



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 58 OF 2013

REPUBLIC...PROSECUTOR

VERSUS

P O N.....ACCUSED

JUDGMENT

Introduction

This judgement relates to the murder of M A N (hereinafter ‘the deceased’). The accused person is P O N. He is charged under section 203 read with section 204 of the Penal Code. The murder is alleged to have been committed on 6th January 2008 at Maalek Hotel and Lodging in Githurai 45 in Nairobi County. He has denied the offence necessitating the full trial.

Section 203 of the Penal Code creates the offence of murder in the following terms:

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

This definition of murder creates the following ingredients that must be proved beyond reasonable doubt before an accused person can be convicted for murder:

- a. **The unlawful act or omission causing the death of the deceased (*actus reus*).**
- b. **The malice aforethought on the part of the person who causes the murder (*mens rea*)**
- c. **The identity of the person causing the death.**

The law places the onus of proving these ingredients of murder on the prosecution. The standard of proof for murder, being a criminal offence, is proof beyond reasonable doubt. The burden of proof never shifts from the prosecution even in cases where the accused pleads acceptable legal defences. It is with this in mind that this court will consider and evaluate the evidence in this case to determine if the prosecution has discharged that mandate. Where doubts exist in evidence tendered in court, this must be applied to the benefit of the accused person.

Background

The accused was arraigned in court on 28th May 2013. For reasons appearing on the file record hearing of the case commenced on 17th July 2014 before Honourable Lady Justice Florence Muchemi (Justice Muchemi). She took evidence from three prosecution witnesses: J A O, PW1, (J) the sister to the deceased; Mr. Simon Njenga, PW2, (Njenga) the process server and Caroline Were Nyasak, PW3, friend

to J and the deceased.

I took over these proceedings on 13th November 2014 upon the transfer to another station of Justice Muchemi. In compliance with section 200 (3) of the Criminal Procedure Code the accused person opted to have the proceedings continue from where Justice Muchemi had reached without recalling the witnesses who had earlier testified. I received evidence from eight witnesses namely: A O, PW4, (A) cousin to the deceased; Jacob Nyangor, PW5, (Jacob) Senior Chief South Gwasi; Martin Okik, PW6 (Martin); Dr. Peter Muriuki, PW7, (Dr. Muriuki); CIP David Mursoy, PW8, (CIP Mursoy); CPL Nehemiah Ndirangu, PW9, (CPL Nehemiah); PC Isaac Mugambi, PW10, (PC Mugambi) and Susan Njeri, PW11, (Susan) and that of the accused who was the only witness for the defence.

It is from the analysis of the totality of this evidence that this court will be able to determine whether the accused is guilty of murder or of any other offence as allowed by the law in which case this court will have no alternative but to convict him or whether he is not guilty in which case this court shall acquit him as the law requires.

Prosecution case

The prosecution presented a case based on a very sad story. The story begins in 1999 when the accused, who was then working with the Kenya Army, now Kenya Defence Forces, met the deceased through the intervention of Martin. Martin was known to the accused and the deceased. The accused was related to Martin's wife while the deceased was the daughter of Martin's Landlord. During the accused's visits to Martin's home, he met the deceased and was interested in her. He informed Martin and with Martin's encouragement the two met and finally started living together in what is loosely known in Kenya as "come we stay marriage". Although this is not a matrimonial case, this court cannot shy away from analyzing the evidence touching on this union because it is relevant to this trial. The union between the accused and the deceased was acceptable to the parents and although there is no evidence that any customary or any other form of marriage was solemnized the couple were in all intents and purposes man and wife. Several witnesses including J, Caroline, A and Senior Chief Jacob testified to the existence of that union. Jacob testified to issuing the deceased with an identity card in accused's name. That union resulted in two issues, namely, **C** and **M**, both girls.

In the year 2002 the accused left Kenya for Sierra Leone for a Peace Keeping Mission. He left the deceased pregnant with their second child **M**. He returned to Kenya in 2004 by which time the second child **M** had been born. It seems that upon his return the relationship between the accused and the deceased started deteriorating. Things were not working out between the two of them. Evidence from J in reference to this issue shows that **"When he returned home he used to take his daughter M and go strolling with her in September 2004. He left with the girl one day and she was not seen again. This was the cause of their disagreement which led to their separation."**

It seems that the disagreements degenerated to a stage where the deceased went to report to Senior Chief Jacob on 15th September 2004 that she had been locked out of her house and abandoned by the accused. The chief visited the home and met the parents of the accused who opened accused's house enabling the deceased to pick up her belongings in the presence of the Chief and left.

