



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE NO. 75 OF 2009

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

NANCY KAGWIRIA.....1ST ACCUSED

KENNEDY MWITI.....2ND ACCUSED

JAMES KIOGORA.....3RD ACCUSED

JUDGMENT

1. The accused persons **NANCY KAGWIRIA, KENNEDY MWITI, JAMES KIOGORA** are charged with murder contrary to section 203 of the Penal Code. The particulars of the offence are that on the 9th day of August, 2009 at Kieni Kia Ndege Market, Igoji Division in Imenti South District within the Eastern Province unlawfully murdered Moses M'Ngai.
2. The prosecution called 12 witnesses. The facts of the prosecution case is that the 1st accused was the wife of the deceased and both of them lived in rented premises owned by PW5 and his wife PW1. On the night in question the accused and the deceased were seen together taking alcoholic drinks in a bar belonging to PW2.
3. According to the bar owner PW2, the 1st accused and the deceased sat at the same table with the 2nd accused, 3rd accused and one Gitonga. They took alcohol before all leaving together. Later same evening the 1st accused returned to the bar and drunk some more. Then the deceased joined her much later. The 2nd and 3rd accused were also there drinking.
4. PW2 testified that he heard the deceased quarrel and then fight with his wife the 1st accused complaining that the 2nd accused was torching her inappropriately. It is after the confrontation that the couple reconciled and then went away with the 3rd accused. PW2 testified that at the time the couple and 3rd accused left, all 3 of them were extremely drunk and that it was around midnight.
5. PW3 Bundi testified that he entered the bar of PW2 at about 12.30 am same night and he found PW2's wife Rose holding a panga and standing near where the 2nd and 3rd accused were seated. Seated between the two was the 1st accused PW3 testified that the deceased, husband of the 1st accused was standing near them. He heard Rose threaten to cut the deceased on the neck with the panga. PW3 also heard the 3rd accused telling the deceased that even though he may claim that

- the 1st accused was his wife, he was going to sleep with her that night.
6. PW3 testified that he was looking for change of 1000/- note he had. When he could not get he decided to leave. He stated that the deceased pleaded with him not to leave him there but to escort him to the police to report that his finger had been cut. PW3 testified that he went away with the deceased up to Kieni Kia Ndege Police Post where the deceased entered to make his report. PW3 left him entering the Police Post.
 7. PW3 testified that soon after leaving the deceased, he met Julius a brother of the deceased, and Kibaki a neighbor and informed them where he left the deceased. PW3 stated that he went home and slept. That next morning he heard of deceased death. He stated that he proceeded to deceased house where he found him with a rope around his neck and his body sitting on a table and his hand crossed.
 8. PW4 was at PW2's bar on the night in question when the deceased entered making noise and demanding to go home with his wife. PW4 saw the deceased walk to where the 1st and 3rd accused were seated. PW4 saw the deceased try talking to his wife the 1st accused who declined to talk to him. The deceased then walked to where he PW4 was seated and joined him.
 9. PW4 then saw the 1st accused and 3rd accused leaving the bar shortly later the deceased, who was drunk also left the bar at around 11.30 pm. PW4 said he did not witness any fight inside the bar. He also said that the bar was full of customers. PW4 also stated that he never saw the 2nd accused that night.
 10. PW5 is a businessman at Igoji and owner of the premises which the 1st accused and deceased had rented. PW5 stated that the two had rented a room they used as a house, and two other rooms which they used as a kitchen and a hotel area.
 11. PW5 testified that at 5 am on 10th August, 2009 he was woken up by Mugambi, one of his tenants. According to PW1, the wife of PW5, she is the one who sent Mugambi to wake PW5 up. The report was that the deceased was inside the house the 1st accused had rented from PW5. Both PW1 and 5 went to see and they found the deceased standing with a rope around his neck and the right hand inside his pocket. The feet were touching the ground the left hand was stretched out. PW5 testified that he had not heard anything the previous night.
 12. PW6 was the Deputy DCIO Meru on 26th August 2009 when two weeks after the incident the DCIO instructed him to take over investigations into this case. PW6 testified that the case had originated from Kieni Kia Ndege Police Post. PW6 stated that he proceeded to OCS at Nkubu Police Station who briefed him about the case and handed it over to him together with the three accused persons who by then were suspects.
 13. PW6 testified that he proceeded to the deceased house and carried a curtain which had blood stains Pexh 3. He also scrapped some blood from the door of the deceased house. He also scrapped more blood at the door to the Bidii Bar where deceased and accused persons had been drinking that night.
 14. PW6 testified that he also collected a rope, Pexh 1 from 2nd accused house within the premises where the deceased and 1st accused lived. He also collected red slippers from deceased Pexh2. He also took a jacket from the deceased house Pexh 4.
 15. PW6 later filled an Exhibit memo for Pexh5. He used it to take all the exhibits to the Government Chemist for analysis.
 16. The results of the analysis were produced by consent as Pexh 6. It shows that the Jacket Pexh 4, swabs or scrapings from the walls and door to deceased house and from the bar had blood which was insufficient for grouping. The rope Pexh 1 had human blood of group B a blood sample from the deceased was also found to be of group B.
 17. PW6 testified that there were two posts mortem forms on the deceased carried out at Meru General Hospital. It was dated 14th August, 2009 by Dr. Macharia Pexh 8. The second was by Dr. Njue dated 21st August, 2009 Pexh 9.
 18. PW7 assisted PW6 with investigations and the recording of witness statements and gathering of exhibits.
 19. PW8 was uncle to the deceased. He recalled that on 9th August, 2009 one Gitonga went to him and informed him that the deceased and 1st accused man and wife, were involved in a fight against each other at Bidii Bar. PW8 testified that he did not bother to go and check PW8 testified that

