



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL (MURDER) CASE NO.17 OF 2011
REPUBLICPROSECUTOR
VERSUS
STEPHEN NANDWA OCHIENGACCUSED
J U D G M E N T

Introduction

1. The accused person herein, Stephen Nandwa Ochieng has been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars thereof being that on the night of 13th and 14th day of March, 2011 at Musoma Village Manyala Location of Butere District within Kakamega County, murdered Felister Anyango Ogoda. The accused pleaded not guilty to the charge and the case has been ongoing since 11.05.2011 when the plea was taken. The prosecution called 5 witnesses. The accused was the only witnesses for the defence. He testified as DW1.

The Prosecution Case

2. From the record, the accused in this case is a brother to the deceased's husband who had recently died before the unfortunate incident occurred. After the death of her husband, the deceased returned to her people, but later on the accused person followed her and brought her back, built a house for her, and furnished it before leaving the deceased to live her life, though by the time the deceased died, the two were living together as husband and wife.

3. According to PW3, Jane Achieng Ogwayo, she was in her house at about 9.00pm on 13.03.2011 when she heard the deceased calling ODO to return her hoe. From the evidence, ODO is the alias name of the accused person. After hearing the deceased's call, PW3(Achieng) did not go out to the deceased's house, but went to bed and slept, only to learn the following morning at about 7.00am that the deceased whom Achieng referred to as Nyalego, had died. On receiving the news of Nyalego's death, Achieng went to Nyalego's house where she found many people. Achieng is the wife of another brother of the accused person. Achieng saw the deceased's body lying next to her (deceased's) house with her house keys lying next to her. The police who were present at the scene asked Achieng to open Nyalego's house and inside the house the police carried out a search which revealed Nyalego's one mattress and 2 bed sheets together with a blanket missing. Achieng testified that she knew Nyalego's house well – just a single roomed house and that she also knew the bedding which Nyalego had. She was also accompanied into Nyalego's house by her husband.

4. Achieng also testified that the police conducted a search in the nearby plantation and found ODO

asleep in the plantation. They recovered a blanket and one bedsheet. She told the court that both the blanket and sheet found with ODO in the sugarcane plantation belonged to Nyalego. Thereafter, Achieng recorded her statement with the police. She also testified that she saw marks of beatings on Nyalego's back and waist when the clothes were pulled up.

5. During cross examination, Achieng told the court that she did not know how Nyalego died and further that she did not respond when Nyalego asked ODO to return her hoe.

6. PW4, Jacob Otieno Ogara testified that on the morning of 14.03.2011, at about 10.00am, while on his way from his shamba, he was informed of Nyalego's body which was lying next to her house. He reported the matter to the village elder one Joseph Odhiambo Agoya (not called as a witness) who in turn informed the Assistant chief of the area. The matter was eventually reported to Manyatta AP Camp.

7. According to PW4(Ogara) the accused was arrested from among the crowd that had gathered at Nyalego's compound. He also testified that he followed the police at a safe distance when the police went into the sugar cane plantation in search of Nyalego's missing items and that one blanket and one sheet were recovered. On 17.03.2011 Ogara was one of the people who identified Nyalego's body for post mortem examination. During cross examination, Ogara testified that the blanket and bedsheet were recovered after ODO had been arrested from the crowd at Nyalego's home.

8. PW5 was Alex Okello Mirende a neighbour of the deceased at whose home ODO claimed to have been when the alleged incident took place. He testified that on 13.03.2011 in the evening he was at his home. He went to bed at 9.00pm and woke up in the morning of 14.03.2011 to prepare for his in laws who came in at about 12.00pm, and that was in the cause of that day that PW5 learnt of the death of the deceased. PW5 told the court that he had nothing to say about the accused person herein.

9. Number 54326 Corporal Peter Malonza Mukinya testified as PW2. His testimony was to the effect that on 14.03.2011 at about 2.00pm, while he was at the Manyatta police patrol base, the area Assistant Chief, one Esau Tolo went to the Base and requested him to go and see the Assistant chief of Bondeni area who needed help. He immediately left for the AP camp where he was informed of the death of the deceased. He went to the scene and found the body which was lying some 10 metres from her house with the keys to her house lying in a plastic bag next to the body. On checking the body he noticed blood oozing from the mouth in addition to the presence of some strangulation marks around the neck. According to PW2 Nyalego was killed elsewhere and the body dumped where it was found.