The issue concerning the whereabouts of the child **M** was taken to the Children's Court by the deceased. She sued the accused for custody of **M**. Summons were issued and with the help of the Federation of Women Lawyers (FIDA) the deceased was assisted by Njenga the process server from FIDA Nairobi Office to serve the process on the accused who at the time was stationed at Kahawa Barracks, Nairobi.

The prosecution evidence further shows that the accused accepted service of the court documents on 30th November 2007. It seems that the deceased who had accompanied the process server in order to identify the accused for service talked with the accused and decided to live together and perhaps to abandon the court case. The deceased was supposed to return to Eldoret where she lived with J her sister after the service but she did not return. This evidence came from deceased's sister J and from her friend Caroline. Caroline was assisting the deceased every time she travelled to Nairobi since she did not know Nairobi

well.

The deceased returned to Eldoret, collected her clothes and their other child, C, and came back to Nairobi on 7th December 2007. Caroline met her and her daughter C. The deceased told Caroline that she was going to live with the accused who had already found a house at Githurai. Caroline accompanied the deceased and her daughter C to Kahawa Wendani near Kahawa Barracks. They found the accused in the house and Caroline left the deceased and C there and went home.

The deceased kept on communicating to J and Caroline through her cell phone. It seemed that things did not work out between the accused and the deceased as the deceased had expected. On 6th January 2008 the deceased called J and complained that her efforts to get the child (C) were unsuccessful. J called the deceased around 9.00pm on 6th January 2008 without success. J received a text message on the same day from deceased's phone that: "**Handset yangu imeharibika**" that is, "my phone is out of order" after which the deceased's phone went off and she was not reachable. On 10th January 2008 J called Caroline and sent her to the deceased's house at Kahawa Wendani to check on her. Caroline went there on 11th January 2008 and found the house locked. On 13th January 2008 Caroline returned to the same house where she found a new tenant had occupied the house. She relayed the message to J who decided to come to Nairobi on 11th February 2008 to look for the deceased.

In company of her cousin A, J went to Kahawa Barracks on 12th February 2008 to look for the accused. Their efforts to find out from the accused what had happened to the deceased failed because the accused denied knowing them or the deceased. Even after the accused's seniors at Kahawa Barracks and at the Department of Defence intervened, even after J showed them a photo album with photos showing the deceased and the accused, it was not helping the situation.

J and A reported the case of a missing person at Kasarani Police Station. Through police internal communication, police learned of an unidentified body of a female discovered in room 213 at Maleek Hotel and Lodging (Maleek Hotel) in Githurai 45 Nairobi. It transpired that on 7th January 2008 at 10.30am CIP Mursoy of Githurai Kimbo Police Station had received a report of the body of an unidentified female at Maleek Hotel and had gone to the place. The body had been moved to the City Mortuary and the report booked. CIP Mursoy later learned of a report of a missing person made at Kasarani Police Station.

J, A and Caroline were informed of the recovery of the unidentified body. On 16th February 2008 in company of police the three went to Maleek Hotel and were shown room 213 where they were told a man and a woman had booked on the evening of 6th January 2008. They were also shown some items recovered from that room. J was able to identify a skirt and a pair of maroon sandals and Caroline was able to identify the maroon sandals as belonging to the deceased. On 18th February 2008 J and A accompanied police to the City Mortuary where they identified the body recovered at Maleek Hotel as that of the deceased.

The accused was arrested on 24th May 2013. According to PC Mugambi efforts to arrest the accused failed until that date when the accused was taken to Kasarani Police Station by Military Police. He was charged with this offence and taken to court on 28th May 2013.

Defence case

The accused testified as the sole witness for the defence. He gave an unsworn statement. He confirmed having worked with Kenya Defence Forces. He confirmed having been introduced to the deceased by his friend Martin. He however called the deceased his friend and not wife and stated that she had two children without confirming these were his children as well. He told the court that the deceased kept on complaining that the accused lived far from her and became aloof and that because of this attitude the accused also kept aloof. He confirmed having gone for a Peace Keeping Mission in Sierra Leone in 2002 and returning to Kenya in 2004. He confirmed having been posted to Kahawa Barracks upon his return

and having been served with court papers in respect of a children's case. He testified that he was preparing to attend court when the deceased told him that the case had been dropped.

