



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 9 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS KALUME KINGI.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Ms. Ruttoh Advocate for the accused person

J U D G M E N T

The accused **Thomas Kalume Kingi** has been charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. In particular the prosecution alleged that **Thomas Kalume Kingi** on the 16.6.2018 at Madzongoloni village, within Kilifi murdered **Kache Mzomba Kimanje**. He pleaded not guilty and subsequently was represented at the trial by Learned counsel **Ms. Ruttoh** whilst **Mr. Mwangi**, prosecution counsel represented the state.

Evidence at the trial by the prosecution as against the accused

According to **(PW1) – Priscila Jira Ring alias Luvuno** on the 19.6.2018, she was attending a burial event with other family members. It happened in **(PW1's)** own testimony that the accused was also in attendance. In the middle of the night in which she gave the time as 3.45 am, the other relatives left the burial home to their respective residences, but due to time she decided to remain behind and spent a night in the deceased house.

Further, **(PW1)** testified that in the same homestead the deceased was in the house asleep. It did not take long according to **(PW1)**, the accused came in knocking the door of the house she was staying with the deceased. As she did not suspect any foul play, **(PW1)** opened the door for the accused to get in as he wanted to have a talk with the deceased. Thereafter, the accused asked her to step aside as he wanted to consult with the deceased in a little while. **(PW1)** heard the deceased scream for help. She decided to seek assistance by making calls but most of them were non-responsive. That obviously did not please the accused. When **(PW1)** returned back to the same house she found many people surrounding the deceased apparently bleeding from the injured parts of her body. It did not take long before the police visited the home and carried away the deceased body for further investigations.

Next prosecution witness was **(PW2) – Kennedy Kingi**, who on oath told the Court that accused person is his elder brother. In the evidence of **(PW2)**, on the 15.6.2018 he was able to identify the body of the deceased which with multiple injuries once. Together with other family members, a report was made to the police as the body of the deceased was also collected and taken to the mortuary.

Next intent also was **(PW3) – Nelly Rehema Kingi** who in her evidence told. The Court that on 15.6.2018 she recalled a telephone call concerning the death of the deceased. She proceeded to the home and witnessed the presence of very many people surrounding her body. On observation, **(PW3)** also experienced that the deceased body had suffered injuries with blood oozing one of those affected areas.

In the fullness of time, the body of the deceased was subjected to the postmortem examination. In this respect, **(PW4) Dr. Mukaji** of Kilifi County Hospital testified that on 16.6.2018 she did carry out a postmortem examination on the referred body of **Kache Kimanje**. Having gone through the examination, **(PW4)** testified that the body revealed presence of deep cut on the left parietal region measuring 10 cm x 1 cm x 5 cm accompanying skull fracture, cut wounds to the anterior aspect of the skull and two punched out holes on the same skull left parietal. The doctor in her opinion would then conclude that the deceased cause of death was severe head injury due to deep cut wounds on the head.

The other witness summoned by the prosecution was one **Elijah Chigiri Kiti**. His account of the incident started with **(PW1)** going to his home to seek help against the threats and or assault by the accused against the deceased. In his testimony **(PW5)** left the work he was doing of milking cows, though he did not attend to the issue personally he sent other persons like Rodgers and Timothy to go need verify the report.

According to **(PW5)**, in a little while they came back with no tangible information about the complaint made by **(PW1)** on the threats to life upon the deceased. In light of that report, **(PW5)** saw it fit not to be anxious about the concerns of safety of the deceased as raised with him by **(PW1)**. However, at the spur of that moment he heard screams from the deceased home. He also rushed to that scene only to confirm the tragic news of the death of the deceased.

(PW6) Rodgers Kiti Mbura in his evidence told the Court that on 15.6.2018 he was woken up by **(PW5)** to go to the house of the deceased to verify the report given by **(PW1)** on her safety and security. On arrival at that home, they seemed not to find anything credible to report back to **(PW5)**. As this incident was now a police case, **(PW7) Cpl. John Mmasi** told the Court that on receipt of instructions from the DCIO, he did proceed to investigate the crime. This he did by recording witness statements, participating in the postmortem examination and finally effecting arrest for the accused to be charged with the offence of killing the deceased.

