



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE NO. 19 OF 2008

REPUBLICPROSECUTOR

VERSUS

K C CACCUSED

JUDGMENT

1. The accused herein is charged with Murder contrary to section 203 as read with section 204 of the Penal Code. The prosecution case is as follows. The deceased J K N was the second wife of K N (PW2). The senior wife was D K N (PW1). The family lived at [particulars withheld] village even though PW2 worked away from home, visiting every so often. Prior to 25th January, 2008 the deceased had carried on an illicit affair with the accused an infraction for which the traditional sanction is “*malu*”, a form of compensation to the husband of the deceased.

2. On the said date the deceased (J) and a friend D G (PW3) accompanied by the latter's 13 year old daughter K G (PW7) were walking to the village water point. The deceased had a jerry can and a vegetable basket. She had been lent one shilling by PW3 to use in purchasing water. On the way, they were stopped by the accused who aggressively demanded to speak with the deceased privately. PW3 and her daughter proceeded to the water point, filled the water cans and picked the vegetables on behalf of the deceased but she did not rejoin them. PW3 left the deceased's water can and basket at the water point and went home by the same route, but did not see the deceased or indeed the accused.

3. Several hours later, the accused came to PW3's house and stated that his love affair with the deceased had been discovered by the husband of the deceased, that he wanted “*malu*” from the accused; that the accused had therefore taken the deceased to Malindi where he had rented a house for her, and hence she would not be returning to the village. At that point the matter was being treated as a case of elopement and therefore acting on the report of PW1, the assistant chief (PW4) summoned the accused to the office twice. But the accused did not attend. Eventually the matter was reported to the police as the deceased remained at large.

4. On 15th February, 2008 the badly mutilated and decomposed body of J was found in a thicket near [particulars withheld] School. The body had multiple machete cuts and the right arm was missing. Police collected it and launched investigations. Meanwhile the accused left [particulars withheld] for [particulars withheld] village, the home area of his in-laws where he stayed from 3rd February, 2008. He was eventually traced hiding in a forest on 14th September, 2008 and was arrested by members of public after a chase.

5. In his unsworn defence statement the accused told the court that he was a resident of [particulars withheld] and knew J as a neighbour. He said that on 25th January, 2008 he met J

with PW3 and her daughter PW7 and called J aside. That he gave her money and sent her to buy flour and take to his wife; that J agreed and went to the shop informing her companions she would rejoin them later. Thereafter he went on his way to Kilifi and upon returning home later confirmed that the flour was delivered by J and another person.

6. He went on to state that in the days following, J was not seen in the village and an elder came to ask him about her. He repeated to him the incident of the previous encounter with her. He was arrested in mid-September while pursuing his wife in her home of origin. He denied killing J.

7. The facts leading to the disappearance of J are undisputed in one respect: that the accused stopped J and separated her from PW3 and 7 while they walked to their chores on the 25th January, 2008; that he had a conversation with J; that thereafter J disappeared and was found in a thicket, murdered, about twenty days later; and eventually the accused was arrested in another area ([particulars withheld]) in September, 2008.

8. The medical evidence shows that J died from severe multiple cut wounds inflicted by a sharp object, particularly on the head. The body was decomposed to the skeleton. Hence hers was not a natural death.

9. The main issue to be determined herein is the identity of the person who inflicted these injuries. The prosecution evidence against the accused is primarily circumstantial and delivered through PW3 and 7, the last persons to see J at [particulars withheld] alive. According to these witnesses, J remained behind to talk to the accused who had intercepted them as they walked to the village water point.

10. The accused later on the same date at 7.00pm visited PW3. Concerning the visit, PW3 told the court:

“At 7.00pm accused came to my home and asked whether I had filled the water container and picked vegetables for deceased (J). I confirmed. Accused told me to go and collect the items as he had taken (J) away.”

When the witness questioned him, the accused explained that his illicit affair had been discovered by J's husband (PW1) who was to give J to the accused as a wife. Therefore the accused had decided to take J away.

11. It is PW3 who after collecting the water can from the water point briefed J's co-wife PW2 about the matter. Hence initially it was thought J had eloped with the accused. The accused despite being served with summons by a village elder C K (PW6) to attend the area chief failed to do so. He did not refer to this matter in his defence.

12. During cross-examination, PW3 did not waver in any manner. She explained that the delay before reporting to J's co-wife (PW2) was not long. Clearly at the time she, like everybody else believed J to have eloped with her lover, the accused. PW3's evidence also corroborates that of her daughter PW7 who was with the two women when the accused intercepted them, and was present when the accused later visited pW3's home in the evening. PW3 evidence received useful corroboration from the testimony of the deceased's co-wife, PW2. She told her about the two incidents with the accused in similar detail as she told this court. Additionally, in his evidence the accused admits that he was left by PW3 and 7 with J on the fateful day.

13. Despite the incriminating content of the testimony of PW2, 3 and 7, in his cross-examination of the two witnesses accused never canvassed the suggestion that he sent J to buy flour for his wife, itself a ridiculous assertion considering that his affair with J was apparently public knowledge at [particulars withheld] village. He claimed that J was to use a part of his change from shopping for flour to buy water.

