



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO.24 OF 2013

REPUBLIC

-VERSUS-

PETER NDIRANGU MUNYIRI.....ACCUSED

JUDGMENT

Peter Ndirangu Munyiri, whom I will hence forth refer to in this judgment as 'the accused', was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63. According to the particulars in the information, on 17 November 2013 at Kiawara Market in Kieni West District within Nyeri County, he murdered John Macharia Mwangi.

After **Dr Richu Mwenda (PW3)**, the psychiatrist examined the accused and was satisfied that he was mentally fit to take plea and stand trial, the accused pleaded not guilty.

To prove its case against the accused, the state called eight witnesses the first of whom was **Esther Wangui Wambugu (PW1)**. It was her evidence that she was a businesswoman and hailed from Kiawara. On 17 November 2013, at around 9 P.M. while at Kieni where she ran a grocery, Wangui received a call from one Mama Muthoni informing her that Macharia had been stabbed by the accused. The deceased was her son. She lost consciousness and only managed to go to the Kiawara police station on 19 November 2013. On 21 November 2013 she went to the mortuary to identify her son's body for postmortem purposes. She was accompanied by her daughter and the deceased's employer's wife.

It was her evidence that she had known the accused for two years before the murder incident occurred and that the deceased was a friend to the accused although they were not that close. Further, that the accused lived around 500 meters from where Mama Muthoni lived in Kiawara.

Police Constable John Mutoro (PW2) testified that he worked at Kiawara Police Station and that on 17 November 2013 at around 9.30 P.M. he was on duty at the report desk when the accused came and reported that he had killed someone. He booked the accused's report. On the same night Robert Kayamba and Mary Kayamba reported that the accused had assaulted them. Their report was made after the accused had made his and when he was in police custody. He also booked their report of assault.

Constable Mutoro informed the officer commanding Kiawara police post (OCS). The OCS and one constable Mutisya are said to have visited the scene. They indeed confirmed that the deceased had been murdered. It was also the evidence of constable Mutoro that the accused looked drunk at the time he arrived at the station to make his report. As far as Robert's and Mary Kayamba's reports are concerned, he did not confirm whether they had been assaulted as reported. However, in answer to questions put to him during cross-examination, he testified that the two had sustained physical injuries and, as a matter of fact, one of them was bleeding from the forehead.

The evidence of certification of the deceased's death was given by **Dr. Obiero Okoth (PW4)** who at the time of giving his testimony, was a pathologist at Kenyatta National Hospital. He conducted an autopsy on the deceased's body on 21 November 2013. The pathologist observed that the deceased was a male African in his 30's; he was of a medium physique and good nutrition. At the time of the autopsy, the body had been embalmed. There was a single stab wound on the anterior neck region measuring 2 centimeters from the midline. The wound itself was 4 centimeters long. It was his opinion that the cause of the deceased's death was multiple injuries on the cardiovascular and respiratory areas secondary to a single stab wound.

Police Constable Meshack Mutisya (PW5) was attached to Kiawara police post in 2013. He testified that on 17 November 2013 at 9.30 P.M. he was at his home when he received a call from Inspector James Nyabindi who was the officer in charge of Kiawara police post. Inspector Nyabindi informed him of a murder that had been committed at Kiawara along the road leading to Naromoru. He accompanied Nyabindi to the scene. They went to the scene in a government vehicle driven by police constable Mwangi.

It was his evidence that the deceased's body was inside the accused's compound but closer to the gate which was about ten metres from the main road. There was also a crowd of people at the scene. There were drops of blood between where the body lay and the accused's house. Inside the accused's house, they found a settee that was also blood stained. Also blood stained inside the same house were a t-shirt and a knife. The officers took these items. The deceased's body was taken to Mary Immaculate Hospital mortuary at Mweiga but was later transferred to Nyeri Provincial General Hospital mortuary.

Constable Mutisya took the deceased's blood sample together with the knife and the t-shirt which they had recovered from the accused's house to the government laboratory for forensic analysis.

