



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 78 OF 2012

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

JUSTA MUTHONI MUTERO.....ACCUSED

JUDGMENT

1. The accused person is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code Cap 63 Laws of Kenya**. The particulars of the offence are that:

“On the 11th day of January 2012, at Mung’etho village in Murang’a County, jointly with others not before court, murdered Rose Muthoni Muriuki.”

2. The prosecution called a total of 11 witnesses. Briefly, the prosecution case is that on 11th January 2012, the deceased left home at about 11 a.m. to travel to Mwea together with the accused to purchase rice for a supply order that the accused had received from Naivas Supermarket. The deceased left after informing her daughter, **Mercy Karimi Muriuki (PW2)**, that she had just received a call from the accused informing the deceased to meet her at the By-pass. The deceased never returned home on that day. Efforts to reach her through her mobile phone were not fruitful, prompting a search for her.

3. **PW3, Martin Njue Muriuki** reported to the police and the accused was arrested by **PW8 Snr. Sgt Patrick Okwara** on 12th January 2012, being the last person known to have been with the deceased. **PW10, I.P Francis Omondi**, the investigating officer in this case took over the case.

4. Nearly a month after the deceased’s disappearance, a decomposed body was discovered in a very thick bush inside the compound of Kiambaa Primary School. **PW4, No. 39725 PC Paul Okuthe**, then attached to Makuyu Police Station, accompanied by other officers went to the scene and removed the body.

5. Since the body was decomposed, DNA profiling was done to assist in the identification. **PW5, John Kimani Mungai**, the Government Chemist, analyzed mouth swabs taken from PW2 and PW3, who are children of the deceased, and tissues from the decomposed body of the deceased. He concluded that the deceased was the biological mother of PW2 and PW3. A post-mortem was performed on the body of the deceased by **PW6, Dr. Anthony Kamau Murage** on 29th February 2012. PW6 observed that there was a

nylon thread on the neck, while the hyoid bone was broken, an indication of force applied on the anterior of the neck. He concluded that the possible time of death was 10 days from the date the body was found. He was of the opinion that the cause of death was asphyxia due to ligature.

6. The accused had initially been arraigned in court on 17th January 2012 on charges of abduction contrary to **section 256** of the **Penal Code** in **Makadara Cr. Case No. 315 of 2012**. She was released on bail, but later absconded, prompting a warrant for her arrest to be issued. These charges were later withdrawn on 29th September 2012 and she was subsequently charged with murder. **PW1, Dr. Joseph Maundu** examined the accused on 3rd October 2012 and concluded that she was fit to stand trial.

7. On 31st March 2012, PW10 visited the scene where the body had been recovered in the company of **PW7, CPL. Joseph Ochieng**, other police officers and relatives of the deceased where they collected an earring which was identified by PW2, tree barks twisted into a string, and a black piece of cloth, presumed to have been a trouser worn by the deceased. In the course of investigations, the deceased motor vehicle of registration number KBH 975W, as well as her handset were recovered by the Flying Squad officers in Kibera.

8. Data records from the Safaricom mobile service provider were provided in respect of the accused person's mobile phone no. 0704605829 as well as the deceased's phone number 0722657558. The records were provided by **PW11, CPL Daniel Hamisi**, who was attached to the Safaricom Law Enforcement Liaison Office at Safaricom Headquarters, Nairobi. PW11 retrieved the records from the Safaricom database. He certified the records and produced a certificate as required under **section 65(8)** as read with **section 106A** of the Evidence Act.

9. When placed on her defence, the accused gave a sworn testimony in which she advanced an alibi. She testified that on 11th January 2012, she was at her place of work in Cianda market where she sold clothing, shoes and bags until 6.30 p.m. when she went back to her house. She also stated that she called and spoke to the deceased at around 10 a.m. or 11 a.m. She further testified that on 12th January 2012, after she had returned home from work, police officers came to her house at about 9.00p.m to inquire from her about the deceased. She informed them that she had spoken with the deceased at around 10 a.m. or 11 a.m. She was arrested and placed in custody for one week before she was arraigned in court and charged with kidnapping the deceased.