Further evidence by the deceased is that on 7th December 2007 the deceased and Caroline visited him at Kahawa and introduced Caroline as her business partner; that the deceased assisted by Caroline rented a house in Kahawa and that he assisted them to furnish the house; that he was summoned by Major Sulubu whom he found with J and A; that J and A were enquiring the whereabouts of the deceased; that he told them he has seen the deceased last when she and Caroline were renting a house; that he was summoned at Department of Defence by the Commanding Officer Military Police where he met J and A who were still looking for the deceased.

He further testified that he left Nairobi on 15th February 2008 to go to his rural home to engage in business. He explained that he had finished serving the mandatory military colours and was at liberty to choose to discontinue his service. He said he continued with his business until 2013 when he returned to Kahawa Barracks where he learned that the DCIO Kasarani wanted him to report to the police station on allegations of murder; that he was given a military Landover which he used to go to Kasarani Police Station; that he was placed in cells and taken to court thereafter.

Submissions

At the close of the defence case Mr. Olando for the accused submitted that the accused was charged with murder because he knew the deceased, lived with her and had children together; that there is no evidence identifying the accused as the person who killed the deceased; that none of the 11 prosecution witnesses saw the accused with the deceased at Maleek Hotel and that the prosecution has not discharged its burden of proof. Counsel further submitted that J pursued this case against the accused because the accused denied having married the deceased; that the issue of the two children is not relevant to this case and cannot be used to resolve the issue before the court as to who killed the deceased; that there were many unfounded allegations touching on telephone communication but no mobile phone data was presented in court to confirm that the communication took place; that the unidentified man at Maleek Hotel was not the accused person as there is no evidence to that effect; that no evidence linking accused to Maleek Hotel was presented; that investigations were poorly carried out and that no staff from Maleek testified.

Counsel further submitted that the images presented in court from Equity Bank were not the original; that they were not clear and Susan could not tell whose images they were because she had not met the deceased or the accused; that the accused has explained his whereabouts from 6th January 2008 until the time he learned that police were looking for him and that he voluntarily presented himself to Kasarani Police Station.

Mr. Olando submitted that there is no evidence as to why the accused should kill the deceased and therefore the intention to kill was not proved; that no identification parade was conducted and that there are contradictions in evidence. He asked the court to acquit the accused.

Ms Macharia for the prosecution submitted that the prosecution has tendered evidence to prove the death of the deceased through the evidence of Dr. Muriuki who performed the post mortem examination on the body of the deceased; that there is circumstantial evidence leading to the accused as the person who killed the deceased; that there is evidence to show that the accused and the deceased were married, lived together and separated and later reconciled; that they lived in Nairobi and were together before the deceased went missing; that the couple disagreed over the whereabouts of their child **M** and this led to their separation; that conduct of the accused after the deceased went missing depicts a guilty mind; that he denied knowing J and A and deserted service and that he lied to court by stating that he procedurally left service; that the accused did not take part in searching for the deceased and that there is sufficient evidence to show that it is only the accused who could have killed the deceased. Counsel submitted that the prosecution has proved the case beyond reasonable doubt and asked the court to convict the accused for murder.

Analysis and determination

As stated in this judgment, this court will be determining the following:

- i. Whether death of the deceased occurred through an unlawful act or omission.
- ii. Whether the accused is the person who caused that death.
- iii. Whether the accused in causing that death (if found to have caused it) possessed malice aforethought.

That the deceased died is not in dispute. The body of the M A N was examined by Dr. Muriuki Ndegwa at the City Mortuary on 26th February 2008. From the notes on page 1 of the Post Mortem Report (Ex. 1) the body was found at Maleek Hotel on 7th January 2008 in room 213. From the evidence of CIP Mursoy who visited the scene on 7th January 2008 in the morning the half-naked body of an unknown female was lying on the floor of room 213. CIP Mursoy observed injuries on the back, shoulders and hands with her hands tied with a piece of cloth. There were no identification documents on the body. CIP Mursoy removed the body to the City Mortuary.