During his cross-examination, constable Mutisya testified that although he was the investigations officer, he did not record any statement from the accused and that he was not even aware whether the accused was drunk at the time he made his report. None of the people he found at the scene informed him that they had witnessed the murder. According to him, Robert Kayemba and Mary Kayemba had witnessed the murder but at the time he arrived at the scene, they had already gone to the police station. Even then, he did not interrogate them.

Mary Adeya (PW6) testified that she lived in Kiawara but she could not quite recall what transpired on 17 November 2013. Nonetheless, she testified that on the material date her brother, Robert Lembaya, was traveling to Kiawara from Nyeri town and so he called their mother to pick him from the bus stage apparently because he had luggage. She went to pick him instead. This was around 7.30 or 8 P.M. while they walked home, she was ahead of her brother. Suddenly somebody confronted her brother. She asked one Abdi to check who it was that had confronted her brother. Abdi asked the stranger to leave Robert alone. They then proceeded home but further down along the way the stranger emerged again and grabbed Robert. The latter overpowered him and managed to escape. However, he left the bag behind.

Adeya went back to the scene where her brother had been confronted. They collected the bag that her brother had left there. As they went home, they heard screams from their home. The stranger had pursued her brother to their home. He assaulted their mother. Robert was at home at the material time. He had a cut wound on his hand. After the stranger left, they went to Kiawara police post to report the incident to the police. They found the same stranger at the police station. Adeya, however, changed her testimony to say that the stranger who attacked them was not the person she saw at the police post. In fact, she could not remember the person who had confronted them. The witness was not aware that anybody had been killed and that she also only learnt of the murder when they were leaving the police post. At that time, two people arrived on a motorcycle and reported that a person had been killed.

Robert Kayemba (PW8) testified that in 2013, he lived with his sister (PW6) and father at Kiawara. On 17 November 2013, he was at Ihururu but he travelled to Kiawara on the same day. He called his mother to say that he was on his way. He found his mother waiting at the bus stage at about 7 P.M. His mother left and he remained behind with his sister Mary. As he walked home with his sister, a stranger grabbed her. He intervened and had his sister escape. He also escaped. He ran home but the stranger pursued him there. It was his evidence that he sustained an injury when he fell down. A village elder asked them to report the matter to the police.

When they arrived at the police station, they found the stranger who had attacked them there. The same stranger alleged that he, Robert, had killed somebody. He, however, could not remember the stranger. It was his evidence that the stranger was taken away by the members of the public and he did not know where they took him. He also did not know the accused person. He also testified that they went to the police to report a threat to their lives.

The Government chemist **Elizabeth Waithera Oyiengo (PW7)** testified that she was a government analyst and that on 26 November 2013 and 2 December 2013 she received from constable Mutisya (PW5) a knife, the deceased's blood sample, a yellow t-shirt, and the accused's blood sample. She was to examine the items and determine the presence and origin of blood stains. She established that the knife was moderately stained with blood of human origin. The t-shirt, on the other hand, was heavily stained with blood of human origin.

In her analysis of these items, she established that a DNA profile generated from the knife and the t-shirt matched the DNA profile generated from the deceased's blood.

The **accused** opted to give sworn testimony when he was put on his defence. He testified that on 17 November 2013 he had been drinking from about 5 P.M. till about 7.30 P.M. when he left to go to his house. His house was not very far from where he was drinking; it was about 300 metres. He was attacked by three people as he entered the house. The attackers forced him to lie on the floor and demanded money from him.

In the course of what appeared to be a robbery incident, the attackers started fighting among themselves. They then ran away but when he rose from where he had been lying, he found one of the attackers lying on the floor. He informed a neighbour, whom he described as 'Mama John' what had transpired.

He went and reported the incident to the police. Though he had taken some beer, he was conscious of what was happening. His house had no lights at the time of the attack and therefore he could not tell how the deceased was injured. He denied having attacked the deceased. He denied having told the police that he had killed the deceased. He also denied owning the knife which was exhibited in court as the murder weapon.

In cross-examination, the accused admitted that he knew the deceased since he lived at Kiawara shopping center where the accused also lived. He denied knowing Mary Adeya and her brother Robert. He asked the court to find that there was no sufficient evidence to sustain a conviction for the offence of murder.

