REPUBLIC OF KENYA

High Court at Meru

Criminal Case 42 of 2010

REPUBLIC ……..……..PROSECUTION
VERSUS

JOHN KOBIA MARURE……...……...……ACCUSED

J U D G M E N T

The accused JOHN KOBIA MARURE is charged with murder Contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the night of 11th and 12th July, 2010 at Mbarau village, Mucuune Sub-location, Kitheo Location in Tigania West District jointly with others not before the court murdered PRISCILLA KARIMI.

The prosecution called a total of five witnesses. The brief facts of the prosecution case are that the accused and deceased sat together at an illicit brew drinking den. The two of them walked out of the den together with PW2,Kiraithe and Ngoya at 7.30p.m

The group crossed the river and reached Ngoyai's home. Ngoyai entered his home. The accused and deceased insisted on being left together. PW2 Salesio, and Kiraithe proceeded to their homes. The next morning the body of the deceased was found inside a shamba next to Ngoyai's farm. A postmortem on the body of the deceased revealed she died of head injury and that she had suffered multiple lacerations on the head and neck and fractures and intracranial bleeding and fractures of both temporal bones. These findings were consistent with the deceased having been murdered. The report was exhibit 1.

The accused in his sworn statement put forward an alibi as his defence. He said he was at his home on the night of the 11th and 12th July, 2010. He said that he learnt that the deceased was missing from PW2 the next morning. He said that PW2 asked him if he had seen Kirimi the deceased. He said he was attacked by PW2 and the sons of the deceased and that members of public are the ones who saved his life. He denied the charge.

In cross-examination the accused admitted seeing the deceased on the 11th at the drinking place. He however denied ever speaking to her that day.

The accused is facing a charge of murder. The prosecution must establish that the accused person caused the death of the deceased by some unlawful act or omission. The Prosecution must adduce evidence to prove that the act or omission was motivated by malice aforethought. S.203 of the Penal Code gives the ingredients of the charge of murder as follows:

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

Malice aforethought is an important ingredient for the offence of murder to be proved. Section 206 of the Penal Code provides the circumstances which constitute malice aforethought as follows:-

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

Mr. Muthamia for the accused urged that the accused had denied the charge although admitting they drank together that day. Counsel urged that the case was a fabrication as a result of a land dispute.

Mr. Mungai, learned State Counsel submitted that the prosecution had adduced sufficient circumstantial evidence which pointed a finger at the accused as the one who murdered the deceased. Mr. Mungai urged the court to consider the evidence of PW3 which brought out a conduct of a guilty mind against the accused.

The evidence against the accused is three-fold. There is the evidence of PW2 Salesio that the deceased was last seen alive at about 7.30 p.m on the night of 11th July, 2010 in the company of the accused. The second piece of evidence against the accused is that of PW1 JANE KARUGE who was a nieghbour of the accused. It was PW1's evidence that at 1am on 11th July, 2010 the accused went knocking her door. When she confirmed who it was, as she knew the accused, she opened her door. The accused, after learning that PW1's husband was not home that night, told PW1 that there was a lady who had accosted him and that he had beaten her that he suspected she was dead.

The third piece of evidence was by PW3 Catherine Kiritu who said that she was married to a brother of the accused. PW3 said that on 11th July, 2010 at 2a.m, her sister-in-law JANET EKWENE, who was married to accused other brother went to her running. She told her that the accused was trying to commit suicide. PW3 said that both of them went running. PW3 testified that she climbed the tree and cut the rope from the branch where it had been tied while Janet cut the rope from around the neck of the accused. The two sisters-in-law escorted the accused to his mother and that when he was asked what his problem was, he said nothing and instead he started crying.

In regard to the first piece of evidence against the accused as shown by PW2, the accused was the last person seen with the deceased before she was found dead. For this evidence a rebuttable presumption arises. Section 119 of the Evidence Act as read with S.111 of the same Act applies. The two sections provide:-

"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."

" 111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within an 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 a fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

The accused faced a rebuttable presumption that since the deceased was last seen alive in his company, he had a statutory burden to explain either how the deceased met her death or alternatively give an explanation of how they wanted company.

The accused in his sworn defence admitted during cross-examination that he had been drinking with the deceased on the afternoon of the day she was last seen alive. The accused denied going away from the drinking den in her company.

PW2 was a credible witness. He had a good demenour. He was an elderly man. He impressed me as the one who was worthy of belief. He told the court that he, Kiraithe, Ngoyai accused and deceased walked out of a drinking den together at 7.30 p.m on 11th . PW2 testified that the accused and deceased were left together near Ngoyai's shamba. Next morning the deceased's body was found in the shamba next to that of Ngoyai.

PW2 was telling the truth, it was in the accused interest to explain either how the deceased met her death or how they parted ways. The accused gave no explanation either way. He did not discharge the statutory burden placed on him by Ss.111(1) and 119 of Evidence Act.

The evidence of PW1 and 3 should be considered alongside that of PW2. PW1's evidence was accused went to her house asking for her husband. The accused then disclosed to PW1 that he had beaten a lady who had accosted him and that he suspected she had died. This was five hours after PW2 left the deceased in the company of the accused. The additional fact that the body of the deceased was found in a shamba next to where PW2 had last seen both accused and deceased talking is no coincidence. It is part of the same chain of events. The deceased was found dead still at the same place where PW2 and others left the deceased and the accused and therefore the same place where she met her death. The accused confession to PW1 was he had beaten a woman to death. That also ties with the evidence of PW2 that he was in the company of a woman when PW2 left him at 7.30 p.m. The fact that the same woman was found dead near the same place completes the chain in sequence of events.

The evidence of PW3 shows that about one hour after leaving PW1's home, the accused proceeded to his home and hang himself. If it was not the quick action of PW3 and her sister-in-law, one JANET EKWENE, the accused may have died. His conduct when asked why he was trying to take his life is further a proof of a person with a strong guilty mind, strong enough to drive him to try to take his own life.

The evidence of PW1, PW2 and PW3 put together forms of strong circumstantial evidence against the accused. **In ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** at page 5 the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii)the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

There was no eye witness to the murder in this case. The circumstantial evidence relied upon by the prosecution is very clear and shows clearly that the accused was the one who had both the opportunity the time to commit this offence. The circumstances from which the inference of guilt was sought to be drawn were cogently proved as demonstrated herein above. The circumstances unerringly points to the accused guilt. I find that the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

I find that the prosecution has proved the case against the accused person for the offence charged beyond any reasonable doubt.

I find the accused guilty as charged and convict him accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF OCTOBER, 2012.

J. LESIIT
JUDGE