- on the same night he and one Kibaki met PW3 who informed him about the same fight. The two PW8 and Kibaki proceeded to the bar and found it closed. The two were able to see Rose, the wife of the bar owner who confirmed that the deceased and the 1st accused had fought at the bar that night but that both had gone away.
20. PW8 testified that still accompanied by Kibaki, they proceeded to the house where the 1st accused and the deceased lived. They found the lights off and the place quiet. They concluded the two were asleep and they decided to leave.
 21. PW9 was another uncle to the deceased. His evidence was that at 6.30 am on 10th August 2009 he received a call from Lawrence Mugambi through 1st accused phone. He informed him of deceased death. PW9 proceeded to the house where the deceased lived with the 1st accused. He found the deceased with a rope loosely around the neck, the feet touching the floor, one hand inside his pocket and with blood on the left cheek.
 22. PW9 testified that he and family members of the deceased demanded a second post mortem having been dissatisfied by the fact Dr. Macharia arrived late for the post mortem, carried out the examination in five minutes and declined to allow any family member into the post mortem examinations room.
 23. PW10 was Dr. Guantai. He produced the post mortem report Pexh 8 which was filled by Dr. Macharia on 14th August, 2009. The results of the examination was that deceased had fractured tracheal and laryngeal cartilage, a deep bruise around the neck covering the entire circumference of the neck. As a result of the examination, the doctor formed the opinion that the deceased died due to strangulation. The doctor ruled out suicide and ruled that the injuries could not have been self-inflicted.
 24. PW11 was Dr. Moses Njue who at time of the post mortem examination was the Chief Government Pathologist. He testified that on the 21st August, 2009 at Meru District Hospital he and Dr. Macharia conducted post mortem examination on the body of the deceased. It was a second post mortem and he could tell as much due to incisions on the head, chest and middle of the abdomen.
 25. Among notable observations he made were abrasions transversions round the neck in a horizontal way. Doctor testified that the other significant injury was a deep injury on the back of the right hand at the dorsum consistent with the defence injury. There was also a blunt force injury on the temporal region of the head on both sides which was an external force or friction which was as a result of a force leading to swelling of the brain due to consistent blood clot.
 26. The doctor concluded that the injuries on the neck were as a result of ligature strangulation and not hanging and not manual strangulation. He said hanging was ruled out as in hanging there was usually a gap which is "c" shaped at the back of the neck due to body hanging on the rope. The injury on neck was transverse meaning died of strangulation. He concluded that homicide was highly entertained. He testified that the deceased must have been subdued than hanged.
 27. The doctor testified that toxicology could have enhanced his findings if it was availed. The post mortem was Pexh9.
 28. PW12 Gitonga testified that on 9th August, 2009, he left one Kagwiria's bar where he had been drinking. He proceeded to Bidii Bar where he found many customers taking alcohol. He stated that he was already drunk. He found the 1st, 2nd and 3rd accused and the deceased.
 29. PW12 testified that the 1st accused asked him to buy her alcohol. He stated that the 1st accused was seated between the deceased and the 2nd accused. PW12 stated that he bought all 3 alcohol. That just a minute later the deceased stood up and asked him to watch and see how the 2nd accused was behaving with wife (1st accused) PW12 stated that the deceased pretended to go to the toilet.
 30. PW12 testified that he saw the 2nd accused kissing the 1st accused. PW12 said that he told the deceased "so what even if the 1st accused was kissing the 2nd accused?" PW12 testified that he witnessed the deceased pulling the 1st accused so as to take her home. He saw 1st accused fall to the floor. She then started pulling the deceased down. PW12 then saw deceased slapping the 1st accused. PW12 then asked to stop fighting which they did. He then left the three of them in the bar.
 31. PW12 testified that he met PW8, uncle of the deceased and informed him about the fight the

