



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 59 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

MARGARET ROBI KERIOBA.....ACCUSED

RULING

The accused herein **Margaret Robi Kerioba** faces a charge of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that:-

“On the 3rd day of June 2012 at Teachers Estate in Nakuru District within Nakuru County, jointly with others not before court murdered RICHARD WILCAN OKELLO.”

The accused was arraigned in court on 30/7/2012 when she entered a plea of ‘**Not Guilty**’ to the charge. The prosecution led by the learned State Counsel called a total of nine (9) witnesses in support of their case. **Mr. Chirchir** Advocate represented the accused.

The brief facts of the case were that the accused who was a student was seeking a place to do her attachment. She was linked up to the deceased who worked as a lab technician at Crater Medical Centre in Nakuru. **PW2, Grace Roki Kerioba**, a sister to accused who lived with the accused told the court that on 3/6/2012 the accused left the house saying that she was going for an interview at Crater Hospital. **PW4, Margaret Wambui Kariuki**, the wife to the deceased told the court that she worked with her husband (deceased) at Crater Medical clinic. On 2/6/2012 she met the accused who asked to be shown where Richard (deceased) was. **PW3** directed accused to where the deceased was. The deceased then left the clinic together with the accused. That night **PW4** told the court that the deceased phoned and told her he would be coming home later. As it was he never returned and **PW4** left to go back to work.

PW3, Ronald Karani Osiemo, was a neighbour to the deceased. He told the court that on 3/6/2012 about 9.30p.m. the deceased came to his house accompanied by a lady and a man. The deceased requested **PW3** to accommodate his male companion, which **PW3** accepted to do. The deceased then went with the lady to his own house. Later that night at about 3.30 p.m. **PW3** says he heard a commotion emanating from the house of the deceased. He did not bother to check but the next day he found deceased was not in his house. All efforts by **PW3** to trace the deceased through his mobile phone were unsuccessful.

Meanwhile **PW1, Alfred Makhoha**, a brother of the deceased upon being informed that the deceased could not be traced either at his home or at his place of work reported the matter to police. He also informed the police that the deceased had last been seen in the company of the accused.

The same day or 4/6/2012 the accused went to the Police Station and reported that the deceased had raped

her in his house on the night of 3/6/2012. She claimed that the deceased had administered an HIV test upon her and then proceeded to rape her three times. When the deceased fell asleep at 3.00 a.m. the accused managed to escape. As she was walking on the road some boda boda riders rescued her. She led them to the house of the deceased. They apprehended the deceased and were taking him to the police station. However, the deceased escaped from their clutches and ran away. Police recorded the rape report and issued the accused with a P3 form.

Later on 11/7/2012 police were called to the scene where a human skeleton had been found in an abandoned incomplete building. The officers went and collected the bones and at the site they also recovered documents bearing the name of the deceased **'Richard Wilcan Okello'** and a document bearing the name of his wife **PW3, Margaret Wambui Kariuki**. Police took the skeletal remains to the mortuary. Upon completion of police investigations the accused was arrested and charged with the offence of murder.

At the close of the prosecution case this court has a duty to evaluate the evidence in order to determine whether the prosecution have established a prima facie case that would require the accused to give a defence to the charge.

The accused faces a charge of murder. The offence of murder is defined as follows by Section 203 of the Penal Code Cap 63 Laws of Kenya:-

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

From this definition there can be discerned four (4) crucial ingredients for the offence of murder. All four must be proved beyond reasonable doubt:-

1. Proof of the fact of the death of the deceased;
2. Proof of the cause of that death;
3. Proof that the accused by an unlawful act or omission caused the death of the deceased;
4. Proof that the said unlawful act or omission was committed with malice aforethought.

