



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 44 OF 2014
(FORMERLY KISII HCCRC NO. 83 OF 2013)

BETWEEN

REPUBLIC PROSECUTOR

AND

NOAH IMONJE MISANGO..... ACCUSED

RULING

1. On 1st July 2013, this court was informed that **NOAH IMONJE MISANGO** (“the accused”) murdered **M M** (“the deceased”) on 26th June 2013 at [particulars withheld] in Migori County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The prosecution marshalled 8 witnesses to prove that the accused had murdered the deceased in the course of procuring an abortion which is a felony under **section 158** of the *Penal Code*. At the time of her death, the deceased was a student at [particulars withheld] University where she was studying Social Work at the School of Social Science. She was also residing at the University Hostels.
3. A student leader in charge of health, F N (PW 3), testified that on 26th June 2013, a student by the name Z R called her to inform her that deceased, who was her roommate, was unwell. When she went to the hostel to check on the deceased, the deceased told her that she was having heavy monthly periods but she could manage. On the next day, 27th June 2013, at about 10.00 am, Z told her that the deceased was very sick and was bleeding. When she went to the hostel, she found the deceased had been taken to the University Clinic. She proceeded to the clinic where she found a lot of blood at the door.
4. Mary Sebensia Owuor (PW 2), a nursing officer at [particulars withheld] University, recalled that while she was on duty on 27th June 2012, the deceased was brought to the clinic by other students on a motorbike. She was bleeding and when she examined her she found that she was in the process of aborting a foetus. The foetus was hanging and was stuck on the placenta. As she could not deal with the situation she decided to refer the deceased to Rongo District Hospital.
5. A vehicle was procured and the deceased was taken to Rongo District Hospital. PW 2 testified that the doctor removed the foetus and placenta and referred the deceased to Kisii Level 5 Referral Hospital (“the Hospital”). Although she did not accompany the deceased to the Hospital, PW 2

was informed that the deceased died while on the way to the hospital.

6. The deceased's father, J M R (PW 5), recalled that he received a telephone call informing him that his daughter was sick and that she was being taken to the Hospital. Although he lost communication with the caller, he decided to proceed to the Hospital. At the Hospital, he made inquiries and was directed to the mortuary where he identified his daughter's body.
7. On 3rd July 2013 Dr Peter Asava (PW 7), a pathologist at the Hospital, conducted the autopsy on the deceased's body after it was identified by two relatives; F M and N R. He observed that the body did not have any external injuries. He noted that the uterus was soft, had not contracted and was at 12 to 14 weeks gestation. He examined the genitalia and did not find any lacerations or tears. He certified the cause of death as "*severe haemorrhage due to retained products of conception secondary to induced incomplete abortion.*"
8. It is clear that the prosecution established the fact and cause of death of the deceased. The conclusions made by PW 7 are consistent with what PW 2 and PW 3 observed of the deceased prior to the death of the deceased. I therefore find and hold as PW 7 did that the deceased died and she died as a result of severe bleeding caused by retained products of conception arising from an induced incomplete abortion.
9. The issue then the prosecution must establish is whether the accused is the person who induced the abortion which led to her death. On this issue the prosecution case was that the accused was lured to his arrest through phone when called through a number which the deceased had been calling him while she was in pain prior to her death.
10. PW 3 testified that after the deceased had been taken to the Hospital, she went back to report the incident to the Dean of Students at the University, M J K (PW 1). She also went back to the hostel where the deceased was residing. She was given the deceased's phone and was informed that the deceased had been calling a "doctor" seeking advice on how to relieve her pain. She searched for and found a number of a person referred to as "doctor" on the deceased's phone. She went to see PW 2 with the phone. PW 2 suggested that they call the "doctor."
11. PW 2 used the clinic phone to call the "doctor." He introduced himself as Alfred and stated that he was in Kisumu. PW 2 introduced herself as Rose and told him that she had received his number from her friend M. He asked her whether, "M succeeded" and she responded that indeed she had. She told she needed his assistance to resolve her own. When he further inquired about her gestation period, she disclosed to him that she was one and a half months pregnant. They agreed on a cost of Kshs 3,000/- and that they would meet at on 28th June 2013 near the Migori River Bridge at Migori.
12. PW 2 then informed PW 3 about what was discussed with the "doctor" and they both reported the matter to Rongo Police Station where arrangements were made to arrest him. PW 1 and two other officers accompanied them to Migori to lay the ambush. As they were going there in a van, PW 2 kept communicating with the "doctor." He told them to drop at go upto the Migori River Bridge which is along the Migori – Isebania Highway. PW 2 gave the phone to PW 3 who continued to communicate with him. As she was older she feared that the "doctor" would suspect she was not the kind of person seeking assistance. PW 3 then alighted from the vehicle and was directed by the doctor to cross the road and proceed to where he was. He described how he was dressed and he confirmed to her that he had seen her. They met and proceeded to a nondescript Chemist shop. While at the Chemist Shop, the doctor asked about M and where she was. PW 3 told him that M was at the University. He tried to call the deceased's phone but the phone was not being picked on the other side. At that time while they continued to talk, police officers, who had been trailing PW 3, entered the shop and arrested the "doctor." PW 3 identified the accused as the person she met at the Chemist shop.
13. PC Daniel Choge (PW 6), who was at the material time stationed at Kamagambo Police Station,