10. The accused denied any involvement in the murder of the deceased, adding that she had never been to Mung'ethu where the body was discovered. She also stated that she did not know James Kamau, adding that she had never telephoned him. The accused further denied meeting with PW2 at the police station or making any confession to her. She stated that she never owed the deceased any money and never had any business dealings with her. She faulted the data records produced in court for failing to show the time that she had called the deceased or the time she had been at the scene of incident. She also denied ever violating bail terms.

11. In his submissions, learned counsel for the defence urged that there was no evidence to show that the accused and deceased met on the material day. He submitted that the evidence showing that the accused had been within the geographical zone where the body was found was ambiguous since the exact area was not mentioned. He pointed out that the deceased's mobile phone had been found with one Dennis Ochieng' Odongo who was simply interrogated and released. Counsel also faulted the failure by police to investigate and establish the identity of James Kamau who had received the Kshs. 650/- that had been sent via MPESA mobile money transfer. Counsel dismissed the police investigations as shoddy since the evidence on record did not prove the charges of murder.

12. Ms. Onunga for the state submitted that the chain of events linked the accused to the murder of the deceased. She recalled the testimony of PW2 who testified that the deceased had informed her that the accused owed her money and further that the deceased was set to travel to Mwea with the accused. Furthermore, the accused had indicated to PW2 that she travelled with the deceased but dropped off along the way since she had been unwell.

13. Ms. Onunga urged that the prosecution case was supported by investigations on the call records of the mobile phone numbers of the deceased, the accused and James Mungai which revealed that the mobile number of the accused had been used to call the deceased in the same geographical location that the deceased had been. Counsel added that the evidence further showed that the deceased, the accused and James Mungai not only transacted but also communicated with each other on the day the deceased disappeared.

14. I have carefully considered the entire evidence adduced as well as submissions by both counsels. The accused is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. **Section 203** of the **Penal Code** provides that:

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

15. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought in the following terms:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

16. The burden lies with the prosecution to prove beyond reasonable doubt that the accused person unlawfully caused the death of the deceased. It must also be proved that the accused had formed the necessary *mens rea* to commit the offence.

17. The cause of death of the deceased is not in dispute. According to the postmortem report produced by PW6, the deceased died as a result of asphyxia due to ligature. The deceased was positively identified following DNA analysis of samples taken from the body of the deceased and swabs from her children, PW2 and PW2. PW9 conducted the DNA profiling and produced the report containing his findings in court. The basic issue for determination in this case therefore, is whether the accused murdered the deceased.

18. The prosecution case, in my view, is founded exclusively on circumstantial evidence since none of the prosecution witnesses saw the accused commit the act that result in the death of the deceased.

19. The principle regarding the application of circumstantial evidence was enunciated in the case of **R. vs. Taylor Weaver & Donovan (1928) 21 Cr. App. Reports 20**, 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 proposition with the accuracy of mathematics. It is no derogation of evidence to say that is circumstantial.”

20. In the case of **Mwita vs. Republic [2004] 2 KLR 60**, the Court of Appeal stated 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 incomparable with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt.”

21. In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** at page 5 the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

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

(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.”

22. Before drawing the inference of the accused's guilt from circumstantial evidence, the court must be certain that there are no other co-existing circumstances which would weaken or destroy the inference. (See **Musoke vs. Rep. [1958] EA 715**).

23. According to PW2, the deceased was last seen alive on 11th January 2011 when she left to meet with the accused. PW2 testified that on the previous day, the deceased had informed her that she would be meeting with the accused to accompany her to Mwea. Indeed, on the material day, the deceased informed PW2 that the accused had called her, asking the deceased to meet her at the Ruiru By-pass. It was PW2's testimony that the deceased did not return home on that day and PW2 unsuccessfully tried to reach the deceased on her mobile phone. Concerned, PW2 informed her brother PW3, who also attempted to reach the deceased on phone. When he could not reach her, he decided to go to deceased's home in Ruai and did not find her. PW3 then reported to the police. This led to the arrest of the accused who was charged with abduction.

