



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 44 OF 2007

REPUBLICPROSECUTOR

VERSUS

DAVID KIBET KIPLAGAT.....ACCUSED

JUDGMENT

The accused David Kibet Kiplagat was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the charge are that on the night of 1st and 2nd day of September, 2007 at Kapkatet Village, Lessos in Nandi South District of the Rift Valley Province, jointly with another not before court murdered Mary Jepkering.

The trial has gone through the hands of two other Judges. They heard the evidence of all prosecution witnesses. I made the ruling on a case to answer and also heard the defence. In total, the prosecution called a total of nine witnesses. Record of proceedings however shows that prosecution called eight witnesses, that is PW1 to PW8. After PW8 testified, the next witness is recorded as DW4, Police Superintendent Lucy Kamau who testified on 22nd October, 2012.

On 10th July, 2013 the learned State Counsel Mr. Mulati clarified to the court that the said witness Lucy Kamau ought to have been listed as PW9 and that she was indeed a prosecution witness. She was therefore the last prosecution witness.

THE EVIDENCE

PW1 Philip Kipkurgat testified that the accused was employed as a herder by his neighbour and that the deceased Mary Chepkering was his sister. He stated that on 2nd September, 2007 while in his house, he heard a scream and on going outside found the body of his sister lying down with a dress but no pants on. He said that there were many people around the body including his mother. He said he saw an injury on the deceased's neck.

PW1 further testified that he reported the matter at Lessos Police Station and that police from Nandi Hills police station visited the scene and took the body to the mortuary.

It was PW1's testimony that he had last seen the deceased on 1st September, 2007 at 4.00 p.m. in the

company of the accused at their mother's home and that the two later left together to some other place.

According to PW1, the accused was arrested because he was found wearing the deceased's jacket and also because he ran away from his employer's home after the deceased's death. He identified a blue jacket in court as belonging to the deceased.

On cross-examination, PW1 said that he told the police that one Evans had killed the deceased, but that when Evans went underground the accused was arrested. He said he had visited the deceased's house to borrow cigarettes. He said there were many young men in the deceased's house including Evans and David (accused). He said that he was told by one Isaac that the deceased had been drinking (alcohol) with the accused in the house of Grace. He further said that after the death of the deceased they suspected the murderers to be Kisii men but when the Kisii men could not be traced, the accused was arrested.

PW2, Grace Koech testified that she was the deceased's in-law and that the deceased was a herdsman of a teacher called Nelson Kata. She stated that on 1st September, 2007 at about 7.30 p.m. she was in her house preparing chang'aa in the company of seven other people including two Kisii persons, Jimmy, Kipchumba and Kiptoo who had gone to her house to drink chang'aa. She stated that the deceased went to her house accompanied by her two sons, namely Boi and Felix. She said that the deceased bought chang'aa worth Ksh. 10/= which she gave to her through the window as she refused to enter the house stating that she was going back to her house to prepare chang'aa.

PW2 further testified that at about 8.00 p.m., the accused went to her house and bought chang'aa worth Ksh. 30/=. That when she gave her the chang'aa, she walked away. That later, a lady whom PW2 referred to as Sarah Choge went into her house carrying a hurricane lamp and asked her who was screaming. PW2 said that she told Sarah Choge that she had not heard any screams.

PW2 said that on the following morning at 6.00 a.m., she heard Sarah screaming at her door. She and her husband ran to Sarah's house only to find the deceased had died behind Sarah's house in a maize garden. The body lay facing upwards and was dressed in a torn skirt.

In Cross-examination, PW2 stated that she could not remember the clothes the accused was wearing when he went to her house. She stated that she only knew him as David and that it was the first time the accused had bought chang'aa in her house.

In re-examination, PW2 stated that the deceased did not have a jacket but only the skirt and a T-shirt.

PW3, Sarah Choge, the mother of the deceased testified that on 1st September, 2009 at about 9.00 p.m., the deceased was cooking in the kitchen while she was in the main house. The deceased was with the children in the kitchen. After cooking she took to them food in the main house while she returned to the kitchen. She next saw her dead outside the house.