As the prosecution closed its case, accused person was placed on his defence. He elected to give unsworn statement in which he denied any responsibility and culpability with regard to the allegations by the prosecution. In their closing remarks, both counsels filed their written submissions giving perspective on the entire evidence as the burden of proof threshold issues. The prosecution counsel submitted that the burden and standard of proof of beyond reasonable doubt was discharged to secure a conviction against the accused. He principally relied on the evidence of the star witness **(PW1)** to invite the Court to find that the death of the deceased is traceable to the accused. In support of the submissions and sufficiency of evidence against the accused as a perpetrator of the murder, counsel cited and place reliance on the following cases: **Anthony Ndegwa Ngari v R {2014} eKLR, Abanga alias Onyango v R CRA No. 32 of 1990, Stephen Haruna v The Attorney General of the Federation {2012} LPELP 782, Ahamad Abolfathi Mohammed & Another v R {2018} eKLR, Nzuki v R {1993} KLR 171, Daniel Muthee v R CRA No. 218 of 2005 (UR), R v Lawrence Mukaria & Another {2014} eKLR**. Learned prosecution counsel taking queue with the decided cases submitted that the accused had every opportunity to commit the murder.

Ms. Ruttoh for the accused in her quest to have the Court acquit the accused submitted that there was no cogent or credible evidence to prove the elements of the offence beyond reasonable doubt. Similarly, in any event Learned counsel submitted that circumstances inferred from the death of the deceased failed to establish how the physical assault ensued. Thus together that nobody saw the accused commit any unlawful acts or that he had created or contributed to the creation of a state of affairs endangering the life of the deceased raises serious questions of existence of a *prima facie* case worthy of sustaining a conviction.

Learned counsel submitted that no doubt, the deceased died but no evidence is before Court as to who killed her on 14.6.2018, Learned counsel argued and submitted that irrespective of the wishes of the prosecution to the extent of proving the charge beyond reasonable doubt there is no iota of evidence.

Determination

Subject to any appropriate caution or warning, the summary of the evidence at this trial depicts case purely based on circumstantial evidence what are the ingredients required of the prosecution to prove:

- (a). The death of the deceased.*
- (b). That the deceased death was unlawful.*
- (c). That in causing death the perpetrators was actuated with malice aforethought.*
- (d). That the prosecution evidence is capable of establishing the identity of the perpetrator and squarely placing him or her at the scene of the murder.*

The threshold of circumstantial evidence is to be recalled on the framework of beyond reasonable doubt. That is how the world of Criminal Law is defined. In a criminal trial, the verdict of guilty concerns the constitutional right to presumption of an accused person under Article 50 (2) (a) of the Constitution until the contrary is proved. That satisfactory criteria is everything to do with a consideration and abiding burden of proof of beyond reasonable doubt. In Lord Denning own words in **Miller v Minister of Pensions {1947} 3 ALL ER:**

“Proof of beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong as to leave only a remote possibility in the accused’s favour, which can be answered with the sentence of course, its possible but not in the least probable. The case is proved beyond reasonable doubt, but nothing short of that will suffice.”

In **Common Wealth v Webster 59 Mass 295 Chief Justice Shaw** said in part:

“Reasonable doubt is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is not sufficient to establish a probability, though a strong one, but the evidence must establish the truth of the fact to a reasonable and moral certainty. Thus we take to be proof beyond reasonable doubt. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and Judgment of those who are bound to act conscientiously upon it. Thus we take to be proof beyond reasonable

doubt. The majority of facts in this case are in support of circumstantial evidence. It seems to me therefore that the Courts rides on truth. Truth is either abstract and necessary or probable and contingent. I and each of these kinds of truth is discoverable by appropriate but necessarily different kinds of evidence. The degree of excellence and of strength to which witnesses may rise to convince the Court of the truthfulness of their statements seems almost indefinite. The endless multiplication of witnesses, the subsided variety of their habits of thinking, their prejudices, their interests afford the means of concerning the force of their testimony augmented ad infinitum because these circumstances afford the means of diminishing indefinitely the chances of their being all mistakes, dismissed or all combining to deceive us.” (See Stewarts elements Vol (II) Encyclopedia Brit Art Metarphysics)