- deceased had with his wife. PW12 testified that at 11.30 pm same night as he left to go home, he met PW3. PW2 said he was in the company of PW8 and one Kibaki. He stated that PW3 informed them that the deceased had gone to the Police Station to make a report and that he had a cut on the hand. PW3 and Kibaki decided to check on the deceased and so he left home.
32. The accused persons were placed on their defence. They each gave a sworn defence.
33. The 1st accused told the court that she was in the company of her husband on the material night. She said that they went together to Bidii Bar at 8 pm and drank alcohol amongst very many customers some of whom she did not know. The 1st accused stated that at some point her husband told her that they should go home to which she asked him for time to finish her drink. The 1st accused stated that her husband (the deceased in this case) slapped her and threw her down. She said that one Gitonga and one Mbaabu went to her rescue and held the deceased. The deceased then hit the table and the glasses fell down and broke. The 1st accused stated that they continued drinking after promising the wife of PW2 the bar owner that she would pay for the broken glasses. She said that they left the bar at about 10.30 pm, her and her husband. She said that she met the 3rd accused outside the bar but went home to their rented premises with her husband alone.
34. The 1st accused stated that she was not able to sleep in same room with the deceased because he was absent with a message from his uncle, one Kinyamu, referring him to this mother's grave to get the money he was asking from him. The 1st accused said she left their bedroom and slept in the room they had rented for use as a kitchen. That in the morning she went back to their bedroom and found him hanging on the rope around the neck, with legs bent and toes almost touching the floor.
35. The 2nd accused in his sworn defence stated that on 9th August, 2009 he received a call from his uncle, PW2 owner of Bidii Bar to go see him. He found his uncle at his bar at 8.30 pm. The 2nd accused stated that PW2 informed them that since he PW2 was growing old, he wanted to share out 2nd accused father's properties between the 2nd accused and his siblings. 2nd accused said that he agreed with PW2 after which he went to the bar and drank 2 beers. He also bought beer for his teacher whom he found in the bar.
36. The 2nd accused stated that he then returned to his uncle's place and slept. The 2nd accused stated that he then returned to his uncle's place and slept. The 2nd accused stated that he noted the 1st accused and her husband in the bar and saw them have an altercation. However he said he did not know them and did not involve himself with them.
37. The 3rd accused said that the 1st accused was his sister. In his sworn defence the 3rd accused said he entered Bidii Bar at 9 pm and took beer while standing. He said he had met the deceased at the door to the bar as he entered and as deceased left. They greeted each other.
38. The 3rd accused said that he heard Rose, wife of bar owner PW2 telling the deceased to leave the bar so that he does not cause more damage. He also stated that he sat with the 1st accused and the deceased in one table along with many other customers. That they drank alcohol before parting ways at the entrance to the bar same evening. He denied being involved in deceased death.
39. I have carefully considered the evidence adduced by the prosecution and the defences raised by the 3 accused in this case.
40. The burden lies with the prosecution to prove the case against the accused beyond any reasonable doubt. The prosecution must adduce evidence to establish that the accused persons, formed one common intention to cause death or grievous harm to the deceased.
41. The evidence against the accused persons is varied. However it is clear that the 1st and 2nd accused were the last persons seen in the company of the deceased before he died.
42. For the 2nd accused, a rope Pexh 1, later found to have human blood group as that of the deceased (Group B) was recovered in a room 2nd accused was using as a bedroom. The Investigation Officer in this case, two weeks after the incident.
43. I will first consider the evidence of the night in question. We have overwhelming evidence from PW3, 4 and PW12 that the 1st accused, 2nd accused, 3rd accused and the deceased drunk together at Bidii Bar. The bar belonged to PW2. The accused persons and the deceased kept walking in and out of the bar. The 1st and the deceased first entered Bidii Bar at 8 pm. They drunk together