10. PW2 also testified that upon interrogation of the relatives, he established that Odo and Nyalego had fought the previous night, like they did on many previous occasions after their drinking sprees. PW2 also recovered the bag in which Nyalego's belongings were found in the nearby sugarcane plantation after he had arrested Odo. PW2 stated that inside the plastic sack, he found a blanket and a bedsheet both of which items were identified as belonging to Nyalego. The blanket, white spotted bedsheet and sack were produced as PExhibits 2,3 and 4 respectively.

11. Dr. Menase Kipsang Rotich conducted the post mortem examination. He testified as PW1. His evidence was that on 17.03.2011, he performed a post mortem examination on Nyalego's body which was identified by Ogara and one Joseph Otieno. The body was that of an African female adult which was of good nutrition and physique. Externally, the body was cold and swollen and had a mark around the neck typical of something like a rope having been put around it. The head was swollen. The significant finding was on the respiratory system with the cricoid cartilage being very soft. There were no fractures. Dr. Rotich formed the opinion that the cause of death was asphyxia due to strangulation. The doctor filled the Post mortem form under Death certificate No.093275 signed it and duly stamped it. The same was however not produced as an exhibit although the Court Assistant's records show the same as PExhibit 1. I shall return to this point later in the judgment.

The Defence Case.

12. At the close of the prosecution case the accused person was found to have a case to answer. He was

put on his defence. He gave sworn evidence in which he denied committing the offence. He stated that on the night of the alleged offence he was at the home of PW5, Alex Okello Mirende where there were visitors and that he had taken cows there for dowry. That he was taken from PW5's home and asked to go and assist in carrying the deceased's body when in actual fact he was under arrest. He also denied being found in the sugarcane plantation and also denied being found in possession of the items belonging to Nyalego.

13. The accused however admitted that before Nyalego died they were living together as man and wife, though he claimed Nyalego was a rowdy drunkard. During cross examination, the accused stated that he did not have any grudge with any of the prosecution witnesses who come from same area as himself. He also confirmed that the mattress, blanket and bedsheet produced in court belonged to Nyalego. He also stated that the prosecution witnesses testified against him because they were jealous of his farming success story. He asked the court to set him free.

Submissions

14. Counsel for the accused person filed final written submissions dated 25.10.2016 and urged the court to make a finding that the prosecution case falls short of the required standard of proof. Counsel submitted that the prosecution had failed to prove that the accused person intentionally planned and caused the death of Nyalego or that the accused knew that his acts would result in the death of the deceased and finally that the prosecution had failed to prove that it was the accused person who actually caused the death of Nyalego. Counsel submitted that the accused person was charged simply because of his proximity to Nyalego and not because he committed the offence.

15. In response, prosecution counsel submitted that the prosecution relied on the evidence on record.

Issues for determination

16. After a careful analysis of all the evidence on record, the issues that arise for determination are the following.:-

- a. Whether the deceased died and what the cause of death was;
- b. Whether the deceased died as a result of the unlawful acts or omissions on the part of the accused person
- c. Whether, the prosecution has proved that he accused had the necessary malice aforethought in killing the deceased, if the answer to(b) above is in the positive.

Analysis and Determination

17. Section 203 of the Penal Code, Cap 63 Laws of Kenya provides that anyone who unlawfully and with malice aforethought causes death of another is guilty of the offence termed murder. Section 206 defines what constitutes malice aforethought. What the provisions of Section 206 mean is that once it is confirmed from the evidence on record that the death of the deceased resulted from the unlawful act or omission of the accused person, and that such act or omission falls within the ambit of the provisions of the said Section 206, the court need not go further and should make a finding that the accused person is guilty as charged. I shall now proceed to consider the issues set out above.

a. Whether the deceased died and what the cause of her death was

18. The evidence on record clearly shows that the deceased in this case died. All the prosecution witnesses have testified to this fact. Even the accused person confirms in his sworn testimony that the deceased died. He however denies that he is the one who caused the death of the deceased. Regarding the death of the deceased, Achieng, testified as follows;- "..... I heard people on the way saying that Nyalego had died.I then went to Nyalego's homestead and saw many people gathered there.

