



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 6 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL RIBCKE ROBEL.....ACCUSED

JUDGMENT

The accused **MICHAEL RIBCKE ROBEL** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence were that:

“On the 8th day of December, 2009 at Vescon Estate Bamburi in Mombasa District within Coast Province murdered ESTHER ELSI IGOKI MUNYI.”

The accused a German national was first brought before the court on 17th May, 2010. Efforts were made to trace an interpreter and plea was not taken until 18th November, 2010 on which date the information was read out to the accused and he entered a plea of not guilty. His trial commenced before **HON. LADY JUSTICE GRACE NZIOKA** on 8th March, 2013 at which trial the prosecution was led by the learned state counsel **MR. ONSERIO**. Hon. Justice Nzioka heard a total of seven (7) witnesses after which she became unavailable to continue with the hearing of the case. I then took over the case and the accused through his lawyer **MR. ONJORO** waived his right to a *de novo* hearing opting instead to proceed from where the first trial judge had stopped. I therefore took the evidence of the remaining two witnesses making a total of nine (9) prosecution witnesses.

Briefly the facts of the case were as follows:

The accused a German National and his Kenyan wife (now the deceased) **ESTHER IGOKI** lived together there in a flat in Vescon Estate in Bamburi within Mombasa County. **PW1 FOCUS IBRAHIM** told the court that he operated a butchery on the ground floor below that flat and states that he knew the couple very well as they were his customers. On 8th December, 2009 **PW1** went to open up his business as usual and cleaned up his butchery. He noted a persistent foul smell in the butchery. He suspected that the foul odour may have been due to uncleanliness in his butchery and he washed it a second time. This did not get rid of the odour. **PW1** decided to investigate the source of the smell. He went upstairs and

peeped into the flat occupied by the accused and the deceased and he noticed a lot of flies inside the flat. At that point **PW1** decided to alert the caretaker. Together with the caretaker **KEVIN MUDAKI PW3** they knocked on the door and the accused opened. They immediately realized that the foul smell was emanating from that flat. They asked the accused to let them in but he declined. The two then reported the matter to the police for further action. **PW8 CORPORAL LABAN CHILUI** who was the investigating officer of this case confirms that on 8th December, 2009 a report was made at Bamburi police station regarding a foul smell emanating from one of the flats at Vescon Estate. He and **PW9 INSPECTOR SAMUR ATHMAN** went to the scene. Upon arrival they knocked but nobody opened the door. The police noticed flies around the ventilation above the door. **PW9** scaled the door. He saw the accused inside the flat but upon seeing him the accused darted into a different room. Police broke down the door and gained access to the flat. A bizarre scene met their sight. They found the accused lying on a bed next to the badly decomposed body of the deceased. Upon trying to pull the accused off the bed police noticed fresh blood flowing from his chest and realized that the accused had stabbed himself in the chest. The police bandaged his wounds and recovered a knife with fresh blood stains next to the bed. They then rushed the accused to hospital for treatment. They also removed the body of the deceased to the mortuary. Other exhibits including the passport of the accused, the beddings, and the clothes accused was wearing were all retrieved and were taken to the police station.

PW5 SERGEANT MICHAEL ODUOR a scenes of crime officer was called in. He took a series of photographs at the scene which photographs together with his signed report were produced as exhibits in the matter **Pexb1**. An autopsy was conducted upon the body of the deceased and upon completion of police investigations the accused was charged with the offence of murder.

At the close of the prosecution case the court found that the accused had a case to answer and he was called upon to give his defence in line with section 306(2) of the criminal Procedure Code. The accused elected to give an unsworn defence and confirmed that he lived at Vescon Estate with the deceased who was his wife. He further admits that he and the deceased were together in their house at the material time. However the accused explains that on 5th December, 2009 after a drinking spree with the deceased and her brother, they later came home and accused claims that as he went to sleep he heard the deceased talking to a strange man. He claims that after a brief argument he fell asleep and has no recollection of what occurred thereafter. He claims that when he regained his senses he was in hospital. It is now upon this court to render judgment in this matter.

The offence of murder is defined as follows by section 203 of the Penal Code:

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

Arising from this definition are the three crucial ingredients of the offence **all** three of which must be proved beyond a reasonable doubt by the prosecution in order to sustain a charge of murder. These are

1. Proof of the fact and the cause of death of the deceased.
2. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused – this constitutes the ‘*actus reus*’ of the offence and lastly
3. Proof that said unlawful act or omission was committed with malice aforethought – this constitutes the ‘*mens rea*’ of the offence.

I will now proceed to analyze the evidence before this court in line with the above three ingredients.