Sections 203 and 204 under which the accused is charged read as follows:

Section 203. Murder

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

204. Punishment of murder

Any person convicted of murder shall be sentenced to death

Section 204 has since been declared to be unconstitutional because, first, its application renders mitigation upon conviction futile; secondly, it purports to deprive the trial court of its discretion to mete out what would be an appropriate sentence depending on the circumstances of each particular case; and, finally it is discriminatory in nature. (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**).

Section 203 would then appear to be the only relevant section in charges of murder in the wake of the Muruatetu section. According to this section, this offence is established when, first, death of a person is proved; secondly, it must also be proved that the death was as a result of an act or omission of another person; thirdly, there has to be proof that the act or omission was unlawful; and, finally, it must be proved that the person who did the unlawful act or omitted to act had malice aforethought.

From the evidence presented by the state, it has been proved beyond doubt that one John Macharia Mwangi died on 17 November 2013 and that he did not die a natural death but that the death was as a result of an unlawful act of another person. Esther Wangui Wambugu, the deceased's mother testified having identified the body of her son at the mortuary for postmortem purposes. Police constable Mutisya (PW5) testified that he together with his colleagues, inspector James Nyabindi and constable Mwangi collected the deceased's body from the crime scene and took it to the mortuary. Most crucially, Dr Obiero Okoth certified not only the deceased's death but also the cause of the death. He produced a postmortem report and a certificate of death in proof of these facts.

Thus, the first three elements of the death of a person; that it was caused by an act of another person and that the act was unlawful were proved beyond any shadow of doubt. The only other question which this court has to grapple with is whether the accused is the person who perpetrated the crime and if he did whether he had malice aforethought.

The evidence upon which the prosecution based its case against the accused was largely circumstantial evidence. No witness testified having seen the accused murder the deceased.

The interrogation of the evidence reveals that the inculpatory facts upon which the state relied were, *inter alia*, that the accused presented himself to the police and admitted that having murdered the deceased. Secondly, a knife, stained with blood and which is alleged to have been employed as the murder weapon was recovered from the accused's house; and, thirdly, a t-shirt also alleged to belong to the accused and which was found in the accused's house was tainted by the deceased's blood.

An analysis of this evidence would, however, point to the conclusion that the circumstantial evidence falls below par. In other words, it does not meet the threshold upon which this honourable court can convict the accused for the offence of murder.

I say so for the reasons that, first, although it is alleged that the accused presented himself at the police station and effectively confessed to having committed an offence of murder, there was no evidence that the accused was booked at Kiawara police station on 17 December 2013 for any sort of offence, let alone murder.

Police constable Mutoro (PW2) who was manning the report desk at the time the accused is alleged to have presented himself testified that he booked the accused person's report but, as noted, no evidence was ever produced to prove that the accused person made any report. Failure to produce this evidence would give credence to the accused person's defence that he went to the police and made a report of having been attacked by robbers at his house. At the very least, in the absence of any contrary evidence, the accused's account on this question raised a reasonable doubt in the court's mind about the state's contention that the accused was not only booked at the station but that he was booked on his own confession that he had murdered the deceased.

To compound the state's case even further, the investigation officer, constable Mutisya (PW5) admitted that he did not record a statement of any sort from the accused and neither did he interrogate the accused. In a case where a confession is alleged to have been made, the least the investigation officer would have done is to record the accused's statement.

The allegation that the accused confessed having killed the deceased is further cast into doubt by the evidence of Robert Kayemba (PW8) who testified that when he appeared at the police station on the night the offence is alleged to have been committed, the accused told the police that it was Robert who had murdered the deceased.

Again, although the investigation officer testified that Robert and his sister Mary had witnessed the murder, the two were categorical that they had not witnessed any murder. As a matter of fact, it is only when they were leaving the police station that they learnt from two people who arrived at the station on a motor cycle that someone had been murdered.

The said Robert and Mary are alleged to have made a report of assault. According to constable Mutoro, they had both been assaulted and their report was booked. No evidence of such report having been made was produced and further there was no evidence that the two were assaulted. At one point in his evidence, constable Mutoro testified that he could not confirm whether or not the two had been assaulted but later he said that they had cut wounds and one of them was in fact bleeding from the forehead. But no evidence was given of the officer having issued the victims of the assault with any police medical form (or P3 form) to be filled by a doctor or a medical officer detailing the particulars and extent of injuries that had been sustained and whether any treatment had been administered.

