



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
NAIROBI
CRIMINAL CASE NO. 88 OF 2010
LESIT J

REPUBLIC.....PROSECUTION

VERSUS

PETER GATHONGO KAMANGARA.....1ST ACCUSED

RUTH WAMBUI MUHIA.....2ND ACCUSED

LUCY WANGARI MUHIA.....3RD ACCUSED

JUDGEMENT

1. Three accused persons have been jointly charged with the offence of **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code**:

“The particulars are that: on the 26th day of October, 2010 at Ndakaini Village, Ndakaini Sub-Location in Gatanga District in central province the three jointly murdered ELIZABETH KAHURA MUHIA.”

2. This case was started by Hon. Ombija J, as he then was who heard the entire prosecution case which was comprised of 14 witnesses. I took over the matter under **section 200** and **201(1)** of the **Criminal Procedure Code**, and heard the defence case and the final submissions in the case.

3. The prosecution called 14 witnesses in a bid to prove the case against the accused persons. The summary of the prosecution case was as follows.

4. PW1 who was the father to the 2nd accused and husband to the 3rd accused respectively stated that on 26th October, 2010 he came back to his 2nd wife the deceased herein and found his children with a sister to the deceased. The sister of the deceased was PW8. PW1 enquired about the whereabouts of the deceased from PW8 and she told him that she last saw the deceased talking with the 3rd accused on the road at 10am that morning before both parted ways.

5. PW1 stated that on hearing that he called the 3rd accused but her phone went unanswered. PW1 then called his eldest brother, Kamande Kenneth, his eldest sister Harriet, PW3 and together with PW8 they all proceeded to the 3rd accused homestead. There they found the 2nd and 3rd accused. When they asked the

3rd accused where the deceased was, the 3rd accused stated that she had talked to the deceased in the morning and that they had parted ways.

6. PW1 proceeded to carry a physical check of the bedroom belonging to the 3rd accused. The 1st accused was found hiding under the bed of the 3rd accused. As PW1 went to call police at Ndakaini Police Station to go to the home of the 3rd accused to arrest the 1st accused, PW8 decided to call her sister's phone. The deceased phone rang inside the bedroom used by the 2nd accused. The 2nd accused quickly went to her bedroom and switched off the mobile phone then locked herself inside.

7. On the Morning of 27th October, 2010 PW1 reported about the disappearance of the deceased and the fact that her phone was off. Together with a police officer, PW1 proceeded to the house of the 3rd accused where the 2nd accused was arrested. On further search of the area around the homestead of the 3rd accused, PW1 together with others discovered the body of the deceased wrapped in a blanket P. Exh1. PW1 identified the blanket because he had bought it for the children of the 3rd accused. PW1 also identified the cloth stuffed in the deceased mouth, P. Exh. 2 as clothing he had earlier bought for the child of the 3rd accused.

8. PW6 stated that on 27th October, 2010 at around 8.30 am, he went to the 3rd accused house and found the 2nd accused who informed him that the 3rd accused had left very early with no indication as to where she had gone. PW6 arrested the 2nd accused and took her to Ndakaini Police Station. PW6 was later called by members of the public who informed him that they had sported a body near the house of the 3rd accused. PW6 proceeded to the said area and was present when the body of the deceased was found. PW6 noticed a wound on the back of the deceased head. PW6 stated on cross examination that the deceased body was found in the shamba adjacent to PW1's shamba belonging to one Muchiri.

9. PW8 testified that after the deceased left that morning of 26th, she too left for work an hour later. When she returned at 7.00 pm same day, she found the children of the deceased alone. PW1 came home and found PW8 and the children of the deceased home alone. PW8 was equally surprised that the deceased was not in the house.

10. PW10 was the D/OCS of Ndakaini Police Station and took charge of the initial investigations. PW10 stated that on 27th October, 2010 he took the statement of the 1st and 2nd accused after he had cautioned them. PW10 stated that the 1st and 2nd accused willingly gave their statements which he recorded and read back to them. Counsel for 1st accused had no objection to the admission of the 1st accused statement in evidence and consequently this statement was admitted as P.Exhibit 5(A).

11. A trial within a trial was carried out in order to determine the admissibility of the 2nd accused statement. The court admitted the statement under inquiry into evidence.

12. PW11 was the scene of crimes officer in this case. PW11 stated that on 27th October, 2010 he was requested by P.C Kathurima to take photos where an adult female had been murdered and dumped in a bush. PW11 produced the photos as P.Exhibit 4(a) and a statutory declaration that he personally took the photos as P.Exhibit 4(b).