It was PW3's further testimony that the deceased used to sleep in the main house. She said that she heard her scream once and she woke up, lit a lamp and checked on her (deceased) in other houses but did not find her. Her body lay 20 metres from the house. It did not have a black raincoat the deceased was earlier wearing. She identified one navy blue jacket (MFI-1) as the rain coat she was referring to. She said the body had no injuries.

On cross-examination, PW3 reiterated that the deceased did not return to the house after serving them dinner and that she heard somebody scream once far from her house.

PW4, Felix Kiptoo, a minor testified that the deceased was his aunt. He stated that on 1st September, 2007, the deceased asked him and another one Kiptoo to take her to PW2's house to take chang'aa. He and Kiptoo bought her chang'aa worth Ksh. 10/=. The deceased took the chang'aa while outside the house. They remained in PW2's house until 10.30 p.m. when their grandmother went there and told them that she had heard somebody screaming. Their grandmother told them to go to the deceased's house but

they said it was too late. On the next day they found the deceased's body outside their grandmother's house with no injuries and without the jacket the deceased was wearing when he last saw her.

PW5, Jimmy Chepleng Tirop, testified that the deceased was his aunt. He testified that on 1st September, 2007 at about 4.00 p.m., he went to his mother-in-law's place to take chang'aa and left at 5.00 p.m. At about 7.30 p.m. he found people drinking chang'aa at Grace's place and he joined them in drinking chang'aa. The accused, David Kiplagat also went to the same place and bought chang'aa which he put in a sufuria and left. On the next day, as his wife was going to the shop to buy sugar she heard some screams and she returned to the house to tell him that his aunt was dead. He said that accused was later arrested although he had first escaped.

PW6, an Administration police officer from Nandi Hills District Headquarters testified that he received a call from the area Assistant Chief Samuel Songok who informed him of a dead woman. He said he proceeded to the scene where he found the deceased's body with one shoe on, the pant underneath the body and a condom next to the body. He called police from Lessos Police Station who conducted the investigations. They arrested the accused at Flax area where he had fled to and a jacket the accused was wearing was identified by the deceased's children as belonging to their mother.

PW7, Sammy Songok, Assistant Chief of Lessos Sub-Location testified that on 2nd September, 2007 at about 7.00 a.m. he received a report from a relative of the deceased that the deceased had been killed. Following the report, he called an Administration Police officer who visited the scene and in turn informed the police from Lessos Police Station. He stated that he later mobilized members of the public to track all the persons who were drinking chang'aa with the deceased and that this led to the arrest of the accused who had fled to Flax area in Keiyo District. The accused was arrested whilst wearing a jacket which the children of the deceased identified as belonging to their mother.

In cross-examination, PW7 stated that the deceased was last seen in the company of the accused and another Evans Bokongo who he did not look for.

PW8, Doctor Billy Lubanga conducted the post mortem on the body of the deceased. He formed the opinion that the deceased died of cardio-respiratory failure due to asphyxia from strangulation.

PW9, a Superintendent of Police investigated the case. She said she visited the scene where she found the deceased's body near a maize garden without an underpant. She learnt that the deceased was last seen taking chang'aa with one Evans and that one David (the accused) was seen parking his clothes to flee. She said that the accused was later arrested at Flax area in Kaptagat where he had fled to whilst wearing the deceased's jacket. She produced the said jacket as P.Exhibit.1.

In cross-examination, PW9 stated that she found the deceased's body half naked with a torn skirt which was raised and that the condom found near the scene was not used. She stated that both the accused and Evans who were adversely mentioned worked for the same employer. She also reiterated that the deceased was last seen drinking chang'aa with David (accused) and that Evans was adversely mentioned by the accused.