The absence of this material evidence and the inconsistent testimony given by constable Mutoro would lead to the conclusion that it is highly

probable that it may be true, as the accused himself told Robert, that it was the latter and not the accused who murdered the deceased.

Turning to the murder weapon, it was alleged that it was found in the accused's house and it was tainted by deceased's blood. Coupled with this evidence was the testimony that a t-shirt also said to have the deceased's blood belonged to the accused and that it was found in the accused's house.

It might be true and indeed the evidence of the Government chemist was not displaced on this point that the DNA analysis of the blood that was found on both the knife and the t-shirt matched the deceased's DNA. However, there was no evidence that these items belonged to the accused and that they were retrieved from his house.

Three officers are alleged to have entered the accused's house; these were constable Mutisya, inspector Nyabindi and constable Mwangi. Except for constable Mutisya, neither of the other two drivers testified. More importantly, no inventory was produced signed by the officers or any of them to demonstrate that these items or any other item was recovered from the accused's house.

It is worth noting that at the time of the alleged recoveries, the accused was not in his house but was in the custody of the police at Kiawara police station. It was therefore important that everything ought to have been done to ensure that there was enough evidence to support the allegation that the police officers were in the accused's house and that whatever was recovered from there was indeed the accused's property. In my view, an inventory supported by corroborative evidence of the police officers who accompanied the investigation officer would have been useful. Since the accused person was in the custody of the police at the time the recoveries are alleged to have been made, there was nothing that stopped the police from securing the scene and bringing the accused to the scene to either confirm or deny the allegations made by the police with respect to the accused's house and the recoveries made therefrom.

While it is trite that a court can convict on circumstantial evidence, the evidence presented as circumstantial in this case fell short of the threshold of proof beyond reasonable doubt.

In **Tumuheire versus Uganda (1967) E.A** at pages 328 and 331 circumstantial evidence was held to be the best evidence; the court held that:

“It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person as in the present case.”

As much as it may be a basis for a conviction the court cautioned that:

“As was said by Lord Normand in Teper versus R (1952) A.C. at page 489:

‘Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another...It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Thus a trial court must be cautious that the evidence is inconsistent with the accused's innocence or, put differently, it is consistent with the accused's guilt.

But the rule always is, in order to justify an inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Secondly, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected to the fact sought to be inferred. By way of analysis, the evidence has to satisfy the following criteria:

- (a) the circumstances from which the conclusion is drawn should be fully established;
- (b) all the facts should be consistent with the hypothesis;
- (c) the circumstances should be of a conclusive nature and tendency;
- (d) the circumstances should exclude every hypothesis but one proposed to be proved. (See **Sarkar on Evidence, 12th Edition, Page 34**).

The basis upon which this sort evidence is accepted as proof of the fact sought to be proved has been explained in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715**. In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting **Wills on Circumstantial Evidence (6th Edition, page 311)**, held as follows:

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

In **Simon Musoke versus Republic**, the same court cited with approval the passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** quoted in **Tumuheire versus Uganda** (supra).

In my assessment of the prosecution evidence, I cannot say with any measure of conviction that the inculpatory facts are incompatible with the innocence of the accused. Neither can it be said that those facts are incapable of explanation upon any other reasonable hypothesis than that of the accused's guilt.

The circumstances from which the prosecution wishes this court to draw the inference of guilt have not been fully established but instead, are replete with inconsistencies. The purported facts are also inconsistent with the hypothesis which the prosecution has proffered. They are, in any event, not conclusive and they do not exclude every other hypothesis except the one which was sought to be proved.

In short, the state has not proved its case against the accused beyond reasonable doubt and, in such circumstances, the only alternative open to this court is to find the accused not guilty of murder. I so hold and accordingly acquit him accordingly. The accused is hereby set at liberty unless he is lawfully held.

SIGNED, DATED AND DELIVERED VIA VIDEO LINK ON 25TH FEBRUARY 2022

Ngaah Jairus

JUDGE