13. PW12 was the investigating officer in this case. He stated that on 27th October, 2010 at around 1210 hrs he received a report that a dead body had been found near a bush about 20 metres from the 3rd accused house. PW12 proceeded to the said scene and found the deceased body wrapped in a blanket in a bush. The body had a deep cut at the back of the head. PW12 produced the blanket used to wrap the deceased as P.Exhibit 1, the cloth found stuffed in the deceased mouth as P.Exhibit 2. He also recovered a pair of sport shoes belonging to the 1st accused from the house of the 3rd accused as P. Exhibit 6. PW12 admitted in cross examination stated that P. Exhibit 6 was not taken to the Government Chemist for analysis.

14. PW13 conducted the Mental Assessments of the accused persons. On 1st November, 2010 PW13 conducted a Mental and Age assessment of 1st and 2nd accused whom he found to be adult male and adult female persons respectively, and of sound minds. PW13 produced the P3 form in respect of 1st accused as P.Exhibit 7 and P3 form in respect of the 2nd accused as P.Exhibit 8.

15. PW14 stated that the 3rd accused was admitted on 27th January, 2011 at Mathare hospital following an order issued by the court and had been under the medical care of PW14 since then. PW14 stated that on 26th June, 2011 the 3rd accused was found fit to face trial after she had been in hospital for 6 months. PW14 further stated that the 3rd accused had suffered a major depressive disorder and had a disease of the mind. The psychiatrist testified that given the 3rd accused had suffered a depressive disorder with psychiatric features, hallucinations and the presence of the husband's chronic illness (HIV) and marriage of a 2nd wife, the 3rd accused was likely to have committed the offence due to the nature of her illness. PW14 stated that people who had the 3rd accused condition tended to be suicidal and homicidal. PW14 produced her report as P. Exhibit 10.

16. The three accused were placed on their defence after the court was convinced a prima facie had been established by the prosecution against them. The 1st accused opted to give a sworn statement in his defence, 2nd accused opted to give an unsworn statement while the 3rd accused opted to keep quiet.

17. 1st accused in his sworn defence denied having been part of the murder of the deceased person. Though 1st accused admitted to having been found by PW1 under the bed in the 3rd accused bedroom, he explained that this was due to the fact that he feared PW1 since they had had a quarrel with him some time back when he had visited the 2nd accused. The 1st accused gave a comprehensive recap of his daily activities of the 26th day of October 2010 from when he woke up at the 3rd accused house having spent the night there, up to when he was arrested by the police officers around midnight of the same day. The 1st accused further stated that he had no idea that any murder had been committed there; and had only gone to the 3rd accused house to visit his lover the 2nd accused.

18. The 2nd accused in her unsworn statement denied being involved in or having any knowledge of the murder of the deceased person. The 2nd accused stated that on 26th October, 2010 she was with her mother the 3rd accused and her fiancée the 1st accused in the 3rd accused house having supper. The 2nd accused narrated to court how the 1st accused was arrested. Her statement was in-tandem with the evidence of PW1 and the defence of the 1st accused evidence.

19. The 2nd accused stated that on 27th October, 2010 at around 11.00am her father, PW1 came in company of one police man and she was ordered to accompany them to the police station where she was placed in cells till midnight. The 2nd accused stated that during the night she was taken away by a police officer into an office where she met her father with other police officers. She said that she was asked to sign some papers brought to her with the promise of being released to go home. The 2nd accused stated that she declined to sign what she had not read and that is when PW1 ordered her to sign the papers failure to which the 2nd accused would cease to address PW1 as her father. The 2nd accused signed the papers after which PW1 promised to return for her in the morning, which he never did.

20. The 3rd accused said nothing in defence.

21. I have considered the submissions by counsels to the parties in this case. Certain facts are not in dispute. It is not in dispute that the deceased was the second wife of PW1 and that they had been married for 8 years at the time of her death. There is no dispute that the 3rd accused was the first wife of PW1, that the two had five children, and that the 2nd accused was one of their children. It is not in dispute that the deceased lived in her own home a quarter kilometres from the home of the 3rd accused. There is no dispute that the 3rd accused shared her home with her daughter, the 2nd accused. There is no dispute that

the 1st accused was arrested under the bed of the 3rd accused, the night before the deceased body was found.

