



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO.E011 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN WESONGA MAGERO.....ACCUSED

J U D G M E N T

[1] The accused, **Stephen Wesonga Magero**, as per the information dated 2nd July 2021, is charged with murder, contrary to **S.203** as read with **S.204** of the **Penal Code**.

The particulars are that on the 4th June 2021 at Nambale township within Busia County, jointly with others not before court murdered Joyce Atieno Sakari.

[2] The case for the prosecution evolved from the facts that on or about the material date at about 8. 30p.m the deceased joined the company of a group of people who were at a local bar known as Belinda. These included the accused and **Micheal Wamacha Shikura (PW 4)**. Later, the three of them left for another bar called Highlife but found it closed. They arrived there on the accused m/cycle and having found the bar closed the accused and the deceased opted to proceed to a place called Kisoko while Micheal (**PW 4**) remained behind to go to his house within Nambale town.

[3] On the following day at about 9.30a.m., an aunt to the deceased, **Merisa Nekesa Ngaiwa (PW 1)** learnt that a lady had been picked by the police on the road and taken to hospital as she had been injured. She (**PW 1**) then proceeded to the police station for details and was informed that the injured lady had been taken to hospital in Busia but passed away while undergoing treatment. Thereafter, she proceeded to the mortuary and identified the dead lady as her niece, who lived with her mother.

[4] The deceased's mother, **Deborah Nekesa Witaba (PW 2)**, was at home in Nairobi when she received a phone call from the deceased's boyfriend called Faraj and informed that the deceased had been raped and was in hospital at Busia. She contacted her brother who later told her that the deceased was dead.

[5] **Faraj Ibrahim (PW 5)**, the deceased's boyfriend was with the deceased on the previous day at the homestead of one Andeshi. This was at about 4.00p.m. He remained there briefly and then went away leaving the deceased behind. He later returned to the homestead for the night but did not find the deceased. He was on the following day informed that the deceased had been assaulted and injured and was taken to Nambale police station. He then proceeded to the station where he learnt that the deceased had been killed.

[6] **Sgt Phylis Munyole (PW 6)**, was on duty at Nambale police station on the material date (4th June 2021) at about 6.00a.m. when she was instructed to proceed to a scene where a person was found lying on the road. She and her colleagues proceeded to the scene

towards the direction of Mumias and found the deceased still breathing but unconscious. Her clothes and inner wear had been raised up to the chest. She was immediately rushed to the hospital by the police officers.

[7] **IP Beatrice Rono (PW 7)**, investigated the case and learnt that the deceased had been transferred to the Busia County hospital where she passed away while undergoing treatment. She (**PW 7**) recorded statements from several people including Micheal (**PW 4**) and the accused who were treated as suspects in the killing or murder of the deceased. On completion of investigations, IP Beatrice (**PW 7**) preferred the present charge against the accused and treated Micheal (**PW 4**) as a prosecution witness.

[8] **Dr. Duncan Nabuya (PW 3)**, produced a post mortem report (**P. Ex 1**) prepared by his colleague Dr. Cedric Tumbo, after an autopsy was carried out on the body of the deceased.

The report indicated that the deceased died from severe head injury due to trauma by both soft and blunt objects.

[9] The accused's defence was a denial and a contention that the deceased and her family were people unknown to him. He said that he was a m/cycle taxi operator (**boda-boda**) and was at work on the material date at about 6.00p.m when his colleague Mike (**PW 4**) arrived with a female person and requested him to take them to a place called Centre. He was paid ksh.100/= for the job and then returned to his place of work up to 7.00p.m when he closed work and went home.

[10] On 10th June 2021, while at work he (**accused**) was confronted by police officers who were looking for one Steve. He identified himself and was taken to Nambale police station for reasons he did not know. He was later arraigned in court with the present offence which he did not commit. He contended that he never went elsewhere with Mike (**PW 4**) save to take him at the place called Centre.

[11] The offence of murder occurs when a person who of malice aforethought causes the death of another. The evidence availed herein by the prosecution indicated without dispute that the deceased was a victim of the unlawful act of assault committed against her by an individual or group of individuals. The post mortem report (**P.Ex 1**) produced herein by Dr. Nabuya (**PW 3**) showed that the deceased died from severe head injury due to trauma by both soft and hard (**blunt**) objects. It also showed that the deceased suffered grievous injury resulting in fatality.

