased. This suggestion could however, not hold water for reasons that ownership of the bible was not established against the accused and that his actual name was not inscribed on the bible to show that it belonged to him and even if it was so inscribed, there was no credible proof that he was responsible for the inscription.

24. Wilson (PW 1) was the first to float the name of the accused as appearing on the bible, but he contradicted himself with regard to which name was actually appearing on the bible. Was it the name “Peter Leshao Kataka” or “Peter L.” The same contradiction was also notable in the evidence of the chief (PW 2). The investigations officer (PW 9) was also not sure whether it was the name “Peter” or “Peter Kataka” appearing on the bible.

25. It is clear from the foregoing that the witnesses (PW 1, PW 2, PW 3) as well as Dominic (PW 5) and Antony (PW 6) did not see the name of the accused on the bible at the time of its recovery or that an attempt was deliberately made to inscribe the name so as to connect the accused with the murder.

Definitely, the accused could not have inscribed his own name on the bible and bury it near the hole in which the deceased’s main body was found. This would have been self incrimination on his part. Such scenario was extremely farfetched.

26. The bible was not sufficient and/or reliable circumstantial evidence to show that the accused was in one way or the other involved in the murder of the deceased.

With regard to the fact that the accused was the last person to be seen with the deceased when she was alive, the evidence by Joshua (**PW 3**) did not establish the fact as he could not identify the lady he had allegedly seen with the accused on 8<sup>th</sup> October 2013. He said that the lady had covered her head and face with a piece of cloth (lesso). This meant that he could not tell whether that lady was the deceased.

27. Amos (PW 4), also talked about a lady he had dropped at the accused’s home on 9<sup>th</sup> October 2013, and who had been received by the accused at the gate. He indicated that the lady was a stranger to him and was wearing a jumper (jacket) resembling the one produced in court (P.Ex 2) and which was found at the scene where the body of the deceased was discovered.

28. It was also indicated by Amos that the lady he saw had not covered herself with a head-dress or a piece of cloth. He therefore implied that the lady was not the same lady seen with the accused on the previous day by Joshua (PW 3).

29. Amos, further indicated that he was later to hear that the lady had been killed. However, he did not say or mention that he viewed the body of the deceased on 13<sup>th</sup> October 2013, after it was discovered in a sugar cane farm and confirmed that it was that of the lady he was talking about.

30. Because of such omission, it cannot be said with certainty that the deceased was last seen with the accused while she was alive on the 9<sup>th</sup> October 2013. The suggestion made by the prosecution to that effect was not supported by cogent evidence. It was based on mere suspicion which had already been cast upon the accused no sooner had the body of the deceased been discovered along with a bible purporting to have an inscription of the accused’s name.

31. In *Sawe Vs. Republic (Supra)*, it was stated that suspicion no matter how strong cannot be a basis for conviction in a criminal charge. It may form part of circumstantial evidence against a suspect but cannot be considered on its own to found a conviction.

32. As a whole, the entire circumstantial evidence led against the accused by the prosecution was not cogent, credible and corroborative for a finding that the accused was positively identified as the person or one of the persons who murdered the deceased. His alibi is thus sustainable.

33. In the end result, the puzzle regarding the identity of the murderer of the deceased was not resolved herein by the prosecution. Perhaps, it may take the skills of the legendary fictional character “Perry Mason” and his fictional private detective “Paul Drake” in the T.V series/Novels “**Perry Mason**”, to solve it.

34. Otherwise, the prosecution failed to discharge its burden of proving beyond reasonable doubt that the

accused was criminally responsible for the death of the deceased.

He is accordingly acquitted.

**[Delivered and signed this 21<sup>st</sup> day of February 2017]**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

CC Steve Njoroge/Dorothy

State Counsel – Mr. Otieno

Mr. Kaburi holding brief for Mr. Nyangwencha for accused

Accused