22. There was no eye witness for the murder of the deceased. The prosecution is relying on circumstantial evidence to prove the case against all three accused. It has been held that circumstantial evidence is very often the best evidence. This was the holding in the English case of **R. vs. Taylor Weaver & Donovan (1928) 21 Cr. App. Reports 20**, where the court held:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

23. In order to sustain a conviction on the basis of circumstantial evidence the prosecution needs to adduce evidence that will meet the threshold set out in the case of **ABANGA alias ONYANGO V. REP C.A. No.32 of 1990(UR)** thus:

“It is settled law that when a case rest entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn must cogently and firmly established.**
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.**
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”**

24. I will consider the case against each of the accused. The prosecution is relying on the fact the 1st accused was found under a bed inside the bedroom of the 3rd accused. The other evidence against him was the statement under inquiry by the 2nd accused. In her statement, the 2nd accused stated that she heard the 1st and 3rd accused planning to eliminate the deceased. The 2nd accused stated that the two executed their plot and then wrapped the body in a blanket and disposed it near the house of the 3rd accused.

25. The 2nd accused retracted the statement under inquiry taken from her by PW10. However after a trial within a trial the court admitted the statement as evidence. I will quote a case which is authoritative to this court. It is the case of **Kanini Muli v Republic [2014] eKLR** where the court of appeal held:

“Secondly it has for a long time been accepted that even after the trial court has ruled a confession is admissible, the accused is at liberty to call evidence to show that the confession was not voluntary. In **KINYORI S/O KARIDITU VS REGINA (1956) EA 480**, the Court of Appeal for Eastern Africa, after setting out the procedure that ought to be followed in a trial within a trial, made the following fundamental point:

“The broad principle underlying that procedure is that the accused is entitled to present, not merely to the judge but also to the assessors, the whole of his case relating to the alleged extra-judicial statement; for the judge’s ruling that it is admissible in evidence is not the end of the matter; it still remains for both judge and assessors individually (or, where there is a jury, for the jurors) to assess the value or weight of any admission or confession thereby disclosed and also the accused is still at liberty to try and persuade them that he has good reason to retract or to repudiate the statement concerned or any part of it.” (Emphasis added).

26. I am well guided. The case is an authority to the effect that even where the trial court has ruled that a retracted confession is admissible in evidence, the accused still has a chance to adduce evidence to

demonstrate that the confession is not admissible. Likewise, even after admitting a retracted statement the trial court is expected to assess the value or weight of such statement.

27. The statement by the 2nd accused was not really a confession. **Section 25** of the **Evidence Act** defines a confession as follows:

25. A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

28. The statement by the 2nd accused was a self serving statement. It implicated others and exonerated self from blame. Even if the statement was a confession within the meaning of the **Evidence Act**, it is trite law that a retracted confession is the weakest form of evidence. It would require corroboration from other material and independent evidence in order to found a conviction. Furthermore, the retracted confession of an accused person can only be evidence against the accused that made the confession. It cannot found a conviction against a co-accused.

29. There was corroboration of sections of the statement under inquiry by the 2nd accused in the prosecution evidence. The body of the deceased was recovered within the compound of the 3rd accused home. The second part corroborated in the prosecution was the fact the body was found wrapped in a blanket.

30. The other piece of evidence corroborated was the fact the blanket in question together with the cloth found stuffed inside the deceased mouth were all identified by PW1 as items of clothing he bought for the children of the 3rd accused. The defence did not challenge or contest the evidence that the pieces of cloth had been bought by PW1 or that he bought them for the children of the 3rd accused. That means that these items came from the home of the 3rd accused, and were part of the implements used in the murder of the deceased.

31. The corroboration in 2nd accused statement points a finger against the 3rd accused on the grounds that clothing which had been bought for her were found to have been used in the murder and also in covering the body after the murder. These facts brings into operation the rebuttable presumption under **section 111(1)** and **119** of the **Evidence Act** which provide thus:

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.’

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

32. The rebuttable presumption is that since the piece of cloth stuffed in deceased mouth and the blanket covering her body belonged to the 3rd accused, she must have provided the two items and therefore either

knew how the deceased met her death or was a perpetrator of that death. The 3rd accused had a statutory burden to give an explanation or adduce evidence to rebut the presumption created by the stated facts. The 3rd accused opted to make no explanation.

33. The other evidence was against the 2nd accused. That was the evidence of PW8 that as she waited for police in the home of the 3rd accused, she decided to call her sister phone, and that when she did so, the phone rang inside the bedroom of the 2nd accused. The 2nd accused is said to have rushed to her bedroom, switched off the phone then locked herself inside.