Nyalego was lying next to the door to her house dead.....”

19. PW2 No. 54326 CPL Peter Malonza Mukinya also testified of the deceased’s death thus;- “ We went there and found the Assistant Chief Francis Nanzai who took us to where the body was lying. I found the body of the deceased Phelister Anyango 10 metres from her house.....checking further I found marks of strangulation on her neck. Blood was oozing from the mouth. No other strangulation on rest of body.”

20. From the above evidence, the issue of whether or not the deceased died is settled in the affirmative. The next and more troublesome issue for determination is what caused her death. It is worth noting that this is a case for which there are no eye witnesses, so the only evidence left for determining the cause of death of the deceased is the medical evidence adduced by PW1, Dr. Menase Kipsang Rotich who performed post mortem examination on the body of the deceased on 17.03.2011. According to the findings made by Dr. Rotich, the deceased died from asphyxia due to strangulation. Dr. Rotich testified that when he examined the body, he noticed a mark around the neck, typical of something like a rope that had been put around it.

21. I pointed out earlier in this Judgment the post mortem report referred to by Dr. Rotich Kipsang was not produced as an exhibit in this case. What is the effect of this omission on the prosecution’s case against the accused person. Whereas Dr. Rotich Kipsang testified as PW1, and confirmed that he indeed carried out the post mortem examination on the body of the deceased on 17.03.2011, his evidence on the post mortem report was as follows. “The cause of death was asphyxia due to strangulation. I did not give the age. She was an adult. I signed the post mortem and issued a death certificate.” As this court did not hear the evidence given by Dr. Kipsang, it is not clear why he was not led to produce the report.

22. A similar situation was encountered in the case of **Ndungu – vs – Republic[1985] eKLR**, a case that was cited in the care of **Chengo Nickson Kalama – vs – Republic [2015]eKLR**, where the Court of Appeal led, “.....where a body is available and the body has been examined, a post mortem must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post mortem examination is cross examined. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstance inexplicable and was unhelpful to the prosecution and to the judge....”

23. In this case, though the post mortem form is lying on the file it is not marked as an exhibit, so it is a mere piece of paper. The court is of course aware of the decision in the **Tanzanian case of Republic – vs – Cheya & Another [1973]EA 500** in which it was held that the cause of death can be proved by some other evidence. This court has relied on that decision in appropriate circumstances. In this case, the prosecution case turns mainly on circumstantial evidence and the law on circumstantial evidence being what it is, nothing should be left to chance.

24. In the Chengo case (above) the learned Judges of Appeal stated that the proposition in the Cheya case as found in Ndungu case to have been improperly made. The court in the Ndungu case (Supra) expressed itself thus in part of its judgment;-

“.....where a post mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available, some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class. To return to Cheya it is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision.....”

25. With the above comments by the Court of Appeal, and considering the fact that there was no direct evidence linking the accused person herein to the commission of the offence, this court must exercise caution in deciding whether or not it was critical for the prosecution to produce the post mortem report. It was imperative for the prosecution to produce the post mortem form as an exhibit to enable Dr. Kipsang to “Correlate his opinion with the case for the prosecution.” The prosecution having failed to do so must mean that the accused person gets the benefit of the doubt since the cause of the deceased’s death was not proved.

b. Whether the deceased died as a result of the unlawful acts or omissions of the accused person

26. As noted earlier in this judgment, there was no eye witness to the death of the deceased. What remains for his court to consider is circumstantial evidence. Though circumstantial evidence has been known to prove a crime with the precision of mathematics courts are cautioned to observe certain basic minimum standards before such evidence can form the basis of a conviction. In the case of **Ndurya- vs- Republic [2005]KLR 135**, the court held, inter alia, that “circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. **It was necessary before drawing the inference of the accused person’s guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference**” (emphasis is mine)

27. In the case of **Mwathi –vs- Republic [2007] 2EA 334**, the court held the view that “in the absence of eye witnesses, the court must consider whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt (**Rex – Vs- Kipkering Arap Koske 16 EACA135 and Teper – Vs – R[1952] AC 480 followed.**)”

28. The question that comes up to pose at this point is this: What inculpatory facts have been put forward by the prosecution in this case? Do those facts form an unbroken chain of evidence that would go to prove that it is the accused person and him alone who can explain how the deceased died?

