



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL CASE NO. 33 OF 2016

REPUBLIC OF KENYA.....PROSECUTION

VERSUS

PETER MACHARIA CHEGE alias MACHAA....ACCUSED

JUDGMENT

1. The Accused **Peter Macharia Chege alias Machaa** is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the night of 12th and 13th May 2015 at Karanjee Sub-Location of Mabroukie Location Kiambu County, he murdered John Mwangi Kimani. He denied the charge and was represented by Mr. Tumu.

2. Through ten witnesses, the prosecution presented the following case. The deceased, **John Mwangi Kimani** was the first son of **Stephen Kimani Karanja** (PW4). The deceased was aged about 20 years at the time of his death. In 2015, he and the key prosecution witness, Samuel Mwangi Wainaina (PW1) worked for PW4 at his **Tausi Tyre Repair** shop at Limuru Town and were neighbours at a place in Karanjee known as "**Misri**". On the night of 12th and 13th May, 2015 it rained heavily. PW1 who was headed home from work had been beckoned by the deceased who left work earlier to join the deceased and the Accused at Visions Pub where the latter duo were allegedly sheltering from the rain and also taking drinks.

3. By the time the trio set off to go home, the deceased was drunk and struggling to walk. When they reached a place named "**Mulika Mwizi**" so named because of the proximity to a security floodlight mast, the Accused invited the deceased to his house, promising to buy him more alcohol, but PW1 protested as the deceased was already very drunk. The deceased insisted on the offer and gave up his phone to PW1 which he demanded to keep for him. At the same time, the deceased requested the witness to accompany him to the Accused's house where ostensibly, the Accused would get cash to buy more drinks for the deceased.

4. The Accused led the two to his rental room not far from Mulika Mwizi and unlocked and entered while the deceased stood at the door and PW1 stood some meters away. PW1 was surprised when the Accused emerged to attack him. Fearing for his life, PW1 ran away but returned after a short while only to hear the Accused utter threats against the deceased. The Accused allegedly chased away the witness on seeing him return. PW1 decided to report to police at Kirathimo Administration Police (AP) post but the officer on duty dismissed him and while he took custody of the deceased's phone, the officer directed the witness to report on the next day.

5. PW1 went home and noted the deceased had not returned. Early the next day he made a follow up report with police and was instructed to first go to work and confirm if the deceased would report to work. On reporting to work, PW1 confided in PW4 the events of the previous night. PW4 called his wife. Soon, PW4's wife and the witness were on the way to the place where the night's incident had occurred.

6. Unknown to them, the Assistant Chief Karanjee, **Veronica Wanjiku Kabucho** (PW5) had pursuant to a report from a local resident already raised **AP CPL Peter Kimani** (PW2) of Karanjee AP Post and both had proceeded to a scene where the deceased who seemed in the throes of death lay by a road. He was half naked and had injuries. He was rushed to Tigoni Hospital before PW1 and PW4's wife reached the scene which was said to be some meters from the Accused's house. The deceased's clothes were allegedly scattered at the scene. The deceased was pronounced dead on arrival at Tigoni Hospital.

7. Meanwhile, the Chief Mabroukie Location, **Francis Mwatha Kimani** (PW3) while headed to the scene of discovery of the body received information that certain people at the scene had noticed blood stains at the door of one of the rooms close to the scene, alleged to be the house of the Accused and that there had been fight there the previous night. PW3 called PW2 and with the help of locals, traced and arrested the Accused at his place of work. He was taken to the Tigoni Police Station and later, accompanied scenes of crime personnel and **PC Shukur** (PW8) to the alleged house of the Accused.

8. They conducted a search and documented the scene. A blood-stained mattress, some clothes soaked in a basin, a swab of blood stains on the floor and walls were retrieved from the house. PW8 subsequently prepared an exhibit memo and forwarded the exhibits to the

government analyst for examination. According to **Lawrence Kinyua Muthuuri** (PW9) the Government Analyst, the piece of mattress was found to be stained with blood whose DNA matched the DNA derived from the blood of the deceased.