In his sworn defence, the accused denied he murdered the deceased. He said that he was employed as a casual labourer by Nelson Katwa. That on 1st September, 2007 at 5.00 a.m. he went and sold milk as usual and returned home. Thereafter he went to the farm to spray insecticide to the tea. That at 5.00 p.m. he went to Lessos Shopping Centre to repair a puncture. At 8.00 p.m., he went to Grace's place to buy alcohol where he met Bernard and Evans and returned home after drinking the alcohol.

The accused further testified that at 9.30 a.m. as he was at the place where he sold milk, police arrested him and took him to Lessos Police Station. The police told him that he was wearing a jacket belonging to the deceased yet the same was his and had worn it since 29th July, 2007. He stated that he had no relationship with the deceased but he knew she lived with her mother, had children and was a drunkard. He also knew the deceased visited Grace's place to drink (I opine alcohol) and that she was a friend of Evans with whom they worked for the same employer.

The accused also denied that he went underground after the death of the deceased. He said that he learnt of the death of the deceased while at the Police Station.

On cross-examination, the accused denied that one Tirop bought for him alcohol. He said that he bought three glasses of alcohol, poured them into a bottle and left. He also said that his house was close to that of the deceased.

SUBMISSIONS

In submissions, learned Counsel for the accused, Mr. Magare submitted that there was no confirmation of a meeting between the deceased and the accused on the night of the murder. He submitted that according to PW3, the deceased's mother, the deceased stayed in the house until 10.30 p.m. and thereafter nothing proved that the accused was the last person to be seen with the deceased. He submitted that the condom found at the scene could not be linked to the death of the deceased. He also submitted that the prosecution did not prove mens rea of the intention by the accused to kill the deceased person.

Mr. Magare further submitted that the doctrine of recent possession as explained in the case of **PETER LOTIMU ESINYON -VS- REPUBLIC CRIMINAL APPEAL NO. 388 OF 2006 (NAKURU)** did not apply in the instant case. He did not however exhibit the case law. He said that the said doctrine is hinged on Section 111 of the Evidence Act, which is that the prosecution has the duty to prove that;

1. That the property was found with the suspect.
2. The property was positively identified to be the property of the complainant.
3. The property was stolen from the complainant.

He also cited the case of **JOHN THURANIRA M'ARITHO -VS- REPUBLIC CIVIL APPEAL NO. 200 OF 2007 (MERU)** in which it was held that the burden of proof, even in cases where recent possession is alleged, still lies with the prosecution. And that the burden does not shift to the accused and that there is no duty on the accused to show otherwise.

The prosecution on the other hand submitted that there was sufficient evidence/testimony showing that the accused and the deceased were together on the night the deceased died. That further the fact that the accused went underground after death of the deceased was sufficient evidence he had a hand in the death of the deceased. To the prosecution, circumstantial evidence irresistibly points to accused's guilt and urged the court to find him guilty and convict him accordingly.

EVALUATION OF EVIDENCE

In analyzing the evidence on record, it is no doubt that the testimonies of most of the prosecution witnesses were corroborative. But there is sharp contradiction of the evidence of PW1 with that of the rest of the witnesses with respect to the injuries the deceased suffered. He said the deceased had an injury on the neck whereas all the other witnesses did not observe any injury on the body of the deceased. The court may however overlook this testimony given that by and large, the evidence of PW8 who conducted the post mortem exercise erased doubts as to the cause of the death of the deceased. PW8 observed the possibility of strangulation which was consistent with an injured neck. What the prosecution failed to do was to prod PW1 as to the exact nature of the injury he saw on the deceased's neck.

Be that as it may, the fact that the deceased visited PW2's chang'aa den and took chang'aa is not disputed. It is a fact that was confirmed over and over by nearly all the prosecution witnesses. Further, the evidence that the deceased and another, Evans were seen at the drinking den was corroborated. What is not clear is how far the two associated after the drinking spree as the deceased went home and prepared dinner for her family. It is not disclosed where Evans went.

