



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU

(OMOLO, WAKI & NYAMU, J.J.A)

CRIMINAL APPEAL NO. 521 OF 2011

BETWEEN

HASSAN WAFULA 1ST APPELLANT
JAMES NGIRINE 2ND APPELLANT
HARON MUTWIWA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kericho (Kariuki, J) dated 1st February, 2011

In

H.C. Cr. C. No. 13 of 2009)

JUDGMENT OF THE COURT

The three appellants, Hassan Wafula (1st appellant), James Ngirine (2nd appellant) and Aron Mutwiwa (3rd appellant), were all police officers attached to Mogogosiek Police Post. The three were tried and convicted on a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code. Upon conviction, Mr. Justice G. B. M. Kariuki who tried them at Kericho duly sentenced each one of them to death. The particulars contained in the Information upon which they were tried had alleged that on the 25th day of February, 2009 at around 6.00 a.m. at Mogogosiek Police Post in Bureti District of Rift Valley Province, the three appellants, together with a fourth officer who was acquitted, had jointly murdered J.C.K, hereinafter “*the deceased*”.

On the 24th February, 2009, the deceased had been taken to the police post by one Mrs. Hellen Chepkemoi Rono (PW2) on an allegation that the deceased had obtained some money from Hellen under false pretences. The deceased was locked up in the police cells at the post and in the morning of 25th February, 2009, police officers, among them the 2nd and 3rd appellants took the deceased to a nearby dispensary. Rose Chepngeno Langat (PW3) was a nurse at the dispensary and upon looking at the deceased, she found no pulse and told the police officers that the deceased was already dead. The body was then taken to Kapkatet District Hospital where Dr. Ben Kiplangat Korir (PW12) performed the post

mortem on the body on 27th February, 2009. The post mortem report produced by Dr. Korir showed that the cause of death was *“Cardio respiratory failure following strangling – Not likely to have been self-inflicted. Also probable rape.”*

When cross-examined on the assertion that the “strangling” could not have been self-inflicted and even in his evidence in chief, Dr. Korir explained:-

“I opined that the strangling could not have been self inflicted. The cause of death was respiratory failure following strangling . Perhaps I should not have said in the post mortem report that the deceased could not have strangled herself. I could not tell from the examination of the injuries on the body whether the deceased strangled herself or whether somebody else strangled her. All I can say is that the deceased died due to respiratory failure due to strangulation but I cannot state who strangled her. I also found that probably there was rape because of the laceration on the vagina. Laceration on the vagina could not necessarily be caused only by rape.”

The issue of whether the deceased had been strangled in the police cells by the appellants or whether she had strangled herself arose because in the evidence of the prosecution witnesses, they had said that the deceased had previously attempted to commit suicide. This was apparently because she had financial problems or because she suspected that she had been infected by HIV virus; as some witnesses testified that her husband had died of AIDS.

The first witness to raise the issue of suicide was Hellen, though we must point out straightaway that this witness had a motive in raising that issue. It was her (Hellen) who had taken the deceased to the police post and she would obviously be interested in clearing her name from blame arising from the death. When cross-examined by Mr. Wachakana who represented the 1st appellant at the trial, Hellen said:-

“I had known J.C.K, the deceased for three months. Her husband had died. I do not know the number of children the deceased had. I know David Arap Langat. He was the area chief. I knew him. I could ask for his assistance. I knew J the deceased had financial problems. J, the deceased, had gone to the SACCO for three days and seemed to have a problem as she wept. Chief David Arap Langat gave the deceased Shs.9000/- while I gave J 4000/- J, the deceased told me she expected 470,000/- from the SACCO. She told me this while with David Arap Langat. It was Chief David Arap Langat who went to the SACCO. He told me that J, the deceased had no money from the SACCO and she was not expecting any money from the SACCO. -----”

Apparently the charge of obtaining money by false pretences arose from the allegation that while asking Hellen for the Shs.4000/- the deceased had said she would be receiving Shs.470,000/- from a SACCO and would thus be able to refund Hellen’s money. According to Hellen, there was in fact no money coming from the SACCO to the deceased. When cross-examined by Mr. Meroka for the 2nd appellant, Hellen stated as follows:-

“I remember that in January 2009, I and Chief David Arap Langat went to the home of the deceased, J. K to demand refund of my money. The assistant Chief Arap Kitur was also there. We started by going to the parents of J, the deceased. Her parents did not tell us that alcohol had ruined J. When J heard that we had gone to her parents, she tried to kill herself, i.e. to commit suicide using head scarf. It was the one she wore when she went to Mogogosiek Police Post. She had bared her chest when she tried to commit suicide. She fell on the muddy ground near the tea estate. I saw this as I was there. Assistant Chief Kiptum and the Chief David Langat and the parents were also there. The deceased did not want her parents to know about the debt to me. We went to the deceased’s parents to put pressure in an effort to get her to pay. She told us that her parents would expel her from home if they got to know. But we still decided to go. It was after we went to her parents that she tried to commit suicide.”

