



REPUBLIC OF KENYA

High Court at Embu

Murder Case 5 of 2008

REPUBLICPROSECUTION

VERSUS

VENASIO KIARAGO MWANIKI.....ACCUSED

J U D G M E N T

VENASIO KIARAGO MWANIKI hereinafter referred to as the accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that the accused on the night of 11/5/2008 at Gaturi Village North Kianjuki Sub Location Gaturi North location in Embu district within Eastern Province murdered Augusta Ruguru.

The Prosecution case is that the deceased was the house help of PW5 who is the mother to the accused. They lived in one home. There was another worker called Martin Muturi. The 11th May 2008 was a Sunday. The deceased went to church but never returned home. The next morning her body was found on a road not far from home. PW1 had received a report on 11/5/2008 from the accused's wife that she had left the accused fighting with the deceased. She never got to see the deceased alive again.

The statement under inquiry taken by PW6 was rejected by the court as it was not taken by a Magistrate. PW7 stated that him, the investigating officer went to the accused's home in the company of the accused on 13/5/2008. They entered his house and looked for the murder weapon. It was about 4 p.m. Upon searching they found a hammer between the bed and something else. Under the bed was fresh blood and a pair of slippers. PW7 collected the hammer (EXB.3), slippers (EXB.4) and sample of the blood. There was no blood on the hammer but there was blood on the base outside of the slippers. He did not see PW5. The accused told them the bed in question was the deceased's bed and the house was also hers. There were other houses on the compound.

PW9 Dr. Koremo who produced the postmortem report (EXB.7) indicated that the cause of death was cardiorespiratory arrest due to injury to the skull. The body had bruises around the neck, upper back, left thigh; left side of head had skull fractures and cuts on skull. The accused was found mentally fit to stand trial by PW10 Dr. Thuo.

PW11 the investigating officer said after interrogating the accused, his wife and another separately, he proceeded with PC Salim to the scene where they found the following:-

- ***Stains of blood on the kitchen floor.***
- ***A lot of blood under the accused's bed. He took samples of this blood.***
- ***A blood stained hammer (EXB.8) under the bed.***

- *A rug with blood.*
- *A pair of deceased's slippers (EXB.4)*

After a few days he went back to the scene with PC Salim. At the river 500 meters from the home he recovered the following

- *2 blankets (EXB.9)*
- *Trouser (EXB.10)*
- *Shirt (EXB.11)*

All these were blood stained. The body was recovered in a shamba not far from accused's home. The recoveries were being made in the accused's presence. This witness said there was only one house on that compound. He then sent the blood he had recovered together with all other exhibits to the Government Chemist. He sent the deceased's blood sample to the Government Chemist. He however did not do the same for the accused.

PW4 the Government Analyst said the office received the following items on 30/5/2008.

“A” A hammer

“B” A soiled sample

“C” Blood sample of deceased

“E” A dirty cream trouser of the accused

“F” A white/blue striped shirt of the accused

“G” Blue hat

“H1” A grey blanket with black stripes

“H2” Brown/blue/grey blanket of the accused

“X” white woolen biker

“W” pair of orange slippers.

The 1st report was prepared on 13/5/2008 and sent on 17/5/2008. The 2nd report was done after the exhibits were returned to them on 30/7/2009. His findings were:-

1. *The hammer, blue hat and slippers were slightly stained with human blood.*
2. *Soil sample and woolen biker were moderately stained with human blood.*
3. *The trouser, grey blanket, brown blue grey blanket had no blood stains.*
4. *Report showed the deceased's DNA profile.*
5. *No DNA profiles generated from the blood stains on the hammer, soil sample, hat, biker and slippers.*

However, the blood stains from the hammer, soil sample, hat, slippers were found to be from a female origin.