34. That evidence would have been a key piece of evidence in favour of the prosecution. However I find weakness in this piece of evidence. One, it is the evidence of PW1, 3 and 8 that Police Officers visited the home where the 2nd accused had the phone on the same night after the phone had rang. Yet PW3 and 8 who knew that the 2nd accused may have the deceased phone chose not to inform the police nor have the 2nd accused arrested. Two, I find it unbelievable that PW8 especially, being the deceased only blood relative in that company could have kept quiet and failed to take any action. Three, and more importantly and more critical the said phone was neither recovered nor was any effort made to look for it. I find that all these facts weaken the prosecution case against the 2nd accused.

35. As for the 1st accused being found under the 3rd accused bed did not further the prosecution case against him for the simple reason the deceased had not been found by the time he was arrested. We do not know when the deceased was murdered as that evidence was not presented before the court. I find that it is merely suspicious that the 1st accused was under the bed on the material night but the same does not irresistibly point to his guilt.

36. Even though I am not convinced by his sworn defence that he was hiding from PW1 and that he ran suddenly to hide and therefore entered the wrong room, I do not find any cogent evidence against him. There is a possibility of an innocent explanation for his presence in that house at the time in question.

37. Mr. Wamwayi for the 3rd accused urged the court to take into account the evidence of PW14, the psychiatrist who treated the 3rd accused for six months from 27th January 2011, after a court order. I have already set out the doctor's evidence, her findings and conclusions. Apart from the scientific conclusions PW14 arrived at as to the 3rd accused mental status, the doctor made some conclusions based on the 3rd accused communication to her during the period of treatment. This includes details of assault on the deceased and other details of factual nature. The fact PW1 married again and the allegation PW1 had a chronic disease. The fact of remarriage is established in evidence. The chronic illness of PW1 was not made the subject of cross-examination by counsel for the 3rd accused.

38. I considered that the 3rd accused defence was the report by PW14. That means she was admitting the facts stated therein, not just her medical condition but her admission she could have committed the assault. She described the attack on the deceased. That evidence was in tandem with the injuries captured in the Crime Scene Officer's photographs, P Exh. 4(a). The injuries were also in tandem with the injuries seen on the deceased body by the identifying witness PW7, the I. O. PW6, and other witnesses including PW2 and 4.

39. I did consider the rest of the evidence. I find the fact the blanket and clothing bought for the 3rd accused were found inside deceased mouth and over her body proof that the 3rd accused was, in the absence of an explanation a principle perpetrator of the deceased death. In addition, I find that the prosecution has adduced evidence to prove that the 3rd accused conducted himself as a person with a guilty mind. The prosecution case was that the 3rd accused disappeared from her house on the morning of 27th October, 2010, that was the same morning that the body of the deceased was found. PW6 testified that when he returned to 3rd accused house on the morning of 27th October, he was only able to find the 2nd accused and he arrested her. He testified that the 2nd accused told him that the 3rd accused had gone

away very early that morning. PW6 stated the 3rd accused was found two months later and arrested for this offence. I find that the accused went into hiding after this offence and that her conduct was that of a person with a guilty mind.

40. The prosecution has presented evidence which shows that the 3rd accused may not have been in her right mind when the offence was committed. The defence has admitted that evidence and adopted it as part of 3rd accused case. From this evidence I find that the 3rd accused admits attacking and hitting the deceased once on the head, as a result of which she died. The post mortem report is not an exhibit. However from the defence case and the submissions therein, I find that the accused death and how the death was caused is not disputed.

41. Having considered the entire evidence adduced by the prosecution in this case, I am satisfied beyond any doubt that the circumstances from which an inference of guilt was sought to be drawn has been cogently and firmly established by the prosecution in this case, that the prosecution has established circumstances which unerringly point towards guilt of the 3rd accused, and that all the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the 3rd accused and none else.

42. Having come to the conclusions I have of this case, I find that the prosecution has adduced evidence to prove beyond any reasonable doubt that the 3rd accused attacked the deceased causing her injuries as a result of which she died. I find that the prosecution has proved that at the time the 3rd accused committed this offence she was not in a right state of mind, but was suffering from major depressive disorder with psychiatric feature, paranoid, depressed and homicidal.

43. **Section 166** of the **Criminal Procedure Code** provides as follows:

“166. (1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

(2) When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.”

44. I find that even though the 3rd accused caused the deceased death, she was not in the right frame of mind, was not in control of her senses and was incapable of forming the required *mens rea* to commit the offence charged. I find the 3rd accused guilty of **murder** contrary to **section 203** of the **Penal Code**, but insane under **section 166 (2)** of the **Criminal Procedure Code**.

45. For the 1st and 2nd accused I find the evidence adduced against them did not meet the required threshold of criminal cases. Accordingly I give them the benefit of doubt and acquit them under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2017.

LESIIT, J.

JUDGE