



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 99 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

WYCLIFF MWILU MUTINDA.....ACCUSED

JUDGEMENT

Introduction

Wycliff Mwilu Mutinda, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 26th and 27th July 2013 at Kiamumbi area, Kahawa West in Kasarani within Nairobi County with another not before the court murdered John Ndung'u Kamande. The accused pleaded not guilty to the charges necessitating this trial in which the prosecution called evidence of five witnesses in support of its case while the accused person was the only witness for the defence.

The prosecution presented a case that John Ndung'u Kamande, the deceased, went missing on 27th July 2013. Anastasia Muthoki Makau, PW1, the wife of the deceased failed to contact her husband on that day and she commenced searching for him. The search yielded no results in finding him alive. The deceased's decomposing body was recovered from a septic tank in Kiamumbi area Kahawa West in Nairobi on 18th September 2013. The accused and one Patrick Kyalo Nzioki, a watchman who worked at the same apartment where the deceased was a caretaker, were arrested in respect of the deceased's death and were charged with this offence.

Background

Initially, there was Criminal Case No. 15 of 2014: Republic v. Patrick Kyalo Nzioki and Criminal Case No. 99 of 2013: Republic v. Wycliff Mwilu Mutinda. Both cases related to the murder of John Ndung'u Kamande the deceased. The charges were amended vide information dated 17th February 2014 and by a court order dated 20th February 2014 the two cases were consolidated into one case with the case file remaining Criminal Case No. 99 of 2013. This court took over the proceedings in this case in October 2014. On that date, this court was informed of the death of the Patrick Kyalo Nzioki while in custody. The case against Patrick Kyalo Nzioki abated and the information was amended again to reflect one accused person. The fresh charges were read over to the accused person who pleaded not guilty. Hearing of the case against him commenced.

Prosecution Case

The prosecution presented the case showing that the deceased left his rural home on 26th July 2013 promising his wife PW1 that he would visit again over the weekend. On the morning of 27th July 2013 he did not call his wife as was usual. She texted him around 10.00am on the same day but no response was forthcoming. Around 2.00pm she called his mobile phone number but found it unreachable. She continued calling without success. The following morning on 28th July 2013 she travelled from Kikuyu where she lived to Kahawa West in Nairobi where the deceased worked as a caretaker in an apartment. She found the gate to the apartment wide open. She went to the house the deceased shared with Kyalo, the other accused person before the charges were amended, but her knocking at the door yielded no response. She went back to the gate where she found Kyalo. She asked him about the whereabouts of the deceased but Kyalo said he did not know where the deceased had gone as he had left him (deceased) sleeping in the morning but on returning to the house he had found him and his household items missing. Kyalo showed PW1 the empty house.

PW1 telephoned deceased's brother, Joseph Wanyoike Kamande (PW2) to inform him about the deceased and to find out from him whether he had seen the deceased. PW2 had not seen the deceased. PW1 gave PW2 Kyalo's telephone number. PW2 went to the deceased's place of work the following day on 29th July 2013 and after confirming the information he reported the matter at Kiamumbi Police Station. The matter was taken over by the Kasarani CID Office for investigations.

CPL Anisia Munene (PW4) from Kasarani CID who took over the investigations learned from CPL Celine (not a witness) that the phone belonging to the deceased was in use. The police traced the telephone to one Collins who was using the phone. Collins (not a witness) told the police that the phone (Ex. 3) had been sold to him by one Muritu (not a witness). Collins led police to Githurai 44 to one Muritu who told them that the phone had been taken to him for repair by someone else. He described the person as a brown man who was known to him physically. Police took Muritu with them. Muritu spotted the suspect and pointed him to the police. The suspect, identified as the accused before the court, was arrested. Police told him to take them to his house. At first he took them to a house where there were two men who denied that was accused's home. He then agreed to show police where he lived, a place called Kamae. He opened the house and police entered. Inside the house, PW1, who had accompanied the police found several items belonging to her and the deceased including a scarf (Ex.4), blanket (Ex.5), mattress (Ex.6), shirt (Ex.7), shoes (Ex.8) and trouser (Ex.9). The accused was wearing the shirt, trouser and shoes at the time. They were identified by PW1 as belonging to the deceased. The items were recovered and taken to Kasarani Police Station together with the accused.

Further investigations led police to the recovery of the body of the deceased. The accused took the police to the apartment where the deceased had worked as a caretaker and showed police where he assisted Kyalo to dispose of the body. The decomposing body of the deceased was found inside the septic tank at the place he worked as a caretaker and Kyalo as a watchman. The police had to use an exhauster to drain waste from the septic tank in order to access the body. The accused was thereafter charged with this offence. Kyalo was traced at his rural home in Kitui and also charged in Criminal Case No. 15 of 2014.

