



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL CASE NO. 40 OF 2010

REPUBLICPROSECUTOR

VERSUS

K N.....ACCUSED

R U L I N G

1. **K N** hereinafter “*the accused*” is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence being that on the 27th day of March 2010 in **Mutomo** District, within the **Eastern** Province murdered **K M** (deceased).
2. Briefly, facts of the case are that the deceased left home on the 27th March, 2007 going to graze her herd of cattle and goats. She never returned. Thereafter, her body was found decomposing in the bush. It had a stab wound on the right forearm. A stab wound on the frontal part of the head, the spinal column had a dislocation of the first cervical vertebrae and the spinal cord was dissected at the cervical column. The doctor who performed the postmortem formed an opinion that the cause of death was strangulation and external bleeding.
3. The police on receiving the report moved to the scene and recovered the body. In July, 2010, the accused, a nephew to the deceased was suspected to have killed the deceased. He was arrested and charged.
4. At the close of the prosecution’s case the State called Seven (7) witnesses. **PW1, I N** a 14 years old boy and grandson of the deceased left going to school in the morning of 27th March, 2010 at the home of the deceased. While on his way to the venue of the meeting he encountered the accused who carried a panga that was wrapped in a piece of cloth. He asked the accused whether the meeting was on and he answered in the negative as there had been no communication from the secretary. He went to the deceased’s home where he got information that she had gone to graze her animals.
5. **PW3, Katee Ngalawa Malawa** got notification of the meeting having been postponed. On 28th March 2010 , he was called by the deceased’s granddaughter. He went and found the deceased’s body in the thicket.
6. **PW4, Christine Mary Tom** was on her way to the meeting when she encountered the accused who told her that the meeting had been postponed. She heard of the deceased’s demise the following day.
7. **PW5, N G** the deceased’s daughter left her mother asleep in the morning of 27th March, 2010. She returned home in the evening to find her having gone to graze her animals. She did not return as expected. The following day they found her body in the thicket.

8. **PW6, No. 231245 Superintendent of Police Yufnalis Barasa**, the Investigation Officer investigated the case and charged the accused. It was his evidence that **Nungwa (PW5)** suspected the accused to have killed the deceased. He also relied on a statement by a sorcerer and concluded that there was circumstantial evidence based on the fact that a clan meeting that was to be held at the deceased's home aborted and the accused was seen carrying a panga. On cross-examination he stated that there was no eye witness to that happened.

9. **PW7, Dr. Patrick Mutuku** produced the postmortem report on behalf of the Doctor who performed the postmortem on the body of the deceased.

10. An evaluation of evidence adduced by prosecution witnesses established the fact of death. It is not in dispute that the deceased had sustained a dislocated spine and stab wounds. The said injuries informed the Doctor who performed the postmortem to opine that the cause of death was strangulation and external bleeding. In order for a person to be guilty of a charge of murder the prosecution will be under a duty to prove that he caused the death of another person with malice aforethought (*see Section 203 of the Penal Code*).

11. This is a case where the accused was not seen stabbing or strangling the deceased.

12. PW5 who suspected him did not see him at the scene of murder. She was not at home therefore could not tell circumstances under which she left home. Her evidence was silent on her purported belief that the murderer was the accused.

13. PW2 stated that he saw the accused carrying a panga. He could tell it was a panga because he held its handle but it was covered by a piece of cloth. He made the assumption because of its shape. PW1 on the other hand alleged that there was a dispute between the accused and deceased over a footpath.

14. In charging the accused the Investigation Officer alleged that there was circumstantial evidence. In the case of **Abanga alias Onyango -versus- Republic Criminal Appeal No. 32 of 1990 (UR)** the court of appeal stated thus:-

“It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests;-

i. Circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of definite tendency unerringly pointing towards guilty of 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 committed by the accused and none else.”

15. PW6 claimed that the meeting aborted and the accused was seen carrying a panga. The alleged panga was however not found at the scene of the incident. PW3 stated that the meeting had been postponed because the secretary was away. The fact of the meeting having been postponed could not connect the accused to the offence. Even if we were to believe that there was bad blood between the accused and deceased this would be mere suspicion. The circumstances alluded to, therefore, do not point towards the accused's guilt. It is not possible that he was the person who could have committed the heinous offence.

16. It has also been held now and again that; suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. (*see Joan Chebichii Sawe -versus - Republic – Criminal Appeal No. 2 of 2002*).

17. In this case the prosecution having acted on mere suspicion without evidence, there is no proof that

the accused caused the death of the deceased. Consequently, no *prima facie* case has been established that would require the accused to defend himself. In the result, I enter a verdict of not guilty and acquit the accused of the charge of murder and he shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at KITUI this 10TH day of FEBRUARY, 2015.

L.N. MUTENDE

JUDGE