9. The postmortem on the body of the deceased was carried out by **Dr. Njeru** (PW10) on 15/05/2015. Externally, she found abrasions on the chest wall muscles, lacerations on the upper and lower hip and chin externally. Internally, there were contusions on the chest wall muscles, lacerations of right lobe of the liver with bleeding, as well as a depressed skull fracture with extensive bleeding. Her conclusion was that death was caused by head and abdominal injuries due to blunt force trauma.

10. The Accused gave a sworn defence statement and did not call witnesses. He testified that in the material period he worked at Kimbo's Cafe and lived in an area known as Muthaiga in Karanjee, Limuru. He was at his place of work at the time of his arrest by PW2 and PW3. He was first escorted to Tigon Police Station before being escorted to unfamiliar rental premises in Karanjee. Police broke into a house there and photographed the premises which bordered a shamba. He was questioned by police concerning a body said to have been retrieved from the shamba nearby. He told police he neither knew the occupant of the room in question nor about the body as he lived in a different area of Karanjee, namely, Muthaiga.

11. He denied having met or known the deceased and PW1 or the occurrence of a fight between him and the two men on the previous day asserting that, he was in his house on the night of 12th May, 2015. He claimed that he first saw PW1 at the identification parade which he faulted for including persons who did not appear to have any similarity with his appearance and asserted that the investigating officer attended the parade and prompted witnesses.

12. He claimed to be a victim of mistaken identification, asserting that his actual residence was never visited and that he did not commit the offence charged. Concerning the proximity between the scene at Karanjee to which police allegedly took him, to Karanjee and Kiriathimo Police Posts, he asserted that the former post was only 200 meters away while the later post was 1km away and closer to Limuru town.

13. Final submissions were filed by the defence but not the DPP. The court has considered the evidence on record and submissions filed. There was hardly any dispute as to the death of the deceased and the cause of death which is documented in the postmortem report tendered as **P. Exhibit 6** by PW10. According to the report, the deceased had sustained a laceration to the right lobe of the liver due to injuries on the abdomen and depressed skull fracture attended by bleeding, which resulted in death. Equally, there was no dispute that the deceased person had been found, virtually dying and naked, while lying on a road within Karanjee area on the morning of 13th May, 2015. The court must determine whether, of malice aforethought, the Accused inflicted the fatal injuries upon the deceased on the night of 12th May, 2015.

14. The star prosecution witness was PW1. Through him the prosecution sought to connect the Accused with the assault upon the deceased. Overall, two key strands of evidence were relied on by the prosecution. First, it was alleged that the deceased and Accused spent time together at Visions Pub on the material night before proceeding home in the company of PW1, at the end of which the Accused allegedly lured the deceased to his house and assaulted him. The second is the forensic material allegedly recovered from the alleged home of the Accused on the next morning by police and scenes of crime personnel.

15. Regarding the first piece of evidence, the transaction occurred at night and PW1 admitted he did not know the Accused prior to the material night. For his part, the Accused denied knowing or meeting either of the two men as alleged. So far as the identification of the Accused by PW1 is concerned, PW1 claimed that he only saw the deceased clearly when the trio reached **Mulika Mwizi** which is the location of the security flood lights. It is admitted that on the material night it was raining heavily. Indeed, PW1 the Accused and deceased had allegedly sheltered from the rain at Visions pub before proceeding home after the rain subsided.

16. In the case of **Abdalla bin Wendo v R [1953] 20EACA 166** the Court of Appeal for Eastern Africa held that: -

“Subject to well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury could reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely accepted as free from the possibility of error.”

17. Similar exhortation is found in the decision of the Court of Appeal in **Cleophas Otieno Wamunga v R [1989] KLR 424** where the court observed that:

“The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

Whenever the case against the defendant rests wholly or to a great extent on the correctness of one or more identifications of he Accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the Accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”

18. The admitted facts of this case, namely, that PW1 did not know the Accused prior to the material date that the entire transaction occurred in the night and that it was raining rendered identification difficult. And although PW1 asserted that at Mulika Mwizi he “took a good look at the Accused” as the trio debated whether the deceased should take up the offer of more alcohol from the Accused, it is not

indicated how long the conversation took, how close PW1 came to the Accused or any special features noted. Earlier at the club, the witness had evidently not taken time to converse with or engage the Accused.

