



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 20 OF 2016

REPUBLIC OF KENYA.....PROSECUTOR

VERSUS

DOMINIC NJENGA KARANJA.....ACCUSED

JUDGMENT

1. **Dominic Njenga Karanja**, the Accused herein is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code . In that, on the night of 23rd and 24th September 2015, at Gachororo Juja, within Kiambu County, he murdered Peter Mburu Muiruri. The Accused pleaded not guilty and was represented by Mr. Mathenge.

2. The prosecution case was that the deceased **Peter Mburu Muiruri** was the son of **Dominic Muiruri Mburu** (PW2) and a cousin/friend to **Evanson Muchiri Mwangi** (PW1). PW1 and the deceased sold groceries along Kenyatta Road. While the deceased ordinarily resided with his father at Juja, he would often spend nights at the home of PW1 at Gachororo.

3. On 23rd September 2015 during the day, the deceased and PW1 were together at the stall on Kenyatta Road. Both were employees of PW2. They worked together until 5pm when they closed down. They had a few drinks at a local bar before proceeding to Gachororo. Once in Gachororo, they again visited a bar before leaving for PW1's house, arriving at 10.00pm. On arrival at the plot which had several rooms with different tenants, they found the wife of the Accused washing clothes outside her room. The Accused and PW1 were next door neighbors.

4. It appears that the deceased made a pass at the Accused's wife. She raised an alarm and called her husband who came out of the couple's room. He was angry that the deceased had allegedly seduced his wife. He confronted the deceased and raised blows on him. He ordered the deceased to leave and said he would take him to PW2 to report his conduct. He and his wife began to push the deceased out of the plot. PW1 upon confirming that the deceased was no longer in the plot went to his house and slept, assuming, that the Accused had carried out his threat to escort the deceased home to report to his father.

5. The deceased never got home. Instead, early on the next day **CIP Omeri** (PW4) of Juja Police Station received a report of a body lying in a disused quarry called Waireri. He proceeded to the scene and confirmed that the body of a young man was indeed lying at the bottom of the quarry. The body had no documents but had a phone. After the body was photographed and moved to the mortuary, he called a contact on the phone who turned out to be the deceased aunt. The said aunt, **Lily Wangui** was notified about the discovery of the deceased's body. She in turn contacted PW2 who proceeded to Juja Police Station and confirmed from photographs shown to him by police that indeed the body was that of his son.

6. The body was subsequently transferred to the Murang'a County Hospital at PW2's request. There, a postmortem examination was carried out on 2/10/2015 by **Dr. Gachiri Raphael** (PW3). He estimated the age of the deceased to be 19 years, noted external and internal bruises to the head, abdomen, and neck. He found that the lungs and trachea had collapsed, concluding that death was due to strangulation. The Accused was eventually arrested and charged.

7. The Accused on being placed on his defence elected to make an unsworn statement. To the effect that on 23rd September, 2015 he went out for work returning home with his wife **Nancy Wanjiku** at 9.00pm. Soon after the wife went outside the house to wash clothes. Presently he heard her scream and on running outside met her running towards the house with the deceased in hot pursuit.

8. The deceased was with PW1, a neighbour. The Accused threatened to report the deceased's conduct to PW2. Whereupon the deceased apologized and the matter was resolved. He later allegedly went on to help PW1 to force his door open, PW1 having allegedly lost his key before returning to his house and retiring for the night. He learned two days later that the deceased had died;

9. He participated in burial preparations but was later summoned by police who after questioning him detained him. He asserted that the diseased was his friend had never had any disagreement with him and had no reason to harm him. He denied involvement in his death.

10. The defence filed written submissions at the close of their evidence while the prosecution sought to rely on submissions filed at the close of the prosecution case.

11. The court has considered the evidence on record and submissions filed. There is no dispute that the deceased, PW1 and the Accused were known to one another prior to the material date, and that the deceased and PW1 were neighbors. That the deceased sometimes lived with PW1 despite residing at the father's house and was in PW1's company on the night of 23rd September, 2015 when the two came home for the night.

12. It is not disputed that at the time, the wife to the Accused was washing clothes outside her house while the Accused was inside the house. It is undisputed that the said wife complained that the deceased had attempted to seduce her and/or chased her, prompting the Accused to come to the defence of his wife, confronting the deceased. Following the confrontation and ensuing commotion the deceased did not spend the night in PW1's house nor did he go to his father's house that night. His body was found early on the next day lying in an abandoned quarry not far from the area where PW1 lived.