He prepared a report on 15/4/2010 (EXB.1). The analyst's report (EXB.2) indicated the finding as follows:-

- ***The hammer, hat and left slipper were slightly stained with human blood of blood group AB.***
- ***The soil sample, biker were moderately stained with human blood of group AB.***
- ***The trouser and blankets were not stained with blood.***
- ***The blood sample of the deceased was found to be of group AB.***

He stated that the blood sample of the accused ought to have been submitted as a sample (Report EXB.2). The analysis was done twice because their machines had broken down in the first instance.

The accused gave an unsworn statement in which he stated that he saw the deceased on 10/5/2008. He was at the shamba while she was washing clothes at the river. On 12/5/2008 was a Sunday and they never met. He went to church and they were not going to the same church. The deceased was his mother's house girl. The deceased never returned that Sunday. On 11th May 2008 he woke up at 6 a.m. As he took tea Mureithi told him the body of the deceased was at Kaireri. He informed his mother. They went to the scene. When the body was taken away at 1 p.m. He was arrested. He denied having gone for any search with PW11. He only saw the exhibits here in court.

Mr. Njiru Mbogo's main submission is that the evidence on record did not connect the accused with the murder of the deceased. He said the most crucial evidence was that of the Government Analyst (PW4) but was unreliable as it was full of material contradictions and therefore raised very serious issues. And he further submitted that the Prosecution did not prove the guilt of the accused beyond reasonable doubt. The main ingredients of murder were not proved he said.

This is now the case before Court for determination. Section 203 of the Penal Code defines 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 is further defined in Section 206 of the Penal Code as follows:-

- (a) ***An intention to cause the death of the deceased or any other person; or***
- (b) ***An intention to cause grievous harm to the deceased or any other person. It is immaterial that the person targeted is not the one who is finally killed or injured.***
- (c) ***An intention to commit a felony.***

For a charge of murder to be proved three things must be established and these are:-

- i. ***The death of the deceased and the cause of death.***
- ii. ***The accused committed the unlawful act which caused the deceased's death .***
- iii. ***That the accused had malice aforethought.***

The witnesses herein saw the dead female's body. And the cause of death was cardiorespiratory failure secondary to severe head injury secondary to blunt trauma of the skull. Therefore the issue of death and its cause have been established by the prosecution. The 2 issues for determination are if the accused caused the death and if malice aforethought has been established. From the evidence before this Court there is no witness who came up to say he/she witnessed the killing of the deceased. The evidence is therefore purely circumstantial. What does the law say about circumstantial evidence? In the case of ***REPUBLIC -VS- KIPKERING ARAP KOSKE [1949] EACA 135 at 136*** the Court held that in circumstantial evidence;

“In order to justify the inference of guilt the inculpatory facts must be incompatible with the the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonably hypothesis of innocence is on the Prosecution and always remains with the Prosecution. It's a burden which never shifts to the party accused”.

The evidence that has been relied on by the Prosecution in this case is that of the police officers P.W.6, P.W.7 and P.W.11. P.W.6 took a statement of the accused under inquiry. This statement was however rejected by the Court.

P.W.7 stated that he went to the scene with P.W.11 and the accused and they made some recoveries. However P.W.11 in his evidence talks of having gone to the scene twice with P.C. Salim and the accused only. The said P.C. Salim did not testify. P.W.7 says they were led to the house by the accused on 13/5/2008 and they recovered;

1. ***A hammer with no blood***
2. ***Fresh blood under the bed***
3. ***A pair of slippers also under the bed***
4. ***The accused told them the bed in question belonged to the deceased and same to the house.***
5. ***There were other houses on that compound.***

On the other hand P.W.11 states that he went to the scene with P.C. Salim and accused on 12/5/2008. This is what they found;

- i. ***Stains of blood on the kitchen floor***
- ii. ***A lot of blood under accused's bed. He took a sample of the blood.***
- iii. ***Blood stained hammer under the bed (EXB 3)***
- iv. ***A rug with blood (EXB 8)***
- v. ***A pair of deceased's slippers (EXB 4)***

This witness again went back with P.C. Salim a few days later when he recovered items belonging to the accused. These were;

- i. ***2 Blankets (EXB 9)***
- ii. ***1 trouser (EXB 10)***
- iii. ***1 shirt (EXB.11)***

The evidence of P.W.7 and P.W.11 does not tie up together on this issue of recoveries. P.W.7 says the recoveries were done on 13/5/2008 while P.W.11 says it on 12/5/2008 at night.