The fact of the death of the deceased is not in any doubt. Two police officers **PW7** and **PW9** told the court how upon breaking into the flat at Vescon Estate they recovered the badly decomposing body of a female African which body they removed to the mortuary. The recovery of this body inside that flat was confirmed by **PW1** and **PW3** who was the caretaker. **PW5** the scenes of crime officer told the court that he went to the scene and took photographs of the body. The said photographs were produced as exhibits in court and made for very distressing viewing. They depict the bloated body of an African female dressed in a silver/black top and black tights lying on a bed a top a blue mattress. The body was clearly in

an extreme state of decomposition. Indeed **PW9** told the court that the skin was already peeling off the body. **PW2 JOSEPHAT KARIUKI MUNYI** told the court that the accused was his sister and confirms the accused was her husband. He stated that on 9th December, 2009 after receiving an urgent call he rushed to the scene where he found police removing the body of his sister from the house. The next day he went to the mortuary and identified the body as that of his sister whom he names '*Esther Elsi Igoki Munyi*'. Therefore as stated earlier the fact of the death of the deceased is not in any doubt.

The cause of death is however less clear. There was no eyewitness to the events leading to the death of the deceased. All the witnesses state that the accused and the deceased lived alone in their flat. An autopsy was conducted on the body by **PW7 DR. K. N. MANDALYA**, a consultant pathologist based in Mombasa. His pertinent findings were as follows:

- Extensive decomposition of the body
- Black coloured penis like object made of rubber (vibrator) lodged at the opening of the vagina
- Swollen outer genitalia
- Most internal organs decomposed
- Brain had liquefied due to putrefication and was oozing out of the head
- Moderate amount of mucosa congestion around the vocal cords

PW6 in his report exhibited in court **Pexb5** opined that the cause of death was "*Due to features suggestive of asphyxiation due to pressure on the neck*". **PW7** went on to explain his findings as follows:

"The mucosa [around the vocal cords] was suggestive of pressure on the neck and that led to the conclusion as to the cause of death."

However the pathologist did concede that he experienced great difficulty in conducting the autopsy due to the extensive putrefication of the body. He talks of a '*suggestion*' of asphyxia. His evidence is not entirely conclusive as to the cause of death. **PW7** found Asphyxia to be the likely cause of death. It is pertinent that under cross-examination by defence counsel the doctor did concede that:

"No obvious injuries were seen on the neck. There was no strangulation. The mucosa congestion can also be caused by an infection....."

This will become relevant when discussing the question of *actus reus*. In his evidence the investigating officer **PW8** admitted that:

"The pathologist recommended that further tests be done in order to establish the cause of death."

There is evidence that further testing was done. **PW6 JOHN NJENGA** the government analyst told the court that he received certain items which included the intestines, liver, kidney and blood samples of the deceased for analysis. Upon conducting an examination he found no traces of poison or toxic elements in the exhibit. This therefore rules out the possibility that the deceased may have met her death through poisoning. This court appreciates that given the state of putrefication of the body the pathologist may have been hampered in his attempts to carry out a thorough and conclusive post mortem examination. If indeed the deceased had met her death by strangulation then the doctor obviously would have noticed signs of strangulation e.g. marks on the neck. His assertion that he saw no marks on her neck and his clear statement that there was "**no strangulation**" raises doubt as to whether strangulation did actually occur. As the doctor testified asphyxia can result from several factors including choking and vomiting. In light of this evidence I find that the cause of death remains uncertain. The law requires that **all** ingredients of the offence of murder be proved beyond a reasonable doubt. This standard has not in my view been met regarding the cause of death.

The next ingredient requiring proof is the fact that it was the accused who caused the death of the deceased by an unlawful act or omission. Taking the cause of death as opined by the pathologists to be asphyxia what proof if any has been tendered that it was the accused who committed an act leading to the deceased's death by asphyxia. The concise oxford dictionary defines the term '*Asphyxia*' as "**lack of**

oxygen in the blood causing unconsciousness or death”. Therefore some factor or some act must have led to this loss of oxygen in the blood of the deceased which ultimately led to her death. As stated earlier there was no eye witness to the events leading up to the death of the deceased. By all accounts the accused and the deceased were alone inside their house. In his defence the accused gave a very long and convoluted tale starting from 5th December, 2009 three (3) days before the body of the deceased was recovered. The long and short of the defence is the suggestion by the accused that there was a mysterious third person in their house and who may possibly have killed the deceased. However, I am not persuaded that there is any truth to this defence. Where did this mysterious third party vanish to. When police arrived the house was found locked from inside. How could this stranger have possibly exited the house and managed to lock the door from the inside – this is an impossibility. Secondly, the whole narration about a drinking spree from 5th December, 2009 involving the accused, the deceased and the brother to the deceased is in my view a mere afterthought given that nothing of the sort was put to **PW3** the brother of the deceased during cross-examination. Lastly, the statement by the accused that he fell asleep and blacked out only to regain his senses in hospital is also nothing but a pack of lies. There is evidence from **PW1**, **PW3** and the police officers **PW8** and **PW9** that they all saw the accused awake and alert when they got to the house. **PW1** and **PW3** stated that they spoke to the accused and he responded to them. **PW9** stated that when he scaled the door and peeped inside he saw the accused run into one of the rooms inside the house. Accused could not have been speaking and moving if as he claims he was in a state of unconsciousness I therefore reject his defence in its entirety.