- until 10.30 pm. They left briefly. Then the 1st accused returned followed shortly later by the deceased.
44. At the time PW12 saw the 1st accused kissing the 2nd accused in the presence of her husband the deceased. It was about midnight. By the time PW3 escorted the deceased to Kieni Kia Ndege Police Post to report an assault on his hand, it was past midnight.
 45. From the evidence of the prosecution witnesses, it is clear that the three accused persons and the deceased were together taking alcohol between 8.30 pm and after midnight on the night in question.
 46. The issue is their movement after leaving the bar Mrs. Ntarangwi urged the court to find the evidence against the accused is not sustainable counsel urged that the 1st accused gave a reasonable explanation that she slept in the kitchen and did not know what happened to the deceased.
 47. PW6 the investigating officer trashed 1st accused explanation that she slept in the kitchen because there was no bed in the kitchen.
 48. I am aware to the fact that the burden lies with the prosecution to prove its case against the accused persons. It is not for the accused to prove their innocence.
 49. I note from the PW6's evidence that the 1st accused gave same explanation to him as the investigation officer of this case, 2 weeks after incident, as she gave in her defence.
 50. The first persons to see the 1st accused after she declared the deceased dead was PW1. She said that the 1st accused helped herself in the toilet then went back to her house and called her, PW1 from the door. PW1 stated that PW2 looked shocked. Looking shocked does not exonerate the 1st accused as there could be many explanations for that reaction.
 51. The evidence adduced shows that 1st accused and deceased left Bidii Bar together in company of the 3rd accused. Outside the bar the 3rd accused says he left the two at the door and went home.
 52. The evidence of PW3, 4 and 12 shows that the deceased was in distress on the material night because the 2nd accused not only openly showed affection towards his wife the 1st accused. He was also heard by PW4 and 12 telling the deceased that he was going to sleep with the 1st accused that night.
 53. There is evidence that the 1st accused and deceased exchanged words and engaged in a scuffle at around midnight as the deceased tried to separate the 1st accused from the 2nd accused in order to go away with her to their home.
 54. The 2nd accused was not only crude, openly engaging the 1st accused in open kisses. He also verbalized to the deceased what he intended to do with his wife, the 1st accused.
 55. Both the 1st and 2nd accused admit that they slept in the same building on the material night. The 1st accused said she slept in the kitchen room because the deceased was unhappy with his uncles, who included PW8, for denying him advancement of money he had requested from them. PW8 testified in court about receiving the news that 1st accused and deceased, the latter being his nephew were engaged in a fight that night. PW8 said he even went up to Bidii Bar and found it closed. He then proceeded to 1st accused and deceased home and found it locked and concluded they were asleep.
 56. Mrs. Ntarangwi for the accused persons suggested that the uncles of the deceased Kiambati PW8 and Kinyamu had a grudge against the deceased and could even have caused his death.
 57. I noted that PW8 in cross exam was not questioned regarding any grudge he could have had with or against the deceased. No suggestion was made that he had a motive against the deceased or that he could have been involved in his death. The defence counsels submissions that PW8 and Kinyamu may have been involved in deceased murder was an afterthought. I reject it as baseless.
 58. The 2nd accused admitted he spent the night in PW2's premises. PW2 in his evidence in chief said that the 2nd accused was like a son to him and that he had given him a room behind the bar where he used to sleep. PW2 stated that the 2nd accused spent the night in that house that night.
 59. PW2 covered up for the 2nd accused because his evidence in chief was that the 2nd accused never sat with the 1st accused, 3rd accused and deceased. When he was given his statement to police, PW2 admitted that there had indeed been a fight between the deceased and 1st accused in his bar

