



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 62 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

EUNICE JEPKOECH ARUSEI.....ACCUSED

JUDGMENT

Eunice Jepkoech Arusei is charged with the offence of murder contrary to **Section 203** are read with **Section 204** of the **Penal Code**. She is alleged to have murdered Harun Kiptoror Mosii. She denied committing the offence. The case was heard. The prosecution called a total of nine witnesses. The accused gave a sworn statement in her defence but called no other witness.

PW1, Tito Komen a resident of Keiyo had brewed alcohol at his home on 8/6/2010. At about 5.00 p.m., the accused and the deceased went to Tito's home and bought some alcohol. There were other people already at Tito's home drinking alcohol. They were joined by David Kipkoge Musi (PW2), a nephew to the deceased who asked the accused to buy for him alcohol but it was finished. The alcohol got finished and the accused and the deceased left about 6.30 p.m. Tito said both accused and deceased were drunk and he asked David to follow and assist the deceased on the tarmac. David followed after 5 minutes. On the next day he was informed that people had gathered at his house and he went back home and found the deceased outside his home. He noticed scratch marks on the neck. The accused's body was found in his shamba about 200 metres from his home.

PW2, David Kipkoge Musi confirmed to having found accused and deceased at Tito's home on 8/6/2010. The alcohol was finished and Tito advised him to take the deceased home. After the deceased and accused left, he stayed for a few minutes and he followed. David said he found accused and deceased seated down talking. David asked the deceased to go with him but he said he would go himself while the accused said she would take him home and he left accused and deceased seated there. Next day, he found people gathered at Tito's home and found the deceased dead and was at the place he had left accused and deceased seated. He saw marks on the deceased's neck. He said that Tito told him that accused had stolen deceased's money and that is why he wanted David to escort deceased. He said accused and deceased were always together like husband and wife.

PW3, Jeremiah Kipkorir, told the court that he was one of the people taking alcohol at Tito's home on 8/6/2010 as from 2.00 p.m. He confirmed that accused and deceased went there about 5.00 p.m. and they left about 6.30 p.m. He left the place about 7.00 p.m. with Kipkemoi and next day learnt of the death of Mosi. PW3 also knew accused and deceased as lovers and that they normally went around together.

PW4, Shadrack Kipkemoi Rotich, was at Tito's house taking changaa when accused and deceased went

there about 5.00 p.m. and left about 6.30 p.m. and that David who was also there followed thereafter. Next day, the deceased's body was found in Tito's shamba.

PW5, Willy Kiplangat, a brother of the deceased received a call on 9/9/2010 that his brother was dead. He reported to police and went to the scene with police. On 10/9/2010. He identified the body to the Doctor for purposes of post mortem. Injuries were found around the neck and it seemed a barbed wire was used in strangling the deceased. He knew accused and deceased had been lovers for over 5 years.

PW6, Michael Kipketer Kandie, is the chief of Tugumoi and only learnt of the deceased's death on 9/6/2010 about 9.00 a.m. They looked for Eunice at her home but she was not found in the evening.

The post mortem was conducted by PW7, Dr. Joseph Kangor at Mercy Hospital Mortuary. On examination of deceased, he found bruises around the neck which were alternating and a large bruise on left side of the neck, on the right hand near thumb, and a left deviation of the trachea. Internally, lungs were collapsed. He formed the opinion that the cause of death was hypoxemia meaning lack of oxygen secondary to strangulation. He produced the post mortem report as PEx.1 and a P3 prepared in respect of the accused's mental status as PEx.2.

Bernard Kipngetich Chebii, is the Chief of Metikei where accused hails from. He learnt of the deceased's death on 9/6/2010 and went to the scene.

The Investigation Officer in this case was IP Titus Wanjala who was then based at Eldama Ravine Police Station. He received a report of the deceased's death on 9/6/2010; went to the scene and found deceased's body on a footpath. He found the neck swollen with indications of strangulation. He interrogated those with deceased the day before. He also interrogated accused after her arrest and she claimed to have left deceased with David (PW2).

In her sworn defence, she admitted that she went to Tito's home on 8/6/2010 with deceased who was her friend. She confirmed to PW2, PW3 and PW4 being present. The alcohol got finished. She left with deceased and David followed them and asked deceased that they go home. She said she left the two of them and went home as they were going different directions. Next day, the chief went to her house and informed her of the deceased's death. She was asked to go and write a statement which she did. Afterwards she was arrested.

After due consideration of both the prosecution and defence cases, what is not disputed is that on 8/6/2010, the accused was with deceased at Tito's house taking alcohol where they left about 6.30 p.m. after the alcohol got finished. There is overwhelming evidence to that effect.

It is also not disputed that soon after accused and deceased left, PW2 David followed. Tito said that infact he is the one who asked David to go help the deceased walk home because he was very drunk.

The other undisputed fact is that accused and deceased were lovers. They usually drunk together. None of the witnesses witnessed any quarrel between them on 8/6/2010 day or there before. Nobody witnessed deceased's murder. His body was found along the foot path on 8/6/2010. This case therefore turns on circumstantial evidence. The law is well settled on when circumstantial evidence can be relied upon to found a conviction. In **Republic Vs. Kipkering Arap Koske & Another** (1949)16 EACA 15, the EA court of Appeal held as follows;

“...the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

The circumstantial evidence should irresistibly point at the accused as the killer and none other. No doubt the accused was one of the last people to be seen with the deceased. Upon interrogation by police soon after arrest, she stated that she left the deceased with David because they were going same direction while she was going a different direcion. David on the other hand claims to have left the deceased with

accused where he found them seated and where the deceased was found dead the next day. The court has no idea why the police believed David and disbelieved the accused. The court was told that infact both accused and deceased were so drunk and that Tito advised David to go assist the deceased. One wonders whether the accused being so drunk as alleged, was capable of the act she is charged of. The post mortem revealed that the deceased may have been strangled. In any event, I find her defence plausible. She was consistent in her defence. What she told police a day after the murder is what she told the court – that David remained with the deceased at the spot where he was found dead. So far, there is no other independent evidence direct or circumstantial, that would go to show that it is the accused who murdered the deceased. The police just capitalized on the fact that she was one of the last people to be seen with the deceased. I do appreciate that **Section 111** of the **Evidence Act** places the burden on the accused, having been with the deceased on the evening before his death, to explain how he may have met his death. But the police should have equally investigated David. For the above stated reasons, the accused remains a mere suspect but suspicion alone cannot be a basis for a conviction for an offence of murder or any other criminal offence.

In the end, I find that the chain of events leading to the deceased's death does not irresistably point at the accused as the murderer. Both the act of murder and malice aforethought have not been proved. The prosecution case falls well below the standard of proof required to prove a murder case i.e. beyond any reasonable doubt. The result is that there is doubt whether the accused is the one who murdered the deceased and that doubt must be resolved in her favour. The upshot is that the accused is hereby acquitted of the charge of murder under **Section 322** of the **Criminal Procedure Code** and is set at liberty forthwith.

DATED and DELIVERED this 8th day of July, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Chirchir for the State

Mr. Ombati for the accused

Accused present

Kennedy – Court Assistant