Having said that the law is very clear that the onus is on the prosecution to prove the guilt of the accused. The accused is under no legal obligation to prove his innocence. The fact that it is shown that the accused was alone with the deceased at the time she met her death would lead to the inference on the basis of ‘**circumstantial evidence**’ that he had a hand in her death. In order to render a conviction on circumstantial evidence the court would have to be convinced that there was no other possible or logical explanation for the death of the deceased. In other words all other possible scenarios must be excluded. This is **not** the case here. As I have stated earlier, the finding of death by asphyxia does not automatically point to the accused as the culprit. No strangulation marks were noted on the neck of the accused. **PW6** did also concede under cross-examination that asphyxia could result from causes other than strangulation. **PW7** stated that:

“A choking can cause asphyxia, even inhalation of vomit, but not food stuck in the throat. The choking can be common with people who take alcohol, not necessarily a lot of alcohol”

There exists the very real possibility which possibility has not been sufficiently excluded, that the death of the deceased though tragic could have been accidental from choking. If indeed the accused had strangled and killed the deceased then he is more likely to have made a run for it – he would not have remained at the scene in the house with her decomposing body until police came and found him there. As a court I harbour serious doubts as to whether in fact the accused did in fact strangle and kill the deceased. The benefit of these doubts must be decided in favour of the accused.

Even if this court were to proceed on the basis that the *actus reus* of the offence of murder had been satisfactorily proven against the accused, the prosecution must tender proof beyond a reasonable doubt that the accused acted with malice aforethought i.e. that he was possessed of the requisite *mens rea* for the offence of murder. Here the question of the sanity of the accused which came up at the beginning of this trial comes into play. Section 11 of the Penal Code Cap 63 provides:

“11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”

Does the presumption that he was at the material time of sound mind hold true for the accused? When the police arrived at the scene they found the accused with serious penetrating wounds to the chest. It later transpired that he had tried to commit suicide. The knife he used was recovered at the scene and was produced as an exhibit in court. The P3 form filled out in respect of the accused noted that his appearance was “*sick looking and depressed*”. The record indicates that at the initial appearance of the accused before the High Court on 18th November, 2010 the psychiatrist **DR. MWANG’OMBE** gave evidence.

He stated that the accused had stabbed himself with a knife. The psychiatrist testified that:

“He [the accused] was mentally disoriented and communication was poor. He switched between German and English. He suffered mental illness. I put him on medication for review after 3 weeks. In my opinion he was not fit to plead.....”

Therefore upon an initial psychiatric assessment after his arrest the accused was found to be mentally unstable and was found not fit to plead. This assessment in fact aborted the initial trial and it is only much later after accused had received requisite treatment, and had been admitted at Coast Provincial Hospital for three (3) months, that he was re-assessed and found fit to plead. It is pertinent that the mental state of the accused was only found to have stabilized **after** a course of treatment. At the time of his arrest the accused was found by a qualified medical practitioner to be suffering from mental illness. Indeed for a man to remain holed up in a house with a badly decomposing, stinking dead body is clear evidence of an unsound mind. The accused action of lying on the same bed as his dead wife’s body and stabbing himself is further evidence of mental instability. Given these facts there is the very real possibility that the accused may have been suffering from mental illness long before his arrest and the discovery of the deceased’s body. Once again this probability has not been sufficiently excluded by the prosecution. A person who is of unsound mind is incapable of possessing the malice aforethought required to prove murder. Section 12 of the Penal Code provides:

“A person is not criminally responsible for an act or omission if the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

The only way this court would have been able to know the nature and the extent of the mental incapacity of the accused and whether such mental incapacity may have in any way affected his actions prior to his arrest would have been through expert medical testimony adduced from the psychiatrist. However, the psychiatrist was never re-called to expound further on his findings. In my view this was remiss on the part of the prosecution. The psychiatrist made an initial finding that accused was of unsound mind. Later a report dated 1st December, 2012 indicated that the accused was fit to plead. The prosecution ought to have re-called the psychiatrist in order to expound on these findings. As it is the possibility that the accused was in an unsound state of mind during the time of the incident, has not been excluded. Doubt has arisen regarding the mental status of the accused. It is worth repeating that the onus lies squarely on the prosecution to prove that at the time of the incident the accused was of sound mind and was capable of formulating the malice aforethought required to prove the offence of murder. In my view the prosecution have failed to prove this aspect of the offence to the required standard in law. Once again the benefit of doubt must be awarded to the accused. Based on the foregoing I find that the state have failed to prove this charge beyond a reasonable doubt. I therefore enter a verdict of ‘*Not Guilty*’ and accordingly I acquit the accused. Accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered in Mombasa this 7th day of November, 2013.

M. ODERO

JUDGE