19. The rest of the transaction, following the decision to take up the Accused's offer for more drinks, took place in darkness as the trio left the alleged location of the flood light to follow the Accused to his house. The witness testified that he was able to identify the location of the Accused's house on the next day and participated in an identification parade six days later where he identified the Accused. The parade was conducted by **CIP Lenalepisho** (PW7). This parade itself was a sham. The parade officer allowed the investigating officers to participate by selecting members of the parade, to be presented during the parade and to escort the witnesses to the parade. The Accused's complaint that the investigating officer prompted the witness at the parade do not in the circumstances appear farfetched.

20. There is more that puts PW1's identification of the Accused and general evidence to doubt. PW1 did not lead police and point out them the Accused for arrest. Nor did not give a plausible explanation why he ended up with the deceased's phone on the material night and why, he allegedly reported at a police post located 1Km away from the alleged scene of assault, when Karanjee police post was just a few hundred meters away.

21. And finally, why, despite the violence he described to have befallen him and the deceased at the hands of the Accused so as to cause him to fear for his life, having failed to get help from police, he did not call PW4 to warn him that his son was in mortal danger. After all, if his testimony is believed, the last words he heard the Accused utter against the deceased and the action of chasing him away while armed with a weapon was evidence enough that the deceased's life was under threat. PW1's evidence is such that if any weight is to be placed on it, there must be independent and credible corroboration thereto.

22. What the prosecution proffered was evidence of forensic material collected at the alleged house of the Accused. True, although some of the material was rejected by PW9, the piece of blood-stained mattress (Item F) contained DNA material that matched the DNA generated from the deceased's blood (Item G1). The problem is that despite photographs having been taken in the house of recovery, they were not produced. These would have confirmed the alleged recovery of the mattress from which the piece was extracted. PW8 who conducted the search did not deem it useful to produce the photographs or the physical mattress itself.

23. Moreover, the prosecution did not tender any credible evidence to connect the Accused with the room from which the recoveries were allegedly made. The Accused was not arrested from the room and from the evidence of PW8 and PW1, it is not PW1 who led police to the room but members of public who allegedly spotted blood at the doorstep and claimed that there had been a fight there on the previous night. None of these persons were called as witnesses. The rooms in question were rental units and even if it is believable that other tenants may have been unwilling to testify against the Accused, the landlord was apparently not approached to record a statement. The fact emphasized by PW1 and police witnesses that the body of the deceased was some few meters from the room where the incriminating material was found was not enough.

24. Additionally, given the circumstances of the incident described by PW1, it seems unlikely that he could have identified with adequate precision the Accused's room out of the 10 other rooms on the compound, on the next day. Thus, there is a lacuna in the prosecution evidence in the alleged connection between the Accused and the room from whence the forensic material was recovered.

25. The Accused denied that he lived in the said room or area and asserted that having been arrested from his work place he was led to the room by police. I must say that the manner in which the police carried out the investigation appears unprofessional, if not sloppy. The poor handling of items recovered at the alleged crime scene was evidenced by the rejection of some of the samples by PW9, and it is not clear what became of the photographs taken by scenes of crime personnel.

26. In short, the forensic evidence tendered by the prosecution does not supply any corroboration to the equally shaky identification evidence by PW1. The Accused's defence may raise some questions especially why only he out of many other residents of Karanjee was picked out, but he had no duty to prove his innocence.

27. The court, upon reviewing all the material before it concludes that, the prosecution has failed to establish the charges laid against the Accused to the required standard. In the circumstances the court finds that the Accused not guilty and will acquit him under section 322(1) of the Criminal Procedure Code.

DATED AND SIGNED ELECTRONICALLY ON THIS 16TH DAY OF MARCH 2021.

C. MEOLI

JUDGE

DELIVERED AND SIGNED AT KIAMBU ON THIS 23RD DAY OF MARCH 2021

M. KASANGO

JUDGE

IN THE PRESENCE OF:

.....**FOR PROSECUTION**

.....FOR ACCUSED

ACCUSED PRESENT

COURT ASSISTANT.....