It is also not in dispute that the deceased's body was found on the morning of 2nd September, 2007 and

that on the night of 1st September, 2007 some screams had been heard near where she died. Her body was found half naked without a pant and a torn skirt. An unused condom was also found near the body. Speculation was also live against this background that the deceased may have been raped before she met her death. However, no investigations were conducted in this line. Furthermore, PW8 Dr. Luvanga testified that there was no evidence that the deceased had been raped although there were signs of struggle on her body. Interestingly, PW9, in evidence in chief had said that Evans who was still at large told him that the deceased died after he had had sex with him and Evans. Against this backdrop, I conclude that if the deceased had any sex before she met her death, the same was consensual. But questions arise as to why the police did not find it necessary to conduct any DNA tests so as to rule out whether or not the accused or even the said Evans had had sex with the deceased before she met her death as alleged by PW9. If this were done, then, it would be easier to deduce who the last person(s) to come into contact with the deceased were before she met her death.

The most intriguing issue is the testimony that the jacket the accused was found in possession of belonged to the deceased and that it is the jacket the deceased was last seen wearing before her body was found without it. It was produced by PW9 as an exhibit. It was identified by PW1 (deceased's sister) and PW3 (deceased's mother) as the one the deceased was wearing on 1st September, 2007, a day before her body was found. According to PW6 and 7 however, the jacket was positively identified to the police as belonging to the deceased by two children of the deceased who were not called as witnesses. I take note of the fact that the deceased and PW3 had closely interacted on 1st September, 2007 and so PW3 was also best placed to identify what the deceased was wearing on 1st September, 2007. I am however doubtful of PW1's evidence in this respect given that, according to him, he saw the deceased wearing the jacket on 1st September, 2007 at 4.00 p.m. when the accused and deceased left their mother's home to an unknown place. To the contrary, PW3 did not make any mention of the accused visiting her home or the deceased being seen with the accused at her home at that time.

But the question that lingers in my mind is, although the accused was seen wearing the deceased's jacket, at what point did he become possessed of it? The deceased left the house at 10.30 p.m. on 1st September, 2007 and her body was seen in the morning of 2nd September, 2007. There is however no evidence that the accused was the last person to be seen with the deceased when she left the house on 1st September, 2007.

Moreover, the identity of the recovered jacket was not flawless. Before PW3 was shown the exhibit she had said the same was black in colour. However, it is a navy blue jacket that was shown to her after which she said it was her daughter's jacket. This discrepancy in the colour needed to be corrected. And the only persons who would have made amends were the children of the deceased, who unfortunately were not called as prosecution witnesses.

Therefore, as observed in the referred case of **JOHN THURANIRA M'ARITHO -VS- REPUBLIC, CRIMINAL APPEAL NO. 200/2007 (MERU)**, although the accused did not prove ownership of the said jacket, nevertheless, the burden still lay on the prosecution to prove that the recovered jacket belonged to the deceased. From the foregoing observations, this burden has ultimately not been discharged.

In the event, although there is strong suspicion that the accused may have had a hand in the death of the deceased, such suspicion can never found a ground for a conviction. The suspicion only lays a basis for circumstantial evidence which I find not sufficient against him.

Again, the behaviour of the accused who fled after the deceased died points a guilty finger (mens rea) at him. But again, this behaviour is founded on suspicions which, added to other evidence, is too weak to loop him in with the death of the deceased.

CONCLUSION

The law is settled that proof must be beyond reasonable doubts. The courts cannot entertain all manner of suspicious evidence to be seen to empathize with the prosecution or the situation that comes with the

death of a person. It must rely on strong evidence that leaves no doubt it is the accused who killed the deceased. Unfortunately, this threshold has not been reached. Notwithstanding the weakness of the accused's defence, as I have said earlier, the burden of proof still lies with the prosecution, and the accused can never be asked to prove his innocence. As this burden was not discharged, I hereby acquit the accused accordingly of the charge of murder. He is hereby set free unless otherwise lawfully held.

DATED and DELIVERED at ELDORET this 7th day of May, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Komen holding brief for Mr. Magare for the Accused

M/s. Oduor for the State