13. The cause of death of the deceased was identified by PW3 to be strangulation, and even though the deceased's body bore bruises to the head, the postmortem form indicates that internally no hematoma was observed on the injury site. He also bore bruises in the abdomen. The pathologist (PW3) stated during cross examination that these bruises may have been caused by a blunt object. Concerning the cause of death, he stated:

“Lungs and trachea had collapsed internally due to external cause. Bruises on neck, collapsed trachea led to my conclusion. He did not have any other injuries which could have caused his death. Bruises may have been caused by a fall.”

14. During re-examination, he stated that bruises on the neck and collapsed trachea led to conclusion of strangulation. This means that any injuries that may have resulted from the incident outside the residence of PW1 and witnessed by the said witness between the deceased and the Accused were not severe enough to cause his death, even if admitting that there is no evidence to support the claims by PW1 that the deceased was so severely pushed against a window that the panes broke. But the doctor's evidence further displaces any suggestion that the deceased fell into the quarry and died as a result of injuries thereby sustained. Had the deceased fallen into his death into the quarry described by PW4 to be 100 feet or meters deep, he would have sustained fractures and other more severe injuries and not merely bruises or collapsed trachea and lungs. The court is persuaded that the death was caused by strangulation as stated by PW3.

15. The next question to be determined is whether the Accused is the person, who, of malice aforethought inflicted the fatal injuries upon the deceased. The Accused does not dispute that he confronted and, in his words, 'pushed' off the deceased after he allegedly saw him chasing his wife. For his part PW1 says that the Accused's wife complained that the deceased had seduced her. Whatever the case, the Accused rushed out of his house to defend his wife and while I am unable on the evidence of the pathologist to accept PW1's claim that the Accused strongly thrust the deceased's head against a window breaking the panes and leading to bleeding, it is quite likely that the Accused did not merely "push" the deceased but must have struck him at least initially, with slaps and blows as stated by PW1. It is not plausible that a man attracted outside his house by the alarm raised by his wife, and encountering a man chasing her, would merely push the culprit. More so, as the culprit was a young man and whom the Accused considered young enough to be reported to his father.

16. In the scenario, the court would accept the evidence by PW1 that the Accused did slap and inflict blows on the deceased. But further it was the evidence of PW1 that the said Accused insisted that the deceased leave the plot and he and his wife began to push him towards the gate and outside the plot. The Accused admits that he had the intention of reporting to the father of the deceased but that the deceased apologized the two resolved the matter right there, and he later assisted PW1 to break his door as he had allegedly lost his keys.

17. Despite the repeated assertions by PW1 that it was the Accused and his wife who pushed the deceased towards the gate but admitting that he did not actually see what happened afterwards, the defence never suggested to the witness that after offensive incident involving the Accused's wife, the deceased had apologized and the Accused had joined the witness(PW1) to break his door. Indeed, PW1 even testified that after he witnessed the Accused and deceased in the cause of removing the deceased, he had gone into his house. That when he next came out, he did not see the deceased or Accused again. Evidently the deceased did not spend the night in the house of PW1. What became of him if the problem between him and the Accused had been resolved?

18. The Accused's version of the end of the incident between him and the deceased ends without any mention of what happened to the deceased after he allegedly apologized to him. In an apparent attempt to discount any suggestion that he may have left with the deceased, the Accused stated that he remained in the plot assisting PW1 with opening his door. Had this indeed been the case, the Accused would have remembered to put this door opening incident and the alleged resolution of the matter with the deceased, to PW1 during cross examination, to confirm or deny. These matters were important; if the deceased and Accused had resolved their dispute, the deceased would have spent the night in PW1's house. He did not.

19. PW1 says that he saw the Accused and his wife pushing him outwards of the plot albeit he did not know what happened thereafter. The court is persuaded that the forced departure of the deceased which is inconsistent with the alleged resolution of the matter between the Accused and deceased is indeed plausible and must be the explanation why the Accused's version of the end of the incident avoids mention of what became of the deceased after the alleged resolution. The evidence of PW1 was unshaken; the Accused and his wife were the last persons seen in the company of the deceased on the material night. Both were in the process of ejecting the deceased from the plot. The prosecution evidence from that point forward is circumstantial.

20. It is undisputed that early on the next day, the body of the deceased was found lying in a quarry having been strangled to death.

21. The principles applicable in dealing with a case where the prosecution case rests primarily on circumstantial evidence are settled. **In Joan Chebichii Sawe -Vs- Republic (2003) e KLR** the Court of Appeal restated the principles applicable in considering circumstantial evidence. The Court observed that:-

“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 reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the claim 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, and always remains with the prosecution. It is a burden, which never shifts to the party Accused.”

