



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL CASE NO. 39 OF 2013
REPUBLIC.....PROSECUTOR
VERSUS
BEN SIMIYU WESELA.....ACCUSED

J U D G M E N T

1. The accused, **Ben Simiyu Wesela**, faces a charge of murder, contrary to section 203 read with section 204 of the penal code, in that on the 14th November, 2013, at Saboti Forest Teilet area Trans Nzoia County murdered Kasifa Naliaka Lukorito. The prosecution case arose from the facts that follows hereinunder:-

On the material 14th September, 2013, at about 10.30 a.m., the deceased and her daughter, **Christine Lukorito (PW1)**, were at a farm at a forested area when the deceased alerted the daughter of the presence of a person stealing maize.

The said person was said to be the accused herein.

2. The daughter and others went looking for the accused but all in vain. When it reached the time for them to go home, they hiked a lift on a tractor but because the deceased was unable to board the tractor, she decided to walk home. The daughter and others arrived home and waited for the deceased who did not show up at all.

3. Two sons of the deceased, **Timona Wasike Lukorito (PW2)** and **Amos Wekesa Lukorito (PW3)** together with some of their neighbours went in search of the deceased in the forest.

An earlier search by Timona (PW2) was not successful but the second search by Amos (PW3) succeeded to the effect that the deceased was found but not alive. Her dead body was found lying on the ground covered with stones and tree branches.

4. The body had injuries and a stick was found besides it.

The matter was reported to the area chief and thereafter to the police.

The accused who was allegedly known to the deceased and her family by the name of Antony was suspected of having caused the death of the deceased. He was traced and apprehended on 15th November, 2013, by **Patrick Nyongesa Musombi (PW4)** and others.

5. At the time of apprehension, the accused was allegedly found in possession of a cell or mobile phone said to belong to the deceased. He was handed over to the police together with the cell-phone (P. Ex. 2).

P.C. Paul Oduwo (PW6), carried out necessary investigations and in the process treated the two sticks found next to the body of the deceased as the murder weapons (i.e. P. Exh. 1). he later preferred the present charge against the accused.

6. Dr. Michael Wekesa Makali (PW5), carried out a post mortem examination on the body of the deceased and formed the opinion that the cause of death was cardio-respiratory arrest due to strangulation.

The accused was placed on his defence on the basis of the foregoing facts which established a “prima-facie” case against him.

7. In denying the offence, the accused stated that he left home on the morning of 14th November, 2013, and proceeded to a market. While on his way back home, he met the daughter of the deceased (PW1) but continued with his journey home where he spent the night. On the following day while on his way to undertake his usual chores, he met some police reservists who assaulted and arrested him. He was thereafter taken to the police station and charged with the present offence which he did not convict.

8. At the end of the trial, the learned defence counsel, **Mr. Ingosi**, in his closing remarks submitted that the prosecution failed to prove its case to the required standard. That, what was proved was that a life was lost. However, no “*mens rea*” was proved against the accused as evidence against him was based on suspicion. That, PW1 did not exclude any other person being at the scene of the crime and that the circumstances of the case did not point at the accused as the only suspect.

9. Learned Defence Counsel, further submitted that the doctor (PW5) stated that the cause of death was strangulation. It could not therefore be ruled out that the deceased committed suicide. That, the only evidence against the accused was his alleged possession of a mobile phone said to belong to the deceased. However, the evidence on the recovery of the phone was at variance and there was no positive identification of the phone as belonging to the deceased.

In response to the foregoing, the Learned Prosecution Counsel , Mr. Kakoi, relied on the evidence on record.

10. Under section 203 of the penal code, a person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Herein, the evidence by the prosecution has revealed without dispute from the defence that most likely than not the death of the deceased was as a result of an unlawful act by an individual or individuals. This was confirmed by the fact that the body of the deceased had injuries and was lying on the ground covered with tree branches or leaves and stones. Sticks found next in the body were suspected to be the murder weapons but this was overruled by the post mortem report which indicated that the cause of death was strangulation.

11. Death by suicide could not therefore have arisen or was a remote possibility given the manner in which the body was found on the ground in a forest.

The basic issue for determination was whether the accused herein was the person responsible for attacking and struggling the deceased to death. Apparently, the investigations carried out by P.C. Oduwo (PW6) were not conclusive in the circumstances which led to the death of the deceased. He preferred the present charge against the accused based on what he was told particularly by the daughter of the deceased (PW1).