- P.W.7 says the hammer they recovered had no blood stains while P.W.11 says it had blood stains.
- P.W.7 says the house and bed where all these items were recovered belonged to the deceased. But P.W.11 says the house and bed belonged to the accused.
- P.W.7 does not make mention of recovery of a hammer stained with blood. There are other items

like a hat, biker, blue stripped shirt which were also sent for analysis by P.W.11 alongside EXB 3, 4, 8 9, 10, and 11. It's not clear from where they came from.

The accused has in his defence denied ever taking any officer to his home. He said he was seeing those exhibits in Court for the first time. Nothing called an inventory was ever prepared and produced by P.W.7 or P.W.11. An inventory would have sorted out the mess P.W.7 and P.W. 11 found themselves in. In the midst of all this can the 2 witnesses indeed convince this Court that they recovered these items from where they say they did?

Assuming for a minute that the items were properly recovered and sent to the Government Chemist for analysis, what were the results?

P.W.4 the Government analyst produced 2 reports EXB 1 and 2. The 1st report was prepared on 13/5/2008 and sent to Embu on 17/5/2008 while the exhibits were allegedly received at the Government Chemist on 30/5/2008. In his report he found that the hammer (EXB.3), Hat, left slipper (EXB 4) were slightly stained with human blood of group AB.

- the soil and biker were moderately stained with human blood of group AB.
- The trouser (EXB 10) and shirt (EXB 11) blankets (EXB 9) were not stained with blood.
- The deceased's blood was of blood group AB.

He further explained that on 30/7/2009 the exhibits earlier received and returned were again received with instructions that they be re-examined. He complied and did the 2nd report. The gist of the report is that No DNA profiles were generated from the blood stains on the hammer (EXB 3), soil sample, Hat, biker and slippers (EXB.4). However the blood stains from the hammer, soil sample, blue hat, a pair of slippers were found to be from a female origin. It does not indicate if it was from the deceased. It's also to be noted that no blood samples were taken from the accused for analysis. P.W.4 indicated that this omission was a serious one. Even if the report had shown that the blood stains on the items were of the deceased I would still come back to the issue of how these items were recovered. For example where was the soil sample from? And the hat, blue stripped shirt, blankets etc. How did they know that these items belonged to the accused? There was no inventory to show how and when these items were recovered and if it was in the presence of the accused? Who signed for them?

After a through analysis of both the evidence of the prosecution and defence of the accused I have come to the conclusion that the investigation in this case was very poorly done. And these are my reasons for saying so.

- P.W.1 had information that the accused and the deceased had fought on the day before the recovery of her body. This was never investigated.***
- The casual manner in which the recovered exhibits were handled. No inventory was prepared to show what was recovered, how and when and by who.***
- Why the investigation officer did not present the accused before a magistrate or qualified police officer to record a statement.***
- Failure to take the accused's blood sample for analysis.***

With the above gaping holes in the prosecution case there is no way a Court of Law properly directing its mind to the Law and evidence can convict the accused.

I do find that the prosecution has failed to discharge its duty of proving its case beyond reasonable doubt. For my part I do find the accused not guilty of murder and acquit him under section 322(1) Criminal Procedure Code.

Orders accordingly.

DATED AND DELIVERED AT EMBU THIS 1ST DAY OF OCTOBER, 2012.

**H.I. ONG'UDI
J U D G E**

In the presence of:-

Ms. Macharia for State

Mr. Okwaro for Njiru Mbogo for Accused

Njue CC