14. Besides, PW3 said it is she who gave one shilling to J to buy water when she came asking. And in fact J and PW3 were well on their way to the tap when they came upon the accused. In his defence the accused did not specifically deny that he visited PW3's home on the night of 25th January, 2008 and confessed to have "taken J away." And I believe PW3's testimony that he did visit and spoke these words because PW3 struck me as a witness of truth. But also because it is consistent with the accused's conduct since J disappeared. First he refused to attend the chief's office when summoned. If indeed he had only innocently sent J to run an errand for him, why did he not want to go and inform the chief? Especially since he was aware J was missing.

15. Not only did he avoid the chief's summons, he later ran off to his in-law's place in [particulars withheld]. There he displayed paranoid behavior by denying passage through the home to the in-laws' fellow villagers to the extent that the in-laws, decided to expel him from the home. According to one brother to the accused's wife, M C (PW10) who questioned the accused conduct, the accused explained that he feared that passersby would see him and make reports leading to his arrest. Significantly, that was early in February 2008 before J's body was found. He fled to hide in a forest and later into a church when a group of elders approached him in September, 2008. This is conduct consistent with a person who harbored a guilty conscience over an issue more serious than eloping with a man's wife. He lied to PW3, evidently, that he had accommodated J in Malindi allegedly because the affair had been discovered. The obvious reason was that he was the last person to be seen by PW3 with J alive. And he knew that PW3 had that knowledge. This cannot be other than an attempt to confuse PW3 and to conceal J's death.

16. The allegation to this court that he sent J on an errand to his home is another red herring and a lie in light of what he told PW3 on the fateful night. That J's abandoned water can and the vegetables remained overnight at the water place is a pointer to the fact that J was probably killed on the same day. By the time PW3 and her daughter on their way home passed at the place where the accused and J had been left standing on 25th January 2008, the two were not there. Several hours later the accused told PW3 he had taken J away. On all accounts, by that time J had been already hacked to death.

17. The circumstantial evidence in this case consistently points to the culpability of the accused person, and his defence cannot withstand the overwhelming prosecution case. In order to enter a conviction on the basis of circumstantial evidence, it must point consistently to the culpability of the accused and be incapable of any other hypothesis other than his guilt. There must be no co-existing factors that negate or weaken such inference. The law on circumstantial evidence was settled in the case of **Kipkering Arap Koskei & Ano v R (1949) 16EACA 135** where the court stated:

".....in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused"

Later following **Teper v Reginam (1952) AC 480** the Court of Appeal stated in **Pravin Singh Dhalay v R Cr. 10/97 (UR)** that:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference"

See also **Simoni Musoke v R (1958) EA 715.**

18. The accused knew that he had been found out to be carrying on an illicit affair with J by her husband. Although the husband (PW1) was shy to admit in court he had reported to the area chief (PW4). The customary sanction for such an infraction is "*malu*" a traditional fine, payable to the

woman's husband, in lieu of which the offender (male) is forced to take the partner in the adultery as his wife. It would appear that, the accused was keen to avoid this sanction and hatched a plan to eliminate the supposed source of his troubles. He lured J from her friends and took her to a place where he attacked or had her viciously attacked inflicting fatal injuries. Malice aforethought is evident from the plotting nature of the conduct of the accused and the severity of the injuries sustained by J. Whoever inflicted them intended to cause grievous harm to her if not kill her altogether. He succeed in the latter.

19. I am satisfied in this case that the prosecution evidence meets the necessary legal threshold and that the prosecution has proved its case against the accused beyond reasonable doubt. The accused is convicted as charged.

Delivered and signed at Malindi this **10th** day of **May, 2013** in the presence of the accused, Mr. Mayaka holding brief for Mr. Mouko, Mr. Nyongesa for the State.

C. W. MEOLI

JUDGE

COURT

Record and sentence on the 30th May, 2013 at 10.00am

C. W. MEOLI

JUDGE

30-5-2013

Before Lady Justice Meoli – C W

Mr. Nyongesa for Statements

Accused – present

Mr. Mouko for accused absent

Court clerk – Evans

COURT – Defence counsel absent. To be informed to attend record and sentence on 4-6-13

C. W. MEOLI – J

4-6-2013

COURT – record and Sentence on 5-6-2013 so Mr. Okuto who is present can take instructions as Mr. Mouko no longer attends the trial.

C. W. MEOLI - J

5-6-13

Before C W Meoli

Mr. Nyongesa for Statements

Mr. Okuto for accused

Accused present

Court clerk – Evans

MR. NYONGESA – Treat as first offender. We do not have record.

C. W. MEOLI – J

MR. OKUTO -

Accused is 48 years old and has nine children dependent on him. He has been in custody for four years. He is remorseful and seeks leniency. He seeks court's discretion.

C. W. MEOLI - J

NOTES ON SENTENCE

Accused has been treated as a first offender. He is said to be remorseful. It is true the court has discretion in sentencing but it must be exercised judicially. In this regard the facts of each case must be taken into account.

The accused in this case not only engaged in an extra-marital affair with the deceased: when he was found out and asked to pay *malu*, he plotted to kill the deceased. The deceased died a painful death – the body had nineteen wounds inflicted with a machete. This cruelty on the part of the accused is hard to understand. I cannot possibly see any good reason to give him a lesser sentence than what he deserves. This mindless blood letting is all too common in this jurisdiction.

C W MEOLI – J

SENTENCE

Accused to suffer death in the manner authorized by law.

Right of appeal in fourteen (14) days.

C. W. MEOLI

JUDGE