12. In her testimony, the daughter of the deceased indicated that she actually did not see the accused at the forest farm on the material date but was only informed by the deceased that he had been seen by the

deceased while in the process of stealing maize. She (PW1) however, stated that when she was going to the forest farm she met the accused on the way carrying maize. Her mother (deceased) later told her that the maize was stolen. She (PW1) confirmed that her mother was alive when she (PW1) met the accused on the way.

13. The accused was evidently suspected by the daughter of the deceased (PW1) of being responsible for the death of the deceased merely because the two met while he was carrying maize which according to the deceased was stolen.

This suspicion trickled to the sons of the deceased (PW2 and PW3) through their sister (PW1) even though they were not at the material place on the material date and time.

14. It was the same suspicion which led to the apprehension of the accused by Patrick (PW4) and his group and also played a vital role in the arrangement of the accused in court by the investigating officer (PW6). However, in the absence of any other credible and substantial evidence, mere suspicion can never be evidence of commission of a criminal offence.

Therefore, the suspicion cast upon the accused remained just that. It did not prove that he was responsible for the death of the deceased.

15. Suffice to hold that the prosecution offered no direct evidence against the accused as none of the key witnesses (PW1, 2 & 3) saw him in the act of strangling and killing the deceased even though the deceased suspected him of being a maize thief.

The circumstantial or indirect evidence offered by the prosecution related to the accused's alleged recent possession of a mobile phone said to belong to the deceased and suspected of having been stolen from her at the time she was killed.

16. Possession of property belonging to a murdered person and suspected to have been stolen from the said person would be appropriate circumstantial evidence against a suspect on a charge of murder.

In **Mwita Vs. Republic (2004) 2KLR 60**, it was stated by the court of Appeal that:-

“It is trite that (sic) in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt.”

17. Thus, the guilt of an accused person may be inferred from circumstantial evidence but the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

In the old English case of **R. Vs. Taylor Weaver & Another [1928] 21 CR. APP R. 20**, the principle as regards the application of circumstantial evidence was enunciated in the following words:-

“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.”

18. In this case the circumstantial evidence against the accused is based on the doctrine of recent possession in that he was allegedly found in possession of a cell phone belonging to the deceased a day or so after the murder of the deceased.

However, for the doctrine to stand, the evidence of recovery of the material property must be sufficient and credible. There must also be sufficient and credible evidence for positive identification of the property as belonging to the murder victim.

19. The cell-phone (P. Exh. 2) said to belong to the deceased was recovered by Patrick (PW4) and others. He said that he was informed on phone that a murder suspect had escaped to his area where he worked at the D.O.'s office Kiminini Trans Nzoia County. The suspect was known to him and others by the name Antony and was identified as being the accused herein. He (accused) was apprehended by Patrick (PW4) and members of the public.

20. Patrick stated that on apprehending the accused they searched his pockets and found the cell-phone which was later identified as belonging to the deceased by the daughter (PW1) and sons (PW2 and PW3) of the deceased.

The daughter (PW1) said that the phone make Nokia 110 was an ordinary phone which could be found with or owned by anybody. However, her identification of the phone was based on a crack found on it.

The deceased's son Timona (PW2) said that he identified the phone as that belonging to the deceased by the inscription of his father's name on its battery. He however, acknowledged that the phone in court (P. Exh. 2) was filled with a different battery.

21. The other son of the deceased, Amos (PW3) also identified the phone by the crack found on it.

In his defence, the accused said nothing about the phone thereby implying that he knew nothing about it.

The evidence of the recovery of the phone by Patrick (PW4) was in the opinion of this court, insufficient to be accorded any probative value.

Further evidence of recovery ought to have been provided to support and led credence to that adduced by Patrick who clearly indicated that he was not alone at the time of the alleged recovery of the phone from the accused.

22. With regard to identification of the phone as belonging to the deceased, there was nothing peculiar and distinct about the phone such that no person other than the deceased could have owned or be found with it. It's alleged identification by Timona (PW2) was not proper as it did not contain a battery inscribed with his father's name.

The alleged identification by Christine (PW1) and Amos (PW3) was not reliable as any phone could have a crack. There was nothing peculiar about a crack on the phone.

23. Ultimately, the entire evidence of recovery and identification of the phone was not credible and sufficient enough for the application of the doctrine of recent possession against the accused. This therefore means that the circumstantial evidence offered by the prosecution against the accused was not sufficient enough for this court to draw an inference on the guilt of the accused.

24. In the end result, the prosecution's burden to establish the guilt of the accused beyond any reasonable doubt was not discharged.

The accused is therefore found not guilty as charged and is acquitted accordingly.

[Delivered and signed this 12th day of March, 2015.]

J.R. KARANJA.

JUDGE.