[12] Due to the nature of the injuries suffered by the deceased it was evident that the offender assailant intended to cause her death or grievously injure her. Malice aforethought was thus established by the prosecution evidence and so was the offence of murder.

The basic issue for determination was the identity of the murderous assailant. In that regard, the prosecution case was bereft of direct evidence against the accused. The prosecution therefore sought to rely on circumstantial evidence to prove that the deceased was murdered most likely than not, by the accused.

[13] Circumstantial evidence is evidence which implies that a person committed the offence he is charged with. It is evidence of facts that the court can draw conclusions from.

In **Rep Vs. Kipkering Arap Koseke & Another [1953] EACA 135**, it was stated that to justify the inference of guilt on the basis of circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

[14] And, in **Sawe Vs. Rep (2003) KLR, 364**, the court stated:-

“As we have already pointed out, the evidence in this case was entirely circumstantial. 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 co-existing circumstances weakening the chain of circumstances relied on.

The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. It is a burden which never shifts to the party accused.”

[15] In this case, the accused denied that he was responsible for the death of the deceased. He implied that the deceased was with

his “**boda boda**” mate (PW 4) when he dropped them at a place called Centre. He also implied that the deceased and her family were strangers to him.

However, there was credible evidence from the prosecution establishing that the deceased was assaulted and fatally injured after she left Nambale town heading towards a place called Kisoko in the company of a “**boda-boda**” rider.

[16] Prior to that, the deceased had been in a local bar called Belinda in the company of the accused and others including Micheal (PW 4). Later, the three of them (i.e Accused, deceased and PW 4) proceeded to another bar called Highlife pub but found it closed. It was then that the accused and the deceased left for Kisoko while Micheal remained behind to proceed to his house within Nambale town.

[17] The evidence by Micheal (PW 4) was the most crucial against the accused. It was, in the opinion of this court, credible and cogent in establishing that the accused was the last person to have been seen with the deceased when she was alive and prior to being found along a road unconscious and with serious injuries which later proved fatal. The accused could not therefore be heard to throw blame at Micheal or Mike (PW 4) by implying that he was the last person seen with the deceased before she passed away. He (accused) could also not be heard to imply that he was not at the scene of the offence when it happened.

[18] Indeed, the accused was placed at the scene of the offence the moment he left Nambale town heading towards Kisoko in the company of the deceased. The fact that the deceased was found at that scene a few hours later strongly indicated that she was there with the accused after they left Nambale town together. It was not a coincidence that the two headed to Kisoko where the accused comes from.

[19] The fact that the accused was the last person seen with the deceased prior to her demise was strong and credible circumstantial evidence which pointed more to his guilt than innocence. In the circumstances, his defence was disproved and unsustainable. He was thus identified as the person who murdered the deceased even though nobody saw or found him in the act. He was linked to the offence by the strong and credible circumstantial evidence adduced against him by the prosecution.

[20] The onus was heavy on the accused to furnish explanation for circumstantial evidence not explainable on any hypothesis consistent with his innocence. He was the last person to be with the deceased before she was found on a road with serious head injuries which led to her death. He had a duty to give an explanation of how he parted company with the deceased but he did not. He therefore failed to rebut the presumptions created by S.111 and S.119 of the Evidence Act.

[21] S.111 (1) of the Evidence Act provides that:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any 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 any 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.”

[22] As for S.119 of the Evidence Act, it provides that:-

“The court may presume the existence of any fact which it thinks likely to have happened, regard being led to the common course of natural events human conduct and public and private business in their relation to the facts of the particular case.”

In sum, the evidence by the prosecution placed the accused in a position in which he was required to give an explanation of the circumstances which led to the death of the deceased as they were together at the time. His failure to do so and instead merely deny the offence and raise an alibi attracted the drawing of an inference that he was responsible for the death of the deceased to the exclusion of any other person.

The prosecution case was this proved against the accused beyond reasonable doubt. He is accordingly found guilty as charged and convicted.

J.R. KARANJAH

J U D G E

[DELIVERED & DATED THIS 8TH DAY OF DECEMBER 2021]



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