Defence Case

The accused testified under oath. He told the court that he recalled 27th July 2013 he was at Kahawa West where he had lived for six months to that date. He said he worked for Lionsgate Security Company and used to supervise other guards while they were on duty. He said that he had met Kyalo in April 2013 and became friends and that he had shown Kyalo where he lived. He said he used to pass by the apartment Kyalo guarded in the course of his daily duties. He said Kyalo called him on 27th July 2013 at 2.00am and asked him to go to Kyalo's place; that on arrival Kyalo told him that he (Kyalo) had a problem; that Kyalo showed him a naked body lying near a septic tank in the compound where Kyalo used to work; that Kyalo told him the person was a thief Kyalo had shot with an arrow; that the accused told Kyalo to report the matter to the police but Kyalo refused and told the accused that he (Kyalo) had called him as a friend and if the accused refused to help him (Kyalo) he would shoot the accused with a poisoned arrow. The accused said he believed Kyalo would make good this threat and he agreed to assist in carrying the body which they placed on a slab of a building under construction near the apartment. The accused said he left

Kyalo with the body and went away; that he did no report to the police or tell any other person as he feared to be implicated in the matter.

The accused further testified that Kyalo went to his (accused's) house the following day 28th July 2013 and knocked on the door; that on opening the door, the accused saw a handcart loaded with assorted household items including a sofa seat, blue mattress, a round table, a speaker and assorted clothes in a suit case; that Kyalo asked the accused to keep the items for him because he was travelling and that he would return to pick the items; that Kyalo asked him to show him a mobile phone technician to repair his phone that had problems; that the accused took Kyalo to a technician he knew but not by name and introduced Kyalo to the technician; that Kyalo left the phone with the technician. The accused described the phone as black in colour.

The accused testified further that he continued working until 18th September 2013 when he was arrested by the police as he was going home from the office; that he was taken to a vehicle parked beside the road where he found the mobile phone technician; that police sought to know from him where he had found the phone and he mentioned Kyalo; that police told him to show them Kyalo and he took them to Kyalo's place of work; that they did not find Kyalo; that the accused was taken to Kasarani Police Station where he stayed for two hours after which police told him to show them where he lived; that he took them to his house in Kamae and opened the door for the police where police found the items taken there by Kyalo; that the woman with the police identified the items as belonging to her husband; that he told the police that he had assisted Kyalo to carry the body of a thief and left it at a slab; that he led police to the place and that on the following day the police informed him that they had recovered the body. The accused denied knowing the deceased and told the court on cross examination that he did not know the items brought to his house by Kyalo belonged to the deceased. He said he knew those items as belonging to Kyalo. He told the court on further cross examination that the clothes and shoes he was found wearing which deceased's wife identified as belonging to the deceased were his (accused's) and that he was shocked to hear PW1 telling the court that they belonged to her husband the deceased.

Analysis and Determination

At the end of the trial, defence counsel Ms Makofu submitted that the prosecution has failed to prove the case against the accused person beyond reasonable doubt and urged the court to acquit the accused. She submitted that there is no evidence to prove malice aforethought or to prove motive of the death; that there is no evidence to show that the accused knew the deceased; that the accused helped Kyalo to dispose of the body of the deceased and failed to report this to the police because he feared he would be implicated in the murder.

On the other hand the prosecution counsel Ms Macharia submitted that the prosecution has proved the case against the accused beyond reasonable doubt and urged the court to convict the accused. Counsel submitted that the phone belonging to the deceased was traced to the accused; that the accused was found wearing the clothes belonging to the deceased and that he participated in disposing of the body of the deceased and later led the police to the septic tank where the body had been dumped. Counsel submitted that if the court found that the accused did not commit murder there is evidence to support the offence of conspiracy to murder under section 224 of the Penal Code. She urged the court to convict the accused of conspiracy to murder.

My reading of the evidence presented before me shows that certain facts are not disputed. It is not disputed that the accused and Patrick Kyalo Nzioki knew each other. The accused denies knowing all the names of Kyalo but from the evidence it is not disputed that the Patrick Kyalo Nzioki who was arrested and charged jointly with the accused and who died in custody is the same Kyalo the accused is referring to as his friend who had asked him to assist in disposing of the body. It is not disputed that the accused and Kyalo disposed of the body of the deceased. It is not disputed that the accused led police to the septic tank where the body of the deceased was found although he claims that he left Kyalo and the body on a slab. It is not disputed that assorted items which were identified as belonging to the deceased were found in accused's house. It is not disputed that the deceased's phone was traced to a technician named as Muritu and that Muritu led police to arrest the accused.