24. Evidence of call records of phone numbers (Phone data) of the deceased and the accused and one James Mungai was also produced. These details were availed following an application through from through **Misc. Appln. No. 27 of 2012** at Makadara Law Courts requesting Safaricom Ltd. to avail records of the suspect's mobile phone no. 0704605829; the deceased's 0722657558 and call records in respect of one James Mungai. Records regarding James Mungai were however, not availed.

25. PW10 testified that the deceased's phone was recovered by the Flying Squad officers from one Dennis who had bought it from a second-hand goods shop. The phone was an Alcatel make and was produced in court as P. Exhibit 11. It was identified by the deceased daughter, PW2, as belonging to the deceased. The other phone, a Samsung make, was recovered from the accused on the day she was arrested.

26. The records were retrieved by **PW11, CPL Daniel Hamisi** who produced two reports in respect of the telephone numbers 0704605829 for the accused and 0722657558 for the deceased for the period between 9th January 2012 and 20th January 2012. According to the reports, telephone number 0704605829 was registered under ID. No 830338850 in the name of Justa Mutero whereas the number 0722657558 was registered under ID. No.8849080 in the name of Rose Muriuki the deceased. The records showed that on 11th January 2012, the accused was using the mobile number mobile number 0704605829 while the deceased was using the mobile number 0722657558. James Kamau was using two lines 0704728292 and 071215931.

27. The records showed that there was communication involving the deceased, the accused and James Kamau between 10th and 11th January 2012. From the call logs, the accused communicated with James on 10th January 2012 between 1521 hours and 1522 hours and immediately thereafter with the deceased.
28. Analysis by PW10 of call logs of the deceased's line 0722657558 showed that there was a communication between the deceased and the accused on 11th January 2012 at 1124 hours. This exchange took place in the area code of Ruai, where the deceased lived. These records support PW2's account that the deceased indicated that she had been called by the accused at about 11.0 a.m. This evidence also defeats the account by the accused that she only spoke with the deceased between 10.00 a.m. and 11.00 a.m.
29. On 11th January 2012, calls were also made from the accused person's line no. 0704605829 within the area code of Mung'ethu between 1418 hours and 1422 hours. On the same day, the accused communicated with James Kamau at 1524 hours, which, according to PW10's examination of the Safaricom records, took place within the location code of Mung'ethu, the same area where the body of the deceased was discovered.
30. Evidence regarding mobile money transfers showed that on 11th January 2012 at 1636 hours, the deceased transferred Ksh. 650 using her mobile number 0722657558 to James Kamau's mobile number 0704728292. Immediately thereafter, at 1640 hours, the accused purchased airtime credit worth Kshs.50 via MPESA for James Kamau on the same number 0704728292. At around this time, the deceased called the accused twice. It is safe to generally conclude that between 10th and 11th January 2012, there was a flurry of communication between the accused and the deceased on the one hand, and between the accused and James Kamau on the other.
31. However, despite James Kamau featuring in several communications at the material time, no data was available in respect of the said James Kamau. PW10 testified that no leads were made with respect to the said James Kamau. It is therefore not possible, to determine with certainty, the role he might have played, if at all, in the murder of the deceased. It is nevertheless important to observe that communication with the said James Kamau placed the accused within the same area where the body of the deceased was discovered.
32. Furthermore, records showed that there was a transfer of Ksh. 650 via MPESA from the deceased to James Kamau on the material date at 1636 hours within the same Mung'ethu area. Several other calls made earlier on the same day between 1418 hours and 1422 hours from the accused's person's mobile phone showed that she was within the area code of Mung'ethu. This shows that at a certain period, there were communication and transactions involving the accused, the deceased and James Kamau in the same location of Mung'ethu.
33. The data showing calls made between the accused and the deceased earlier on the material date showed that they were within the Ruai area. This was at around the same time when the deceased left her home in Ruai, having informed PW2 that she was meeting the accused. This is a strong indication that the accused met with the deceased as she had indicated.
34. The evidence of the phone records therefore, places the accused in Ruai where the deceased resided and Mung'ethu, the same area where her body was recovered. It leaves no doubt in my mind that the deceased and accused met on the fateful day she disappeared. This also displaces the account by the accused who denied having been with the deceased on the material date. The accused person's defence of alibi and allegation that she had never been in Mung'ethu is also inconsistent with the evidence adduced.
35. Further credence is found in the testimony of PW2 who spoke to the accused when she was in custody. When PW2 inquired from the accused if the deceased had accompanied her to Mwea, the accused initially stated that they had travelled together to Mwea but the accused had left her there. She subsequently changed her account denying meeting with the deceased on that day. The accused even denied ever being in Mung'ethu area, despite the solid evidence of the call logs. Her defence of alibi was