Dr. Muriuki testified as follows:

“It was the body of an African female adult of fair nutritional status, slim and refrigerated. It was moderately decomposed. Externally, there were multiple massive wounds on the face and upper limbs. Internally I found a displaced skull fracture and intracranial haemorrhage. I formed the opinion that the cause of death was due to multiple injuries from sharp trauma.”

This evidence coupled with that of J and A the persons who identified the body to the doctor to perform post mortem confirms without a doubt that the body found in room 213 Maleek Hotel without identification and taken to the City Mortuary by the police is the body of M A N the deceased in this trial. The evidence further confirms without doubt that the deceased died as a result of multiple wounds inflicted on her by an assailant. The act causing the unlawful death of the deceased in this trial has been proved beyond reasonable doubt.

Did the accused cause the death of the deceased and if so did he possess malice aforethought? In the course of the trial it seemed as though the accused was in denial that the deceased was not married to him. He also seemed to lean towards denying that the two issues of that union, C and M were his children. In his defence he never acknowledged the union between him and the deceased or that he was the father of the two children. As stated elsewhere in this judgment, this is not a matrimonial trial but the evidence of their union is relevant to this case. I also stated that I have no doubt that whether girlfriend and boyfriend or whether man and wife out of the “come we stay” kind of union, the two lived together as evidence shows and sired two children. One of those two children M went missing first and her unknown whereabouts necessitated the filing by the deceased of the Eldoret Children’s Civil Case No. 180 of 2007. It sought custody and maintenance of M born on 7th February 2002. It also necessitated the filing in the same court of Chamber Summons under Certificate of Urgency seeking orders to have the accused compelled to produce the missing child in court pending hearing of the application among other orders. These are the court documents that Njenga went to serve on the accused on 30th November 2007 in company of the deceased.

Njenga saw the accused and served him with the court papers. The evidence from J and Caroline is that the deceased did not return to Eldoret after these papers were served on the accused. They stated in court that the deceased informed them that they had reconciled with the accused after discussing the matter. Be that as it may, the deceased went to Eldoret to pick her clothes and her child C. She returned to Nairobi on 7th December 2007. Caroline took her to a house in Kahawa Wendani where they found the accused. Caroline left the deceased and the child and went home. A month later, on the evening of 6th January 2008, the deceased was unreachable through her mobile phone. Her body was found in room 213 Maleek Hotel on the morning of 7th January 2008. The whereabouts of the child C is still unknown at the time of this trial.

The evidence of J, A and Caroline show the efforts put in place to trace the deceased to no avail. All this time the accused who was the last person to be left with the deceased on 7th December 2007 did not assist the family to look for the deceased or the child C. He denied knowledge of J and deceased. Even with efforts from accused's superiors and military police did not yield any positive results. Immediately thereafter, the accused deserted service.

This court did not benefit from the evidence from the Kenya Defence Forces, specifically from the officers of the military police but this court was informed of a letter dated 22nd February 2008 sent by fax tendered in evidence as Ex. 4. It is from the military police and is addressed to OCPD Suba District. The subject of the letter is the accused. It is intended to seek the services of the OCPD to arrest the accused who had absented himself from the Armed Forces without official permission. The OCPD was asked to apprehend the accused and hand him over to the military police for purposes of disciplinary action against him. The letter further informs the OCPD that the accused was wanted by Kasarani Police for investigations in respect of a criminal case.

This court did not also have the benefit of the evidence of the staff of the Maleek Hotel. The manager one Samuel Mungai Mwangi and the watchman one Andrew Mongare mentioned by CIP Mursoy did not testify. The person who checked the deceased and the unidentified man in room 213 on 6th January 2008 did not testify and the court was told that there was no record to show the identify of deceased's companion. Despite this omission this court has already stated that there is no doubt that the body found in room 213 on 7th January 2008 is that of the deceased.

The totality of the evidence surrounding the identity of the person who killed the deceased is not direct evidence. This leads the court to conclude that the evidence against the accused rests partly on direct evidence up to the time the deceased was taken to the house in Kahawa Wendani where the accused was and circumstantial evidence after that.

What does the law say about circumstantial evidence? In **Neema Mwandoro Ndurya v. Republic [2008] eKLR** the Court of Appeal had this to say in respect to circumstantial evidence:

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v. Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20. But circumstantial evidence should be very closely examined before basing a conviction on it.”

In **Mwangi & Another vs. Republic [2004] 2 KLR 32** the Court of Appeal held as follows in regard to circumstantial evidence:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.”