The issues in dispute and which required determination are whether the accused participated in killing the deceased; whether that death was intended and whether the clothes and shoes the accused was found wearing and which were identified as belonging to the deceased belong to the accused

The evidence by the pathologist, Dr. Dona Nyamunga (PW5) who testified on behalf of Dr. Kalsi who performed the post mortem on the body of the deceased on 21st September 2013, is that the body of the deceased was skeletonized and had no muscle tissue on it; that the body had peri-mortem fractures on the left 8th rib and right tibia, fractured and missing left parietal and temporal parts of the cranium and a concentric and radiating fracture on the cranium. She told the court that these fractures occurred during the time of the death. The opinion of the doctor as to the cause of death was that the deceased died as a result of a blunt force trauma to the head. Tooth samples were taken for purposes of DNA profiling but there is no evidence that this was ever carried out.

The state of the body presented difficulties for the family in identifying their kin. PW1 told the court that she was able to identify her deceased husband by his teeth. PW2 the brother to the deceased also told the court that he was able to identify the deceased by his teeth.

I have considered this matter. Evidence shows that the deceased worked as a caretaker at a certain apartment in Kahawa West where Kyalo was a watchman. He shared his sleeping quarters with Kyalo. On 27th July 2013 he went missing and attempts by his family to reach him were fruitless. His wife PW1 found an empty house with no household items. The deceased's household items were found in the house of the accused. The deceased's mobile phone was traced to the accused. The accused admitted to the police and to this court to assisting Kyalo to get rid of the body. Although the accused did not specify whether the body was that of the deceased and although the body was decomposed to an extent that the family members were not able to identify it by his physical features it is my considered view that the circumstantial evidence points to the deceased as the person whose body was dumped and later retrieved from the septic tank at Kahawa West on 18th September 2013. The cause of death was confirmed as blunt force trauma to the head. In view of the evidence before this court therefore, it is my finding that the death of the deceased has been proved beyond reasonable doubt.

The next issue is who caused the blunt trauma on the deceased leading to his death? I have considered the evidence on record. The prosecution did not tender evidence to show that the accused before this court inflicted that blow on the deceased or participated in doing so. All the evidence shows that the accused assisted Kyalo to dispose of the body and that deceased's household items were found in accused's house. In the absence of evidence by the prosecution as to how those items found their way to accused's house and having taken into account the accused's explanation as to how the deceased's household items were taken to his house by Kyalo, this court finds that Kyalo could have taken those items to accused's house. The evidence does not support that the accused killed or participated in the killing of the deceased and took his household items to his house. The result of the above evidence is that this court finds the ingredients of the identity of the person who killed the deceased and the necessary malice aforethought have not been proved beyond reasonable doubt against the accused. It is probable, and I so find, that the deceased was killed by someone else or some other persons and that the only role the accused played was in assisting to dispose of the body.

The accused in my view is not guilty of murder for the reason that there is no evidence, either circumstantial or direct linking him to the crime of murder as defined. The evidence on the chain of events leading to the death of the deceased is weak and leaves some gaps. Therefore circumstantial evidence as defined in various cases including **Teper v. R [1952] AC 489** and **R. v. Kipkering Arap Koske & Another [1949] XVI EACA 135** is not applicable in this case against the accused person.

The prosecution counsel asked this court to find the accused guilty of conspiracy to murder in the event the evidence does not support the offence of murder. Conspiracy to murder is an offence under section 224 of the Penal Code. Conspiracy is defined as an agreement between two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective and actions or conduct that furthers the agreement (**see Black's Law Dictionary, Ninth Edition**). It is clear that conspiracy connotes planning between two or more people to commit an unlawful act.

I find no evidence in the case before me that the accused and Kyalo or any other person planned or entered into an agreement to kill the deceased. The evidence shows that the deceased's phone was traced to the accused. Muritu who is said to have repaired that phone did not testify. Collins who was found with the phone did not testify. The circumstances under which that phone left Muritu and ended up with Collins were not disclosed, at least from the prosecution side. The gaps were filled by the accused who explained how the phone was taken to a technician whose name he did not give but from the police investigations the technician is Muritu. Had Muritu testified he would perhaps have explained if it was the accused or Kyalo or both of them that took the phone to Muritu for purposes of repairing the same.

With no evidence disclosing conspiracy, this court finds that the offence of conspiracy to murder contrary to section 224 of the Penal Code has not been established against the accused person.