It is essential to give a just view of the notion of the nature of circumstantial evidence. As evidentially circumstances and their combinations are infinitely varied, so also is the duty of a trier of facts to advance a complete perfect proof that the decision captures the indicia on circumstantial evidence beyond reasonable doubt. considering the far reaching changes in a memory of a human being on what had taken place, its often said that circumstances are inflexible proofs, that witnesses may be mistaken or completed but things can be neither. In other words, circumstances cannot lie. The scope for application of circumstantial evidence.

I find it necessary at this stage to see one the relevant principles. In the case of **Abanga alias Onyango v R CR. Appeal No. 32 of 1990:**

“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 guilty is sought to be drawn, must be cogently and firmly established.*
- (ii). Those circumstances should be 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.”*

In **Exall {1866} 176 ER 850:**

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”

The issue of propensity of this case is governed by the admission of the evidence characterized by the testimony of **(PW1)**. In a particular way **(PW1)** explained that she was the one who opened the door for the accused to enter the house. The more related events of her testimony being the aspect of seeking audience with the deceased. The deceased and **(PW1)** happened to spend a night together on 14.6.2018. It is precisely clear and in the context of **(PW1)** evidence that the accused asked her to step aside as he continued to have a conversation with the deceased. The witness **(PW1)** in her statement told the Court that she heard the deceased calling for help and due to her distress call it became necessary to make calls to other family members. Nevertheless, **(PW1)**, further stated in Court that the accused followed in hot pursuit to dispel her from seeking any assistance. In her judgment she feared for the safety of the deceased and went ahead to the home of **(PW5)** to report the incident. There is no doubt that despite the slow response, the evidentiary facts given to **(PW5)** on the unlawful acts of the accused against the deceased came to pass. In the end, **(PW3)**, **(PW5)** and **(PW6)** evidence pointed to the fact a deceased person who had been fatally assaulted it followed from what **(PW1)** said that the deceased and accused person were at the same scene in which her body was discovered bearing multiple injuries to the head.

On the subject of proof out of all these the pathologist **(PW4)** on examination of the deceased body established as a fact that she suffered serious fatal injuries to the head. As required by Law an inference was drawn opined the cause of death as ‘**severe head injury**’ primary the sets of facts from **(PW1)** testimony constitutes proof of essential elements of the crime of murder against the accused. It is obvious that the deceased is dead and the cause of death being severe injuries inflicted to the vulnerable part of the body informed by evidence from **(PW4)**, being the pathologist who performed the postmortem.

Paying homage to the words of star witness **(PW1)** prior to the act of entry of the accused; there was no possibility of ill health or complaints from the deceased. Then quite suddenly as the accused and deceased engaged at other in a so called conversation **(PW1)** heard her call for help. Her reference to that distress call for help meant that the deceased’s life was in imminent danger whether or not her rushing out was proper, it is appropriate to presume that the prevailing circumstances were unfavorable to her right to life and security. It will be generally sufficient to state that she was under sufficient misapprehension of danger.

The test in the first instance is whether the evidence of **(PW1)** is logically probative or disapprobative on this issue of the murder of the deceased. In my analysis and review, the evidence of **(PW1)** as adduced is sufficiently clear and distinctive on the surrounding circumstances of the murder committed against the deceased. In this regard **(PW1)** gave evidence of the accused propensity to check out on the deceased at very odd hours of the night. That isolated misconduct averred **(PW1)** did not stop there, soon thereafter the deceased was found dead with multiple serious injuries. The probative strength of that piece of evidence being the fact of the control test of last seen theory.