The first ingredient requires proof of the fact of death. The prosecution must prove that the deceased is in fact dead. In this case the deceased is named as **'Richard Wilcan Okello.'** There has been no recovery of the dead body of the said **Richard Wilcan Okello**. What police recovered were remains of a human skeleton. The skeleton was not identifiable as it consisted of only bones and teeth but no flesh. There was no face to aid in identification. **PW1** told the court that he identified the skeletal remains as his missing brother **Richard**. However, under cross examination by defence counsel **PW1** says:-

“The body had no flesh. It was a skeleton. Just the skull with skeletal bones still joined at the hands but no hands. The feet had all peeled off. Even the ribs were not there.”

Given the state of the remains it is difficult to believe that **PW1** was able to identify them as the remains of his missing brother as there were no features there for identification. Under cross examination **PW8** the Investigating Officer admits that:-

“Alfred (PW1) could not positively identify the skeleton as that of their brother....”

PW8, Inspector Boniface Mutie was honest when he stated:-

“The doctor could not establish the identity of the deceased with certainty.”

I have looked at the photographs of the remains taken at the scene and exhibited in court PExh.12. All that one can see are bones and teeth. There is no way these remains could be identified as belonging to one person or another. The only reason police **believed** that the remains belonged to the deceased is because documents bearing the names of the deceased and his wife were found strewn at the scene. The

presence of these documents is not conclusive proof that the skeletal remains were the remains of the deceased. The only way to conclusively ascertain identity was to have a DNA test conducted. Indeed the Pathologist preserved samples for such DNA testing. **PW6** the Pathologist who conducted the autopsy stated in his evidence that:-

“As the body had no tissue I recommended a DNA to ascertain the identity of the skeleton bones recovered.”

However, **PW9** the Investigating officer told the court that although he did take the samples to the Government Chemist for DNA analysis he never received back any report to **confirm** the identity of the deceased. It is merely **assumed** that the remains belonged to the said **Richard Okello** due to the recovery of his documents at the scene. There is no **conclusive proof** that these remains were actually the deceased as no DNA report has been tendered to show this. The court cannot base its decision on a mere assumption.

Be that as it may, even indulging the prosecution and taking the remains found to actually be the remains of **Richard Wilcan Okello** the state must tender evidence to prove the ‘**cause of death**’. Therefore the prosecution must tender evidence to prove exactly what **caused** the death of the deceased. In most cases the cause of death can readily be established by way of an autopsy conducted on the body by a qualified pathologist who could then prepare a post mortem report. In this case evidence on the cause of death was tendered by **PW6, Dr. Titus Ngulungu** a pathologist attached to the Nakuru Provincial General Hospital. He confirmed to the court that what he received were skeletal bones inside a polythene bag. Parts of the skeleton e.g. cervical bone, thorax, ribs, bones of fore arm radius and ulna were all missing. Therefore the skeleton presented to **PW6** for autopsy was not complete. In his testimony **PW6** stated:-

“[I] could not therefore determine the cause of death based on examination....”

Later under cross examination **PW6** stated that the possible cause of death was ‘**chest trauma**’. However, I have looked at the post mortem report filled and signed by the doctor and his opinion on the cause of death was as follows:-

“Anatomically unascertained due to above limitation but there is a possibility the cause lies within the chest.”

Thus even the medical expert was unable to state with any degree of certainty what the cause of death was. How can the accused be said to have committed a murder when it is not even clear what caused the death of the deceased person? In the case of **Ndungu vs Republic [1985]KLR 487**, the Court of Appeal held that:-

“Though there are cases in which death can be established without medical evidence relating to its cause where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death as alleged by the prosecution.”

Therefore it is not sufficient for **PW6** to suggest that chest trauma may have led to the death of the deceased. He must go further and testify as to the cause of such chest trauma (if any) and how it may have led to the deceased’s death. All in all I find that there remains great uncertainty over the issue of what caused the death of the deceased. It is not certain whether the deceased met his death due to accident, misadventure or from a human hand. The cause of death in this case has not been proved beyond reasonable doubt. The accused certainly cannot be said to have caused the death of the deceased in a case where the cause of death remains uncertain.