As a result of this finding, I pose the question as to whether the accused committed any other offence other than the one he was charged with as envisaged under Section 179 of the Criminal Procedure Code. I have carefully examined the evidence before me. The accused led police to the recovery of the body. He told the court that he left Kyalo and the body on a slab. However, the evidence by prosecution witnesses shows that he led police to a septic tank near the apartment where Kyalo worked as the watchman and the deceased as the caretaker from where the body was retrieved. The evidence of PW4 CPL Anisia Munene captures this evidence as follows:

“At last the accused told us he was called by one Patrick Kyalo who used to work as a watchman at the same premises and used to live in the same house with deceased. Kyalo called him at 2.00am because of a problem. He went and Kyalo told him to assist him to carry a body to a septic tank 15 metres from deceased's house. He helped Kyalo to carry the body to the septic tank. He said Kyalo had hit deceased on the head when he was asleep. We went to the septic tank led by accused. The septic tank had grass grown all over. He showed us the tank and told us we will be shocked by what we will find there. We opened the lid and we could not see inside because the tank was full. We used a flashlight but we did not see anything. We decided to get an exhauster.”

From the evidence, retrieval work aborted that day. The following day 18th September 2013 the body was retrieved. The deceased was not present when the body was retrieved but having identified the septic tank to the police his absence on the day the body was retrieved in my view is not fatal to prosecution case.

The accused admitted leading police to the scene of disposal of the body. It is my finding after considering his evidence and that of the prosecution the accused knew the body had been disposed of by dumping it in the septic tank and he had assisted Kyalo dispose of the body. The accused claimed he had advised Kyalo to report to the police but Kyalo had threatened to shoot him with a poisoned arrow if he reported the matter. The evidence shows that, and this is admitted by the accused, Kyalo took assorted household items including clothes to the house of the accused and asked him to keep the stuff for him as he was travelling. As at September 2013 Kyalo had not gone for his items and police found the items still in accused's house on 17th September 2013 when they visited that house. This evidence leads me to doubt the accused. In the normal course of life an ordinary person like the accused cannot fail to suspect that Kyalo had committed a crime by refusing to report to the police about the alleged shooting of a thief. The very act of concealing the body in a septic tank where it could not be found without the help of someone who knew this fact is telling that Kyalo had committed a crime. In my view the accused had all the time to report the matter to the police especially after Kyalo disappeared. It is my considered opinion that the accused failed to report not because he was afraid of Kyalo but because he was implicated in concealing the body and thereby assisting Kyalo to escape from liability.

The law terms a person who assists another person who has committed a crime as an accessory after the fact. Section 222 of the Penal Code defines such a person in the following terms:

Any person who becomes an accessory after the fact to murder is guilty of a felony and is liable to imprisonment for life.

Section 396 (1) of the Penal Code defines accessories after the fact as follows:

A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.

The evidence from both the prosecution and defence is that the accused assisted Kyalo to conceal the body. He assisted Kyalo to store the clothes and other items belonging to the deceased in his (accused's) house. The accused must have known that Kyalo had committed a crime by his action of refusing to report the "shooting of the thief to the police" and warning the accused of consequences including shooting by poisoned arrows. Kyalo told the accused he was travelling and requested that the accused stores the items mentioned above for him.

It is also worth noting that the accused was found wearing shirt, trousers and shoes identified as belonging to the deceased. These items were among those stolen from the deceased and kept at accused's house by Kyalo. An issue arose as to the ownership of those items (shoes, shirt and trouser). The accused said they were his while PW1 identified them as those of the deceased. PW1 said she could not produce the receipts because the deceased used to keep them. If these three items were isolated from the other items found in accused's house and identified as belonging to the deceased, this court could have held some doubts regarding ownership of the same by deceased. However, these items were part of the assorted items belonging to the deceased which Kyalo had requested accused to keep for him. I do not believe accused when he says the shirt, trouser and shoes belong to him. All this evidence strengthens the fact that the accused had knowledge that Kyalo had committed an offence.

In my final analysis therefore, I find that I am convinced beyond reasonable doubt that the accused assisted Kyalo to escape punishment by helping him conceal the body of the deceased and by keeping the clothes and other items stolen from the deceased for Kyalo. He is an accessory after the fact of murder. I therefore invoke the provisions of section 179 of the Criminal Procedure Code and find him guilty of being an accessory after the fact of murder contrary to section 222 of the Penal Code. The accused, Wycliff Mwilu Mutinda is hereby acquitted of the charge of murder contrary to section 203 as read with section 204 of the Penal Code. Instead, he is found guilty for the offence of being an accessory after the fact. Consequently, I hereby convict him for the offence of being an accessory after the fact of murder contrary to section 222 of the Penal Code. It is so ordered.

Dated, signed and delivered this 4th February 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Macharia, advocate for the prosecution

Ms Makofu, advocate for the accused

Mr. Wycliff Mwilu Mutinda, the accused

Mr. Daniel Ngumbi, court clerk