



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 13 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

S M N.....ACCUSED

J U D G M E N T

1. **S M**, the Accused herein was the estranged husband of the deceased, **Z N (Z)**. He is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on diverse dates between 25th March, 2012 and 4th April, 2012 at [particulars withheld] within the Nakuru County he murdered **Z N**. He denied the charge and was represented by Mr. Njuguna.

2. It was the prosecution case that the Accused and **Z** had lived together as man and wife for several years at Maai Mahiu as at March 2012. **Z** had two children out of another relationship before she started to cohabit with the Accused. Due to frequent disagreements, **Z** had left the Accused and returned to her family at Limuru. She travelled to Maai Mahiu on 25/3/2012 and was seen there by two of her friends, **L N B (PW2)** and **J M (PW7)**. She informed them that she was headed to her matrimonial home at [particulars withheld] to meet up with her husband over some domestic matter, before returning to Limuru. However she did not return to Limuru per her brother, **E N (PW5)**, or attend a *chama* (women's group) with her Maai Mahiu friends on 29/3/2012.

3. **PW1, V W (PW8)** and another friend **S N (PW2)** became alarmed when they were unable to reach her by phone. They proceeded to the home of the Accused in search of her but found nobody. They made a report to **PC Silvano Njeru (PW9)** of Maai Mahiu Police Station. Meanwhile **PW5** also travelled to Maai Mahiu and reported to police.

4. On 3/4/2012 **PW9** visited the Accused's home and mobilized members of the public for a search. The Accused was working at his shamba. No recovery was made. On the next day however, the search party moved into the Accused's house. In a room that had an earthen floor, and apparently used as a kitchen, were timber boxes stacked together. When these were moved a shallow grave was revealed. When dug out it revealed the decomposing remains of the deceased. On her neck was a noose made of barbed wire, enmeshed in the flesh. The body was removed from the scene. The Accused who was absent at the time was traced and arrested.

5. On 5/4/2012 the body was identified by a brother to **Z**, **J M W (PW3)** for post mortem examination by **Dr. Ngulungu**. His findings were that the cause of death was asphyxia due to pressure applied to neck, consistent with manual strangulation executed with a barbed wire cord.

6. In his defence, the Accused made an unsworn statement. To the effect that he got married to **Z** in 2005 when she already had two children. After residing at Muniu for 3 years they moved in 2008 to Maai

Mahiu, in order to be closer to schools. They were constructing a house at Muniu but he worked in a distant place therefore hardly visiting Muniu. He had last visited on 6/11/2009 to discuss boundary issues with a neighbour. That on 23/3/2012 the deceased left for Limuru to attend the daughter's school visiting day. The younger daughter was ailing and the deceased left home and took her to hospital on 26/3/2012, never to return. He attempted to ring her, in vain and as well contacted the deceased's mother. He was in shock.

7. When **PW5** came to him on 2/4/2012 to inform him that Z was missing he told him of his efforts to look for her. He and **PW5** went to the shamba to plant seeds which **PW5** brought with him. After **PW5** left, he decided to make a report at Maai Mahiu Police Station. Police visited his home on 3/4/2012 and took him to their station. There, he was shown a handbag and a phone, the latter which he identified as the deceased's. He learned then of the discovery of Z's body. He said he loved his wife and had never disagreed with her. He denied murdering her.

8. The defence filed written submissions at the close of the defence evidence. There is no dispute concerning the relationship between the Accused and the deceased, or that she was last seen alive in the last week of March 2012. There is no dispute that the couple had a home at Muniu, Maai Mahiu.

9. The cause of death is not indispute; Z died a violent death; she was strangled to death with a piece of barbed wire. The court must determine whether, with malice aforethought, the Accused herein strangled the deceased to death.

10. The defence counsel has correctly submitted that the prosecution case is based on circumstantial evidence, relying on **Abanga alias Onyango -Vs- Republic Cr. App. No. 32 of 1990 (UR)**. The case of **Musili Tulo -Vs- Republic [2014] eKLR** involved an appeal from conviction based on circumstantial evidence. The Court of Appeal restated the principles set out in **Republic -Vs- Kipkering Arap Koskei [1949] 16EACA 135** as follows:

“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

i. The circumstances from which an inference of guilt is sought to be drawn, must be 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.”