- that night and that the 2nd accused was seated with them in the bar.
60. It was obvious PW2 went out of his way to exonerate the 2nd accused from any involvement with the 1st accused and the deceased on the material night. That attempt was a glaring omission and does not assist the 2nd accused at all. The evidence adduced is overwhelming that the 2nd accused was with the deceased 1st and 2nd accused that night and that they drank alcohol together.
61. The 2nd accused also stated that he was next to the 1st accused and deceased that night, that he noted they had an altercation. However, he said he did not know them.
62. I find 2nd accused gave an obvious lie. He was seen kissing the 1st accused by PW3 and 12. He was seen in the company of 1st and 2nd accused and deceased by PW3, 4 and 12. The 2nd accused lied to the court. I find that the lie can serve as corroboration to other evidence against him in the prosecution case.
63. The court of appeal has had occasion to consider the effect of a finding that the accused told an obvious lie. I am guided by the court of Appeal case of **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990**, the court of appeal observed:

“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 evidence available”.

64. I find that indeed the 2nd accused spend the night within the same premises where the 1st accused and deceased had a house.
65. The other evidence was about deceased. There are two post mortem forms on the deceased death Pexh 8 and 9. Pexh 8 was by Dr. Macharia Pexh 9 was by Dr. Njue and Dr. Macharia. Both reports came to similar conclusions to the effect death was by ligature strangulations and homicide most likely ruled out.
66. The doctors concluded there was no likelihood deceased committed suicide because the marks around the neck revealed that the rope traversed the entire circumference of the neck had caused fracture of the tracheal and laryngeal cartilage and could not have been self-inflicted.
67. The doctors in Secord report saw evidence of defence injuries on the right hand and force trauma on both sides of the temporal sides of the head which were proof deceased may have been incapacitated before he was hanged.
68. Mrs. Ntarangwi urged that the rope around deceased death could have been put by anyone on the night in question. She pointed a finger at PW8, PW9 and one Kibaki, the former having admitted he went up to deceased house that night.
69. I have already dismissed the submission that PW8 or his brother were involved in the murder as it is clear that line of defence was an afterthought.
70. The same goes of 1st accused defence that deceased was unhappy with PW8 and his other uncle PW9 and that both had rejected him. PW8 and 9 were not questioned along that line. The defence pointing suspicious fingers at others was clearly an afterthought, baseless and rejected.
71. All those who saw the body of the deceased on the morning of 10th August 2009 give similar account PW1, 3, 5, 8 and 9 all describe the deceased as having a rope around the neck, with one leg bent, the other leg touching the floor, with right hand inside the pocket and left hand stretched

- out and tongue hanging from the mouth. The physical state he was in coupled with doctors findings all shows that the deceased was murdered.
72. There was evidence which 1st accused does not deny that eventually she landed home with the deceased that was past midnight. It was therefore after 11.30 pm the time PW3 escorted the deceased to the gate of Kieni Kia Ndege Police Post. The 1st accused was the one the deceased was last seen alive with.
73. Section 111 (1) and 119 of the Evidence Act creates a statutory burden on a person to explain how a person last seen alive in the company either dead or how they parted. The two sections provide.