completely displaced by the evidence of call records, which placed her in Ruai and Mung'ethu areas on the material date. The accused's mere denials and inconsistent accounts, demonstrate her deliberate attempts to conceal the truth in the face of strong evidence on the contrary.

36. The collective evidence supports the prosecution case that the accused was the last person to be seen with the deceased. The evidence set out above places the accused to Ruai and Mung'ethu areas, which are consistent with the movements of the deceased on the material date, and the discovery of her body.

37. Even though the accused was not seen with the deceased on this date, the evidence strongly links her to be the last person to have been with the deceased. PW2 testified that the deceased was not seen alive again after leaving to meet with the accused. The call records show that the accused communicated with the deceased at all material times.

38. The evidence adduced, contrary to the account given by the accused, shows that the accused was in touch with the deceased on the day she disappeared. The fact that the evidence shows the accused communicated with the deceased on the day the deceased disappeared; and the fact that the phone data shows that on the same day the accused was within that same area where the deceased body was found calls for a reasonable explanation from the accused. None was offered by the accused, who in her defence, denied meeting with the deceased. Her account comes forth as utterly untruthful. As the Court of Appeal observed in the case of ***Ernest Abanga alias Onyango v Republic* CA No. 32 of 1990:**

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.

39. The accused was charged with abducting the deceased, and was released on bail. However, she failed to appear in court, and a warrant for her arrest was issued. Her conduct of fleeing, more so when she was on conditions of release depicts conduct of a person with a guilty mind. The fact that she denied a matter which this court takes judicial notice of, paints the accused as untrustworthy and untruthful.

40. The deceased, according to the post-mortem, died as a result of strangulation. There was a nylon string on the neck of the deceased body. This is an indication that the person who committed the act of strangulation intended to cause her death.

41. It was alleged that the accused owed the deceased some money. This came from the evidence of PW2 who also indicated that on the material date, the deceased was to get her money from the accused. This allegation may be so; however, there is no conclusive proof as to this fact. The accused faulted the prosecution case for failing to prove the motive for the murder. It was submitted that motive must be established in cases dependent on circumstantial evidence, in reliance of the decision of the court in the case of ***Musili Tulo v Republic (2014) eKLR***. While motive is a relevant factor in establishing the guilt of the accused, the absence of proof of motive does not defeat the case altogether. In the case cited above by the accused, the court cited with approval an earlier decision in the case of ***Libambula v Republic [2003] KLR 683*** where it was reasoned that:

“Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”
(Emphasis added).

42. Considering the evidence as a whole, I find that the evidence adduced is incompatible with accused person’s innocence, and is incapable of any other explanation than that of the accused person’s guilt. The charges indicate that the accused committed the offence in concert with others who were not charged alongside her. This may be so, given the evidence pointing to the possible involvement of one, James Kamau. The accused also added that other persons adversely mention in the evidence ought to have been charged; in particular James Kamau, Dennis from whom the deceased’s phone was recovered, the proprietor of the shop where this phone was allegedly purchased and Joseph Njiru, uncle to PW2 and PW3.

43. Even so, the failure to charge any of possible accomplices does not lessen the accused person’s culpability. Where there is evidence to show the accused person’s involvement in actions leading to the death of the deceased, the accused is individually responsible for the acts that were committed by any of the accomplices in furtherance of the joint action. As **section 21** of the **Penal Code** provides:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

44. Having considered the entire evidence adduced in this case, I am satisfied that the prosecution has adduced sufficient evidence to prove that the accused was involved in the murder of the deceased beyond any reasonable doubt. Accordingly, I find the accused guilty of murder contrary to **section 203** of **Penal Code** under **section 322** of the **Criminal Procedure Code** and convict her accordingly.

DATED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2015.

LESIT, J

JUDGE