11. Further the court in Tulo's case discussed the principles in **Simon Musoke -Vs- Uganda (1958) EA 715** citing with approval the Privy Councils' dictum in **Teper -Vs- Regina [1952] 2 ALLER 480** by stating:

“In order to ascertain 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, we must also consider a further principle set out in the case of Musoke v. R [1958] EA 715 citing with approval Teper v. R [1952] AL 480, thus:

It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

12. The prosecution herein relied on several pieces of evidence, key among these being the meetings that Z had with friends **PW1** and **PW7** on the morning of 25/3/2012. The witnesses stated that the deceased told them she was going to see the Accused over some personal issues. It was said to be over proceeds of a motor cycle the couple had sold to a member of the Accused's family and the matter of a sick child. Whatever the case the two witnesses, like **PW8** also asserted that the couple's home was Muniu and when they could not find her they went there in search of her. Ditto **PW5**.

13. For his part the Accused admits being with deceased on 25th of March 2012. However, he gave the impression that the two were at the material time living together at Maai Mahiu. This version however was not put to the witnesses **PW1, 2, 7** and **8** during cross-examination despite their firm assertion to the contrary. Indeed there is no evidence whatsoever by police witnesses or others that the Accused had a second home at Maai Mahiu apart from Muniu. The deceased's friends were firm that the deceased had been separated from the Accused in the material period, returning to her home in Limuru.

14. In a sense the Accused's statement that the deceased was in Limuru a day before she disappeared, in part corroborates the testimony by **PW1, 7** and **8**. Secondly, the fact that **PW5** travelled from Limuru to Muniu in search of the deceased tends to confirm that:

- a) the deceased was living at home in the material period.
- b) that she had travelled to Muniu.

Otherwise, there can be no reason for **PW5** to come from Limuru in search of a married adult and supposedly happily living with her husband at Muniu.

15. The Accused's defence that the deceased went to Limuru on 26th March and abandoned a younger child, or that **PW5** brought him some seeds on 2/4/2012, which he had sent the deceased to purchase were not put to **PW5**. These statements were made with a view, in my opinion of making it appear that the deceased disappeared from home on 26/3/2012 and ended up at her Limuru home where she must have met her death.

16. In my opinion what demolishes that theory is the finding of the deceased's body at the home of the Accused at Muniu on 4/4/2012. This finding is attested to by many witnesses including **PW1, PW2, PW3, PW8** and **PW9**. Particularly poignant and convincing was the evidence of **PW8** who stated concerning the recovery.

“We tried calling her (Z's number) in vain. Also she missed the “chama” meeting (of 29/3/2012). We tried to look for her at her husband's place.....we decided to report at police station at Maai Mahiu. Police accompanied us to search for her and her husband. We went to Muniu and saw the husband on shamba. Brother of deceased (PW5) with us. A crowd formed and we searched in vain. Next day I got call from Mama K who said deceased had been found. I went to the home of Accused, place where deceased lived. Inside the house we saw small sufuria with ugali.....we saw body removed from ground. Body had a blunt injury to head and had barbed wire on neck. (witness identifies piece of barbed wire Exhibit 1 in Court)..... I saw upon retrieval of body and also at mortuary.....we accompanied (body) to Naivasha mortuary.”

17. This witness clearly had problems recalling the exact dates of events but her evidence regarding the retrieval of body matches with that of **PW3, PW5** and **PW9**. During her cross-examination **PW8** gave actual details of the recovery. After admitting she was mistaken on dates she stated:

“I was present during retrieval.....we entered house. It had segments – 3 rooms. I peeped through window which people broke down to enable us enter into room where body was. She was buried in a room within the house. House had only a mattress, no other furniture.....on top of shallow grave were some boxes and sufurias”

18. None of these witnesses appeared to me as false witnesses and the fact that **PW5** took on a greater role in inquiring into the matter is explained by the fraternal relationship with deceased.

19. The post mortem report on the state of the body before post mortem examination on 5/4/2012 indicates at the space provided for Post mortem Changes and Assessment of time of Death is as follows:-

“Body shows putrefaction attended with peeling of superficial skin. Has soil on the body consistent with previously buried body, done exhumation. Interval approximately 1week to 2 weeks but less than one month” (sic)

20. It is unfortunate that negatives of photos taken at the scene could not be processed because they were damaged. However, that does not in any way detract from the evidence of the witnesses that the body of the deceased was dug out of the matrimonial home at Muniu.