29. In this case, it is in evidence that the deceased was the widow of the accused person’s brother and although she had returned to her people after her husband’s death, the accused person went after her, brought her back to the family homestead and built a house for her. The deceased and Achieng had been married to brothers. The deceased and the accused person were living together as man and wife at the time of the deceased’s death. The accused person also furnished the house in which the two co-habited.

30. According to Achieng’s testimony, at about 9.00pm on the night before the deceased’s body was found lying dead outside her (deceased’s) house, she heard the deceased calling ODO (alias name of the accused person herein) to return her hoe. Achieng did not follow up on that call by the deceased; instead she went to bed and slept.

31. On the morning when the deceased’s body was discovered, the police came to the scene and asked Achieng to open the deceased’s house PW4 testified that the keys to the deceased’s house were found inside a small polythene bag beside the deceased’s body. When Achieng opened the deceased’s house she said, “We found that one mattress was missing and 2 bedsheets and a blanket also missing. I know the house so well as I went in almost every day which has only one room. I knew it well and how it was inside.” Achieng went on to testify that, “the police conducted a search in the nearby sugar plantation with Ogola and a brother to Odo and found ODO asleep in the plantation with one blanket and a bedsheet. He was arrested. I identified the blanket and the bed sheet which ODO was using as Nyalego’s. The blanket had red and white strips. The bedsheet had red flowers and was white in colour.”

32. PW4, Ogara testified that he followed the police into the sugar cane plantation where they recovered the blanket and one bedsheet, although he could not recall the colour of the blanket. Ogara’s evidence as to where the accused person was when he was arrested differs somewhat from that of Achieng. While Achieng stated that the accused was arrested from the sugarcane plantation where he was found sleeping

Ogara stated that the accused person was arrested from the crowd which had gathered around the deceased's body.

33. PW2 Cpl Mukinya testified that when he visited the scene, he gathered information to the effect that the deceased and the accused person had fought the previous night as they often did and that one of his informers told him that he had seen the accused at around 3.00am going away with a bag. PW2 further stated that after he arrested the accused person, he(PW2) asked accused to show him where the bag he had been seen carrying during the night was. That is when the accused took PW2 to the sugarcane plantation from where PW2 recovered a blanket- Pexhibit 2 and white spotted sheet produced as PExhibit 3 and a sack which was produced as Pexhibit 4.

34. Taking all the above evidence into account, I am satisfied that the inculpatory facts put forward by the prosecution in this case are incompatible with the innocence of the accused person, In my considered view the chain of events remains unbroken from the time when Achieng heard an exchange between the accused and the deceased at about 9.00pm on the night before the deceased was found dead outside her house with a mark of strangulation around her neck up to the recovery of the blanket and sheet which were identified as belonging to the deceased. Having removed the deceased's bedding from her house in the dead of night, the accused person is in the best position to explain how the deceased met her death. Further having been found in possession of the deceased's bedding, the accused was either the killer or an accomplice of the person(s) who killed the deceased. It is immaterial to this court what the motive for the killing was, because as it was held in the case of Libambula – vs- Republic [2003]KLR 68, generally speaking motive is not an essential element to prove a crime.

35. Whether the prosecution has proved malice aforethought on the part of the accused person.

36. The medical evidence on record shows that the deceased died as a result of strangulation. The accused person had no right to strangle the deceased. By strangling the deceased, the accused must have intended to cause the death of the deceased. The accused person therefore unlawfully caused the death of the deceased with malice aforethought which is deemed to have been established by the fact that the accused person intended to commit a felony within the meaning of Section 22(C) of the Penal Code. Indeed he caused the deceased's death in the cause of committing a felony of grievous harm to the deceased

Conclusion

37. In the circumstances, I have reached the irresistible conclusion, that it is the accused person herein Stephen Nandwa Ochieng who murdered PHILISTER ANYANGO OGODA. I therefore find him guilty as charged and convict him accordingly under Section 322(2) of the Criminal Procedure Code.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 21st day of February 2017

RUTH N. SITATI

JUDGE

In the present of;-

Miss Tarus (present) for the State

Mr. Manyoni (present) for Accused

Polycap Court Assistant