Section 111(1) “When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

74. The 1st accused attempted an explanation that she did not sleep in the same room as the deceased. However, it cannot be true.
75. First there was no bed in the kitchen she alleged she slept in. secondly there was no reason to leave the deceased since from her own explanation the deceased was absent by his uncles (PW8 and 9). Thirdly the excuse or allegation the deceased was absent by his uncles was an afterthought and therefore untrue. Thirdly if it were so, the 1st accused would have informed PW1 and 5, the first persons to arrive at the scene after the deceased was found dead.
76. I find there is overwhelming circumstantial evidence to show that the 1st accused and deceased left Bidii Bar together and went to their home together. The 1st accused has a statutory burden to explain how deceased met his death. Instead the impression created was that the deceased committed suicide which is not true as proved by findings of two medical doctors.
77. For 2nd accused, he too was in the company of the 1st accused and deceased. He spent the night within the same premises as the 1st accused and deceased.
78. I considered the other evidence adduce which tends to implicate the 2nd accused with deceased death.
79. First was the fact he was seen kissing the 1st accused and telling her husband the deceased in this case that he would sleep with her that night. Second the fact 2nd accused had a room behind the bar of PW2, the same area where 1st accused and deceased had a house.
80. Thirdly the evidence that a rope possible murder weapon which could have caused the ligature strangulation which caused the deceased death was recovered in 2nd accused room, 2 weeks after incident, more significant the rope was found to have human blood of Group B, similar to deceased blood group, after chemical analysis as per report Pexh 6
81. I find all these factor are circumstantial evidence which when considered holistically create a chain so complete that there is no escape from the conclusion that the 2nd accused was among those who caused the deceased death. The 2nd accused had both the motive to commit the offence in order to sleep with the wife of the deceased. That urge to do so, was strong enough motive to commit the offence.
82. The 1st accused was busy kissing the 2nd accused and supporting his bid to have her against the deceased’s protests and attempts to exert his authority as her husband. It was deceased effort to exercise his authority over the 1st accused that the deceased broke the glasses belonging to Rose, wife of PW2. It was as a result of the same effort that Rose assaulted the deceased on the hand leading deceased to go with PW3 to Kieni Kia Ndege Police Post to report.
83. It is after reporting to the police at around 11.30 pm that he returned to the Bidii Bar and subsequent to which he walked away with the 1st and 2nd accused.

84. PW3, 4 and 12 had already gone home. The 1st accused admits going away with the deceased, while 3rd accused says they parted outside the bar and 2nd accused says he did not know the 1st accused and deceased.
85. I find that deceased was strangled by ligature as per doctors findings, most likely by rope Pexh1. That is the only explanation why the rope had human blood similar to deceased blood group. It is also the only explanation why there was blood on the walls, door and (pacia) curtain in deceased house.
86. I find that 1st accused could not have done it alone. I find 2nd accused was her accomplice. I find that from the totality of the prosecution's circumstantial evidence that the 1st and 2nd accused caused the deceased death.
87. I find that they acted in one common intention at the time they committed this offence.
88. As for the 3rd accused, I find no evidence, direct or circumstantial linking him to the offence. He was 1st accused's brother. He could not have had a sexual motive to eliminate his brother in law as 2nd accused had and there was no evidence of a grudge between them.
89. There is evidence 1st and 2nd accused were drunk having started drinking at 8.30 pm upto way past midnight. Due to length of time they sat drinking, and then behavior, I am inclined to find they may have been intoxicated as to be incapable of control over their actions.
90. For that reason I will reduce the charge against the 1st and 2nd accused from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the Penal Code.
91. I find the 1st and 2nd accused guilty for the substituted charge of manslaughter and convict them accordingly.
92. The 3rd accused is acquitted of the charge of murder contrary to section 203 of the Penal Code under section 322 of the Criminal Procedure Code.

DATED SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF OCTOBER, 2014

LESIIT, J.

JUDGE.