- testified that after the report of the incident was made at the police station on 28th June 2013, he was one of the officers deputed to accompany PW 1, PW 2 and PW 3 to Migori to arrest the accused. He testified that as they left for Migori, PW 3 was communicating with the accused who was being referred to as “doctor.” When PW 3 alighted, he followed her as she was talking to the accused on phone. He entered the shop while PW 3 was talking to the “doctor” and posed as a customer. He thereafter introduced himself as the police officer. He arrested the “doctor” who is the accused and collected the phone.
14. At the material time PC Anthony Wairacho Murigi (PW 8) was an officer at the Crime Office, Migori Police Station when PW 6 came to the police station for assistance in arresting the accused. He testified that the accused switched off the phone when he was arrested, he refused to switch it on. After charge and caution, he gave them his telephone number. His office requested for particulars of the subscriber of that number from Safaricom Limited through the letter dated 14th August 2014 but they did not receive any response to the letter. He went to the accused’s Chemist shop which was called [particulars withheld] Clinic next to Migori River Bridge where he was able to recover assorted drugs and instruments.
 15. He prepared an exhibit memo dated 20th November 2012 forwarding the assorted drugs to the Government Chemist with instructions to ascertain, “*whether the exhibits were prescription drugs stipulated under the Drugs Act.*” The Government Analyst, in a report dated 19th February 2014, reported that, “*The items marked A-K were analysed and found to be pharmaceutical drugs (controlled), which are sold by way of prescriptions as stipulated by the Drugs Act.*”
 16. In light of the evidence I have outlined, I am required to determine whether, at this stage, the prosecution has established a *prima facie* case to put the accused on his defence. What amounts to a *prima facie* case has been set out in several cases among them ***Ramanlal Trambaklal Bhatt v R [1957]EA 332, Wibiro alias Musa v R [1960]EA 184 and Anthony Njue Njeru v Republic NRB CA Crim. App. No. 77 of 2006 [2006]eKLR***). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
 17. The only connecting evidence that led to the arrest of the accused was the communication between him, PW 2 and PW 3 and the fact that he was arrested at the Chemist shop with PW 3. There is no evidence that he was found performing an abortion or implicated in any way in connection with the death of the deceased. It is possible, as PW 2 stated, that he talked to or advised the deceased. It was the duty of the prosecution to go a step further to show that he did something that led to the abortion.
 18. When cross-examined, PW 7 stated that there are two kinds of abortion; spontaneous and induced. Spontaneous abortions may occur due to illness or a problem with the cervix or uterus or due to a severe genetic abnormality of the foetus. Induced abortions, he testified, are caused by taking medication knowingly or unknowingly or by trauma to the uterus or abdomen or by medical or therapeutic instrumentation. PW 7 concluded that from his observation of the deceased’s body, abortion was induced.
 19. The prosecution did not demonstrate how the abortion was induced. PW 7 did not detect or observe any physical injuries on the body or genitalia which would suggest any form of trauma. Hence the instruments found in the accused’s shop could not have been used to cause the deceased’s death.
 20. The prosecution presented an assortment of drugs purportedly found in possession of the accused. No connection was established between the drugs and the deceased’s condition. Toxicological or pharmacological tests were not done on the deceased to establish that she had taken any medication that would have induced the abortion. The tests carried out on the assorted drugs by the Government Chemist did not even establish that the drugs were the kind of drugs that could be

used to induce an abortion. The Government Chemist merely determined that the drugs were prescriptions drugs. In short there was no link between the drugs collected from the accused's shop, the deceased and her death.

21. In short the prosecution did not put forth any evidence to establish the fact that the accused could have induced the abortion. The evidence is simply that the accused knew the deceased and they communicated and that he probably advised her on her condition. Whether it is his hand that induced the abortion is a matter of speculation. There may be grounds for suspicion that he was the one who induced the abortion but such suspicion is not enough to call upon the accused to defend himself. Even if he remained silent, the prosecution case would still fail.

22. According to the provisions of **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, I must now record and I do hereby record a finding of not guilty against the accused. He is acquitted.

DATED and DELIVERED at MIGORI this 17th July 2015.

D.S. MAJANJA

JUDGE

Mr Otieno, Advocate for the accused.

Ms Owenga, Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.