Citing various decisions on the issue of circumstantial evidence including **Abanga alias Onyango v Republic Criminal Appeal No.3 2 of 1990** (UR), **Musoke v. R [1958] EA 715** and **Teper v. R [1952] AL 480**, the applicable principles in respect of circumstantial evidence were set out as follows:

- 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; and**

- iv. **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.**

In Regina v. Exall & Others [1866] 176 ER 850, Pollock CB did not like the idea of chains and settled for cords in a rope instead of a chain. He stated as follows:

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”

Whether cords in a rope or links in a chain, what comes out clearly is that every link of the chain or every cord in the rope of circumstantial evidence must be closely examined to ensure that it is not a mere suspicion but creates a conclusion of guilt with as much certainty as human affairs can require or admit of. In others the evidence must leave no doubt in the mind of the trial judge that the accused before the court is the person who committed the offence.

I have examined the evidence that the accused and the deceased lived in a union that suffered its fair share of problems; that they parted for several years; that the deceased sued the accused in Eldoret in respect of a child who went missing while in custody of the accused; that the accused was served with summons to attend court and an order to produce the child; that they assumedly reconciled; that they started living together; that while living together the deceased went missing and her body was found in room 213 at Maleek Hotel; that the accused denied knowing J the sister of the deceased and denied knowing the deceased; that thereafter the accused deserted duty; that he went into hiding from February 2008 to 24th May 2013 when he was arrested; that he did not make any efforts to look for the deceased or to produce the child to court and that he lied when he told the court that he did not desert but left the service voluntarily after serving mandatory period. When any of these links or cords of evidence are taken separately, they are mere suspicions but in my considered view when they are taken together they form strong evidence that leads to one inescapable conclusion that within all human probability the deceased was killed by the accused and none else.

I have also considered the evidence of Susan Njeri, PW11, who testified and produced images showing that on 14th January 2008 slightly before midday, someone who from those images appears to be a man accessed the account of the deceased and withdrew Kshs 8,000 from that account using her ATM card. Susan did not identify the accused as the person in those images and the prosecution did not call evidence to prove the person in those images is the accused. However, Susan was categorical that the person in those images is not the account holder. The evidence of these images is not very helpful to prosecution case but it shows that the person in those images is not the deceased and that the person making the ATM transaction using deceased's card must have had access to her PIN number. This was about one week after the deceased had died.

I have painstakingly examined the evidence of J, Caroline, A, Jacob, and Martin as well as that of the police officers who testified. It is good evidence. It is corroborative evidence. I find no contradictions in it that may lead me to doubt that the accused was involved in the murder of the deceased. As a result I find that there are no other co-existing circumstances which would weaken or destroy the inference that the accused is the person who committed this offence.

I have also given accused unsworn defence and submission by his counsel careful consideration. I find nothing in the accused's defence to create doubts in my mind against the prosecution evidence.

It is my finding therefore that the accused committed this crime and that he possessed malice

aforethought. His behaviour prior to the disappearance of the deceased and after her death points to a guilty mind. Therefore I find all the three major ingredients of murder proved beyond reasonable doubt.

Before concluding this judgement I wish to address the issue of the relevance of the missing child **M**. Defence counsel submitted that the issue of the missing children was not relevant to this trial and that they are alive and well. Further that the deceased could not have agreed to reconcile with the accused if she did not believe the missing child **M** at the time was alive and well. Unfortunately this court does not have evidence to show what became of the two children but prior to the deceased and child **C** came to Nairobi, the issue of child **M** was relevant in that the accused was served with summons to attend court at Eldoret and a court order to produce the child before the date of hearing. He did not produce the child and even after the deceased died he did not produce the child. This court cannot speculate on what happened to that child and later to her sister **C**. However, I take the view that the issue of the child and the disagreement surrounding her whereabouts is the reason for the separation of the accused and the deceased and could have as well formed the motive for murder.

In conclusion therefore, it is my finding that the prosecution has proved the case for murder against the accused person beyond reasonable doubt. As the law requires therefore, I hereby find the accused P O N guilty of the murder of M A N. Consequently I enter conviction against him and orders shall issue accordingly.

Dated, signed and delivered in open court this 10th March 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Macharia for the prosecution

Mr. Olando for the accused

Mr. P O N, the accused

Mr. Daniel Ngumbi, Court Clerk