22. This passage captures the principles pronounced in the timeless decisions on circumstantial evidence, namely **Republic - vs Kipkering Arap Koske [1949]16 EACA 135** and **Simoni Musoke -vs- Uganda (1958) EA 715**. In **Musili Tulo -vs- Republic [2014] eKLR** the Court of Appeal reiterated the need to closely examine circumstantial evidence before making an inference of guilt, the object being to ascertain whether such evidence satisfies the principles in the case of Kipkering Arap Koske and in Musoke’s case. In Tulo’s case, the court restated the principles as follows:-

“i)The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii)Those circumstances should be of a definite tendency unerringly pointing towards the 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 no one else.”

23. The Court went on to state that:

“In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Accused and incapable of any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke -Vs- Republic [1958] EA 715 citing with approval Teper -Vs- Republic [1952] A.C. 480 thus:

“It is also necessary before drawing the inference of the Accused’s guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which weaken or destroy the inference.”

See also **Ahamad Abolfathi Mohamed & Another v. R [2018]eKLR** and **Beena Nwabdiri Bdzita v R[2008]eKLR**

24. The circumstantial part of the evidence is preceded by an eye-witness account of the assault of the deceased by the Accused and the forced removal of the deceased from the plot after which he was not seen in the plot.

25. The Accused and his wife were the last persons seen with the deceased alive. Given the admitted timing of the start of the entire transaction, around 10.00pm the forced ejection of the deceased likely occurred around 10.30pm or 11.00pm. PW4 stated that by 8.00am of the next day, the Assistant Chief of Kiaura Sub-Location had notified him of the discovery at a quarry, of what turned out to be the body of the deceased. And from the description of the quarry’s depth and injuries on the body, the body could neither have been tossed into the quarry nor the deceased fallen thereinto while alive.

26. As indicated, the Accused person’s version of the final events of the night does not make reference to final fate of the deceased at all. He was the last person with his wife in the company of the deceased in circumstances that were suggestive of hostility to the deceased and included physical manhandling and/or assault. The Accused was irked that the deceased, a mere boy still answerable to his father, had the temerity to attempt to seduce his wife, and was so angered by his conduct that he had decided the deceased could not spend the night in the house of PW1 or in the plot. The Accused is obligated to explain what became of the deceased in these circumstances. Under Section 111 of the Evidence Act, the Accused is the person best placed to furnish an account of what transpired to the deceased at the end of the night’s transaction.

27. Section 111 of the Evidence Act provides that: -

“(1) 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 defense creates a reasonable doubt as to the guilt of the Accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person Accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an Accused person to prove a defence of intoxication or insanity”.

28. Considering the above section, Lesiit J in **Republic v. Nicholas Ngugi Bangwa (2015) e KLR** relied on the Court of Appeal decision in **Ernest Abang’a alias Onyango V Republic CA. NO. 32 OF 1990**, where the Court had observed that:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect” (emphasis added).

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.

29. The Accused as indicated did not attempt to explain the eventual fate of the deceased at the end of the night’s incident. He did not even mention that he was present as the Accused and PW 1 were allegedly trying to force the latter’s door open or that he had left. There is a loud silence in this regard. It is true as asserted by the defence that several tenants in the plot witnessed the incident but were not called as witnesses. Section 143 of the Evidence Act states that in the absence of any provisions of law to the contrary, the prosecution is not required to call any particular number of witnesses to prove any fact. The alleged other tenants were not involved in the tussle between the Accused and the deceased.

30. In this case, the statutory burden in section 111 of the Evidence Act fell squarely upon the Accused to explain how he eventually parted with the deceased. He has not. His silence on this matter and failure to canvass his defence that he remained with PW1 in the plot soon after the incident with the Accused, is indicative that he had something to hide.

31. Based on the sequence of events and timing of the night’s transaction and finding of the body of the deceased within the same locality early on the next day, the court must conclude that the Accused, either acting alone or with his wife, forced the deceased to leave the plot and in an attempt to punish the deceased for inappropriate behavior towards the wife or to subdue him, strangled the deceased and disposed of the body at the site where it was found on the next day.

32. However, considering the circumstances giving rise to the entire episode, the court is of the view that the Accused’s conduct while evidently an overreaction appears to negative malice aforethought and to fall within the definition of provocation in Section 208 of the Penal Code. It did not help matters that the deceased may have been inebriated at the time, and the Accused was a mere boy still under his father’s authority, attempted to seduce his wife. In the circumstances, the court finds that the prosecution has proven beyond any reasonable doubt the charge of Manslaughter contrary to Section 202 (1) of the Penal Code.

33. Accordingly, the court enters a conviction against he Accused on the lesser offence of Manslaughter contrary to Section 202(1) as read with Section 205 of the Penal 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 the Accused

Accused - Present.

.....Court Assistant