It is admissible that on the material night of 14.6.2018, the accused was the last person to be seen with the deceased as evidenced from **(PW1)** testimony. The allegations was never controverted by the accused in his defence. The evidence places this current case in the scenario of Section 206 of the Penal Code. The principles contained in those provisions relate to malice aforethought. In a charge of murder

based upon intention to kill or to do grievous bodily harm, I am satisfied that the accused by reason of his unlawful acts to assault the deceased committed the heinous crime.

As has been pointed, under Section 206 (a) (b) of the Penal Code, the person charged and found to have formed the necessary intention to commit the offence of murder as defined in Section 203, of the Penal Code is to be found guilty of the aforesaid offence. The liability for the murder can arise even on the basis of knowledge. In this case, the every clearly points to the fact that the accused had knowledge that his acts and omissions could lead to death or the grievous bodily harm to the deceased.

The use of the word malice aforethought in Section 206 of the Penal Code must be given its ordinary, general and synomous meaning with mensrea and not the narrow meaning of only the highest degree of fault. Such an interpretation in my view is consonant with the golden rule of statutory interpretation which seeks in the construction of the statute to adhere to the ordinary meaning of words used in respect of this malice aforethought as an ingredient has been proved beyond reasonable doubt. One other point is on proof of identification and participation of the accused person in committing the offence. A careful reading of **Cleophas Otieno Wamunga v R {1989} KLR 424**, I believe be of some help with the principles enunciated in this authority. I now consider the evidence adduced on identification. It is clear from the evidence of **(PW1)** that she is the one who opened the door for the accused while knocking the door to draw the attention of the occupants **(PW1)** confirmed of accused introducing himself by name she did also point out that upon opening the door, by use of electricity source of light she positively identified the accused. It is also not disputed that the witness knew the accused before the incident. It should also be recalled that no long ago before the fateful night the witness, accused person and others were at a neighborhood attending a burial event. There are no disturbing aspects in this trial pertaining to the factual matrix and evidence on identification to render it mistaken or non-responsive.

Lastly, the last seen together of the accused and the deceased as stated in evidence by **(PW1)** goes to establish connectivity between the accused and the crime. I cannot also help the accused by exonerating him from the scene given the fact of the matter that **(PW1)** left the house with only the accused and the deceased inside the room. The time gap between the witness **(PW1)** travelling to **(PW5)** to seek help and the body of the deceased being found dead was not considerable to effect negatively the other chain of evidence to implicate the accused.

The evidence on the alibi defence put forward by the accused fell short of the threshold to contravene the burden of beyond reasonable doubt. There was no evidence by the accused to prove that there was a reasonable time gap between the commission of the crime and when they were seen together by **(PW1)**; in the house of the deceased. The chances of an intervening factor in exclusion of the accused in this particular offence remain very remote.

In consideration of the whole evidence, the circumstantial evidence adduced is complete and cogent. The guilt of the accused is unerringly established and no other inference except that of guilt of the accused. Therefore, the prosecution case succeeds, a verdict of guilty entered and subsequent conviction for murder contrary to Section 203 of the Penal Code.

Sentence

Generally speaking, following the dictum in **Francis Muruatetu v R {2017} eKLR**, the imposition of sentence in terms of Section 204 of the Penal Code is a matter of judicial discretion, judicial legitimacy and the rule of Law require that the sentences given in capital cases, more so murder should be appropriately justified, be convincingly explained and follow some common logical approach.

In this regard, I have taken into account the mitigation and aggravating factors of the offence. Further, specific reference to the provisions of Section 333 (2) of the Criminal Procedure Code founded on the Court to credit the convict with the period spent in remand custody. As a result, in exercising discretion and grappling the weight to be accorded the relevant mitigating and aggravating factors, I consider the circumstances of the case calling for an imposition of a custodial sentence. Such emphasis undoubtedly justifies this Court to pass a sentence of thirty (30) years imprisonment with effect from 3.7.2018.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF MARCH, 2022

.....

R. NYAKUNDI

JUDGE

IN THE PRESENCE OF; -

1. MR MWANGI

2. THE CONVICT