Even if the court were to indulge the prosecution further and assume that both the identity and cause of death have been proved satisfactorily (which is not the case here) the State would still be required to go further and tender evidence to prove that it was the accused who by some unlawful act and/or omission caused the death. In this case the accused appears to have been pin pointed as a suspect because she was

said to have been the last person seen with the deceased. **PW4** the wife of the deceased stated that the deceased left his work place in the company of the accused. That was the last time that **PW4** saw her husband alive. **PW3** stated that he saw the deceased at about 9.30 p.m. in the company of a man whom he names as 'Steve' and a lady. **PW3** did not identify the accused as the lady whom he saw that night. There is evidence that the accused made a report to the police the same night that the deceased had lured her to his house under the pretext of securing an attachment for her. He forcibly conducted an HIV test on her and then proceeded to rape her.

PW8 who was the Investigating Officer confirms that indeed the accused did make such a report to police vide OB No.20141612012 . He suggest that the accused may have later murdered the deceased as revenge for the rape ordeal he put her through. Firstly, there is absolutely no evidence indicating that the accused in any way assaulted the deceased. The accused's story is corroborated in all material respects by **PW5, Josephat Njorge Mumbia**. This witness told the court that he met the accused on the material night at about 1.00 a.m. when she was fleeing from the deceased's house. The accused told **PW5** that she had been raped. **PW5** together with other boda boda riders escorted accused back to the house and apprehended the deceased. As they were leading him to the police station the deceased escaped and ran away leaving his shirt in their hands. **PW5** then proceeded with accused to the police station where she recorded her complaint. Therefore by the time the deceased escaped form the hands of **PW5** he was alive and well. After the report was made accused led police to the house of the deceased. **PW8** said they found the house open but deceased was not there. Clearly he had escaped to evade arrest. The court is not told at what point then the accused tracked him down and murdered him. One cannot tell what fate may have befallen the deceased after he ran away into the dark. There is no evidence that the accused chased him and there is no evidence that the accused ever saw or met the deceased after that night. The evidence against the accused amounts to pure suspicion. In my own opinion this suspicion has no basis. **PW8** states in his evidence that:-

“we linked accused to the murder because she was among the last people to see the deceased. Her conduct in running away made her a suspect.”

PW8 claims that accused failed could not be traced in her sister's home in Nakuru. Yet he admits that police made no effort to search for the accused in her rural home in Kisii. In any event **PW8** concedes that it was the father of accused who later brought her to the police station. A person who is staying with her father cannot be said to have absconded. There is not an iota of evidence connecting the accused to the murder or death of the deceased.

PW8 the Investigating Officer states that in his view the accused may have acted with accomplices to murder the deceased. Who are these unidentified accomplices? Why were they not traced and charged? **PW8** also told the court that in his view **PW5** was equally a suspect and ought to have been charged. The court is not told why against the advice of the investigating officer **PW5** was treated as a witness instead of being charged with murder. The police merely latched onto the accused as a convenient scapegoat because they did not want to investigate the matter more comprehensively.

It is settled law that a conviction can only be based on circumstantial evidence where the evidence points irresistibly at the guilt of the accused and where no other factors exist to weaken such an inference. (**See Republic vs Kipkering Arap Koske & Another [1949]1 EACA 135**). In this case the evidence falls woefully short of that required to prove a prima facie case even upon the basis of circumstantial evidence.

The identity of the deceased remains unproven. The cause of death is not proved. There is not a scintilla of evidence to link the accused to the death/murder of the deceased. I find that the prosecution have failed to prove a prima facie case to warrant the accused being called upon to defend herself. The police simply took the easy way out in charging the accused. I therefore enter a verdict of '**Not Guilty**' and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless she is otherwise lawfully held.

Dated in Nakuru this 4th day of November 2015.

MAUREEN A. ODERO

JUDGE

Mr. Mongeri for accused

Surety documents to be released to the depositor.

MAUREEN A. ODERO

JUDGE