E.M.K (PW5) was a brother-in-law of the deceased, i.e. he was a brother to the dead husband of the deceased. He received the report about the deceased being detained at the police post and he eventually identified the body of the deceased to Dr. Korir for purposes of the post-mortem. For some reason, this

witness also paid to Dr. Korir Shs.6000/- apparently for the post-mortem though Dr. Korir was performing his public duty as a doctor working in a Government District Hospital. Dr. Korir did not issue a receipt for this payment and he did not explain why he received the money. Be that as it may, when cross - examined by Mr. Nyaingiri who had apparently taken over the defence of the 1st appellant, Elijah stated:-

“-----. My brother who is the husband to the deceased was sick and he died. I helped my bother who died . He was at Litein Mission Hospital. I did not know the nature of the decease which he had. He was in hospital for a long time. I agree he might have been HIV positive. I did not tell his wife, the deceased, that my brother died of HIV virus. The deceased suspected her husband had HIV and later she got to know it was true. I spoke to J the deceased and tried to comfort her and to advise her. She was intent on committing suicide on account of HIV. I observed her and I saw that she started to deteriorate in health. She had financial demands in respect of which I could not help her. She borrowed money from Cheronno (PW2). I got to know this later. She needed the money to meet her financial demands. She had a child Jackline, who was in Form 3. She found life too tough. -----.”

The evidence of Hellen and Elijah must be what Dr. Korir was attempting to rebut when he made the strange assertion in the post-mortem report to the effect that:-

“---- the strangling was not likely to have been self-inflicted.”

As we have seen the doctor withdrew that assertion. We have already remarked that he received Shs.6000/- from Elijah, the brother-in-law of the deceased herein and the good doctor did not say what that money was being paid for. It is perfectly possible to say that the money was being paid to influence his opinion on the issue of whether the deceased had committed suicide or whether someone else had strangled her.

There were other added factors at play before and during the post -mortem. According to the then acting Superintendent of Police, Valerian Obore (PW1), when he arrived at Mogogosiek Police Base he found a charged crowd of some six thousand people who were threatening to burn down the police post. It was believed that the police at the post must have strangled the deceased, nay not only strangled her but also raped her into the bargain. But when Stephen Matinde Joel Weibe (PW13), a Government Analyst at the Government Chemist Laboratories examined the various items submitted to him to test sexual molestation, the analyst found no evidence of this, even on the vaginal swab taken from the deceased. It was then suggested that if those who were alleged to have sexually molested the deceased had worn condoms, there would be no evidence of spermatozoa. But there was no evidence, one way or the other to support the contention that condoms had been used and these were really theories which were not supported by the evidence. Apparently even the local Member of Parliament was in some way or the other involved in ensuring that someone was charged in order to appease the local populace who believed the deceased had been strangled.

There was, however, the unchallenged evidence of Elijah who would have no reason to lie on the matter that the deceased:-

“-----was intent on committing suicide on account of HIV. I observed her and I saw she started to deteriorate in health. She had financial demands in respect of which I could not help her. -----. She found life too tough..-----.”

No-one saw or could tell how the deceased had been killed, i.e. whether she strangled herself or whether someone else strangled her. The evidence against the appellants was accordingly, wholly circumstantial. Our understanding of the law is that circumstantial evidence must exclusively point at the person or persons charged as the perpetrator of the crime under investigation and must leave no room for other possible explanations, or hypothesis. See for example, **Joseph Chemasweti Lomulei vs. Republic**, Criminal Appeal No. 287 of 2010. Taking into account the evidence of Elijah, which got support from that of Hellen, can it be said that the prosecution evidence had excluded the possibility, indeed the probability, of the deceased having strangled herself?

Both Mr. Olaly Chache, for the 1st appellant and Mr. Mugambi Nguthari, for the 2nd & 3rd appellants, submitted before us that the conviction recorded against the appellants was wholly unsafe and that the appeals must be allowed. Mr. V.O. Nyakundi, a state counsel, agreed with them and urged us to allow the appeals. According to Mr. Nyakundi, Dr. Korir concluded that the deceased had been strangled because political pressure had been brought to bear on the doctor. For our part, we do not wish to go as far as saying that; Dr. Korir, in his evidence in court, recanted his assertion that the deceased could not have committed suicide. The doctor also admitted that the laceration in the private part of the deceased was not necessarily caused by rape.

We agree with the learned counsel on both sides that the conviction recorded against each appellant was and still remains unsafe and cannot be allowed to stand. In the event, we allow the appeal of each appellant against the conviction, set aside the sentence of death imposed on each one of them and order that each one of them shall be released from prison unless otherwise lawfully held. Those shall be our final orders in the appeal.

Dated and delivered at Nakuru this 11th day of November, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.