21. From his evidence, the Accused was not present when the recovery was made; and was in custody. However evidence by **PW9** was that he was only arrested after the recovery on 4/4/2012. Further the Accused’s account is contradicted sharply by evidence by **PW5**. Having first visited the Accused’s home on 3/4/2012, **PW5** returned there on 4/4/2012. This witness was questioned at some length concerning reported disagreements between the deceased and the Accused during cross-examination. There is in my view, credible evidence that the Accused was arrested after and not before the recovery of the body. At any rate, whether he was in custody or elsewhere at the time of retrieval of the body, the prosecution evidence on this score is firmly established and is believable.

22. The prosecution sought also to rely on the alleged possession by the Accused of the deceased’s phone on 3/4/2012. I do not think the evidence can be relied on there being no firm relationship proven between the phone and the deceased. The Accused admitted seeing it while in custody, indirectly denying its possession. Remarkably, **PW5’s** statements to police did not clearly connect the phone with the Accused. **PW9** did not appear to have handled the matter with any particularity.

23. The foregoing notwithstanding, three key facts are established:

a) that the deceased was admittedly last seen alive by the Accused between 25 and 26th March 2012 at Muniu where the couple resided.

b) that the deceased who had been separated from the Accused and living at Limuru, was not seen there since 25/3/2012.

c) that her decomposing body was found buried in a shallow grave in her matrimonial house at Muniu

24. Also relevant is the admitted conduct of the Accused in the material period. His beloved wife had, according to him, mysteriously disappeared from home on 26/3/2012 ostensibly to take a child to hospital. Even her own family at Limuru were unaware of whereabouts and were concerned. The Accused however continued with his life as normal and was only persuaded by **PW5** on 3/4/2012 – over one week later - to make a report to a police station that is only metres away from his home. His explanation for that conduct to **PW5** was intriguing. **PW5** stated:

“I stayed on (at Accused’s house) after police left. Mburu came and together we entered his house. I asked him if he had reported. He came from his shamba. He said he got mixed up and that after he finished with my sister on the material date she left at 4.00pm”

25. In his defence the Accused confirmed that **PW5** came to his home on the date before the recovery of the body and that it was only following their discussion that he decided to report to police at Maai Mahiu Police Station. From the Accused’s own narration **PW5** could only have visited his home on the first occasion on 3/4/2012. The Accused’s conduct in my view speaks volumes regarding knowledge on the part of the Accused. Much has been said on both sides about the motive of the murder but as the Court of

Appeal stated in **Musili Tulo's case**; under Section 9 (3) of the Penal Code, unless otherwise declared, motive is generally immaterial so far as criminal responsibility is concerned. However sometimes it is an important though not critical element to the proof of an offence.

26. The court in **Tulo's case** cited their decision in **Libambula -Vs- Republic [2003] KLR 683** where they had observed:

“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See Section 8 of the Evidence Act Cap 80 Laws of Kenya.

Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.” (*Emphasis added*)

27. Thus whether or not the couple had differences over the sale of a motor cycle or other issues in their relationship is neither here nor there. I however believe that the deceased left Muniu to return to her parents in Limuru out of disagreements or other marital problems.

28. Reviewing the facts proved herein, the same points unerringly to the Accused's guilt. There is no possibility that a third party murdered the deceased and buried her body in their Muniu house right under the nose of Accused. **As PW7** stated, the couple lived alone with two children and I cannot accept the indirect suggestion in the Accused's defence that perhaps the police 'planted' the body in their house or otherwise invented the recovery at the Muniu house. The evidence on the recovery by prosecution witnesses is credible in my evaluation. Besides, the Accused's conduct leaves no doubt of his own guilty knowledge. His defence is not believable and I reject it.

29. In my considered view, this case meets the criteria for testing circumstantial evidence as stated in Tulo's case. I am satisfied on this evidence, that Accused strangled the deceased and buried her body in the matrimonial house. The deceased was strangled with a piece of barbed wire exhibited in court. The piece of wire was clearly fashioned as a murder weapon, complete with handles at either end, evidently to ensure a firm grip by the killer. So strong was the force by which the resultant noose was pressed on the deceased's neck, that the same became enmeshed in her neck muscles and thyroid cartilage, according to the post mortem report.

30. The intention to cause death is demonstrable from the forging of the unusual murder weapon and the strangulation. I am satisfied that prosecution has proved its case beyond any reasonable doubt against the Accused I convict him accordingly.

Delivered and signed in Naivasha this 3rd day of March, 2017.

In the presence of:-

Ms Kavindu holding brief for Mutinda for the DPP

Mr. Njuguna for the Accused

Accused – present

CC - Barasa

C. MEOLI

JUGDE